

FORUMS

Global Forum on Competition
2006

Introduction

This publication includes the documentation presented at the sixth Global Forum on Competition held in Paris in February 2006.

Overview

The programme of the Forum included three main sessions on concessions, prosecuting cartels without direct evidence of agreement, and a peer review of Chinese Taipei.

Related Topics

Competition Policy and Concessions (2007)
Concessions (2006)
Peer Review of Chinese Taipei (2006)
Prosecuting Cartels without Direct Evidence of Agreement (2006)
Peer Review of Turkey (2005)
Peer Review of Russia (2004)
Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity (2004)
Peer Review of South Africa (2003)

OECD

GLOBAL FORUM

ON COMPETITION

Sixth Meeting

8 – 9 FEBRUARY 2006

BACKGROUND DOCUMENTATION

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France — DAF/COMP/GF/WD(2006)40
Indonesia — DAF/COMP/GF/WD52006)24
Mexico — DAF/COMP/GF/WD(2006)1
Netherlands — DAF/COMP/GF/WD(2006)2
Romania — DAF/COMP/GF/WD(2006)3
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Turkey — DAF/COMP/GF/WD(2006)32
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Mr. Alberto Heimler, Lead Discussant — DAF/COMP/GF/WD(2006)35

SESSION II

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Background Note by the Secretariat — DAF/COMP/GF(2006)3

Written Contributions

Algeria — DAF/COMP/GF/WD(2006)19
Argentina — DAF/COMP/GF/WD(2006)7
Brazil — DAF/COMP/GF/WD(2006)37
Chile — DAF/COMP/GF/WD(2006)16
Croatia — DAF/COMP/GF/WD(2006)25
Czech Republic — DAF/COMP/GF/WD(2006)42
Estonia — DAF/COMP/GF/WD(2006)8

Written Contributions (continued)

France	DAF/COMP/GF/WD(2006)39
Jamaica	DAF/COMP/GF/WD(2006)18
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Romania	DAF/COMP/GF/WD(2006)11
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Peru	DAF/COMP/GF/WD(2006)27

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Indonesia	DAF/COMP/GF/WD(2006)29
Italy	DAF/COMP/GF/WD(2006)5
Romania	DAF/COMP/GF/WD(2006)30

Sub-Session 3

Chinese Taipei	DAF/COMP/GF/WD(2006)20
European Commission	DAF/COMP/GF/WD(2006)23
Ukraine	DAF/COMP/GF/WD(2006)26

SESSION IV

PEER REVIEW OF CHINESE TAIPEI'S COMPETITION LAW AND POLICY

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

06-Feb-2006

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/A(2006)1/REV1
Unclassified

Cancels & replaces the same document of 31 January 2006

Global Forum on Competition

PROVISIONAL FORUM AGENDA

To be held at the Château de la Muette, 2 rue André Pascal, Paris 16th on 8 and 9 February 2006, starting at 9:30 am

English - Or. English

JT00200588

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

GLOBAL FORUM ON COMPETITION

8 and 9 February 2006

WEDNESDAY 8 FEBRUARY

9:30-9:50 **OPENING REMARKS**

Richard **HECKLINGER**
OECD Deputy Secretary General

INTRODUCTORY COMMENTS

Frédéric **JENNY**
Chairman of the Competition Committee (France)

9:50-10:10 **KEYNOTE SPEAKER**

Mr. Dirk **BRUINSMA**
UNCTAD Deputy Secretary General

10:10-1:00

SESSION I **ROUNDTABLE ON CONCESSIONS**

Chair: Barbara **LEE**
Executive Director
Fair Trading Commission (Jamaica)

10:10-10:15 **PRESENTATION BY THE SECRETARIAT**

Background Note DAF/COMP/GF(2006)2

10:15-10:45 **LEAD DISCUSSANTS**

- Alberto **HEIMLER**
  Director
  Research Department.
  Autorità garante della concorrenza e del mercato (Italy)

- Baris **EKDI**
  Director of Training
  Competition Authority (Turkey)

10:45-1:00 GENERAL DISCUSSION

Written contributions[1]:

Brazil	DAF/COMP/GF/WD(2006)33
Czech Republic	DAF/COMP/GF/WD(2006)43
France	DAF/COMP/GF/WD(2006)40
Indonesia	DAF/COMP/GF/WD(2006)24
Mexico	DAF/COMP/GF/WD(2006)1
Netherlands	DAF/COMP/GF/WD(2006)2
Romania	DAF/COMP/GF/WD(2006)3
Russian Federation	DAF/COMP/GF/WD(2006)6
Tunisia	DAF/COMP/GF/WD(2006)13
Turkey	DAF/COMP/GF/WD(2006)32
United States	DAF/COMP/GF/WD(2006)14
Mr. Alberto Heimler, Lead Discussant	DAF/COMP/GF/WD(2006)35

1:00-2:30 **OECD Buffet lunch** (outside Room 1)

2:30-6:00

SESSION II **ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT**

Chair: Daniel **GOLDBERG**
Secretary of Economic Law (SDE)
Ministry of Justice (Brazil)

2:30-2:45 PRESENTATION BY THE SECRETARIAT

Background Note DAF/COMP/GF(2006)3

2:45-6:00 GENERAL DISCUSSION

Written contributions[1]:

Algeria	DAF/COMP/GF/WD(2006)19
Argentina	DAF/COMP/GF/WD(2006)7
Brazil	DAF/COMP/GF/WD(2006)37
Chile	DAF/COMP/GF/WD(2006)16
Croatia	DAF/COMP/GF/WD(2006)25
Czech Republic	DAF/COMP/GF/WD(2006)42
Estonia	DAF/COMP/GF/WD(2006)8
France	DAF/COMP/GF/WD(2006)39
Jamaica	DAF/COMP/GF/WD(2006)18
Japan	DAF/COMP/GF/WD(2006)28
Korea	DAF/COMP/GF/WD(2006)38

1. Written contributions are available in their original language only.

Written Contributions (continued)

Lithuania	DAF/COMP/GF/WD(2006)9
Romania	DAF/COMP/GF/WD(2006)11
Russian Federation	DAF/COMP/GF/WD(2006)10
Switzerland	DAF/COMP/GF/WD(2006)4
Chinese Taipei	DAF/COMP/GF/WD(2006)34
Turkey	DAF/COMP/GF/WD(2006)17
United States	DAF/COMP/GF/WD(2006)12
Zambia	DAF/COMP/GF/WD(2006)31
European Commission	DAF/COMP/GF/WD(2006)15
BIAC	DAF/COMP/GF/WD(2006)41

THURSDAY 9 FEBRUARY

9:15-1:00

SESSION III **(closed session[2])** **CARTEL CASE STUDIES**

Key Issues for discussion in Sub-Sessions DAF/COMP/GF(2006)4

9:15-12:15 **BREAKOUT SESSIONS (in small rooms)**

Sub-Session 1: **Chair:** Andrej **PLAHUTNIK**
Director
Competition Protection Office (Slovenia)

Japan	DAF/COMP/GF/WD(2006)21
Latvia	DAF/COMP/GF/WD(2006)22
Peru	DAF/COMP/GF/WD(2006)27

Sub-Session 2: **Chair:** Amadou **DIENG**
Chargé des Questions de Concurrence
(Western Africa Economic and Monetary Union)

Indonesia	DAF/COMP/GF/WD(2006)29
Italy	DAF/COMP/GF/WD(2006)5
Romania	DAF/COMP/GF/WD(2006)30

2. Open only to country representatives and intergovernmental organisations.

	Sub-Session 3:	**Chair:** Joseph Seon **HUR** Secretary General Korea Fair Trade Commission (Korea)
	Chinese Taipei	DAF/COMP/GF/WD(2006)20
	European Commission	DAF/COMP/GF/WD(2006)23
	Ukraine	DAF/COMP/GF/WD(2006)26

12:25-1:00 **PLENARY SESSION (Room 1)**

Chair: Daniel **GOLDBERG**
Secretary of Economic Law (SDE)
Ministry of Justice (Brazil)

REPORTS BY CHAIRS OF SUB-SESSIONS and SUM-UP BY THE CHAIR

1:00-2:30 **OECD Buffet lunch** (outside Room 1)

2:30-5:30

SESSION IV **PEER REVIEW OF CHINESE TAIPEI'S COMPETITION**
(closed session[2]) **LAW AND POLICY**

Chair: Frédéric **JENNY**

Reviewers: **Switzerland**
Israël

For discussion:

Competition Law and Policy in Chinese Taipei

Note by the Secretariat DAF/COMP/GF(2006)1

5:30-6:00

SESSION V **EVALUATION, FUTURE WORK AND CLOSING REMARKS**
(closed session[2])

Chair: Frédéric **JENNY**

6:00 **Cocktail hosted by the Delegation of Chinese Taipei** (outside Room 1)

2. Open only to country representatives and intergovernmental organisations.

Non classifié **DAF/COMP/GF/A(2006)1/REV1**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **06-Feb-2006**

Français - Or. Anglais

DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

DAF/COMP/GF/A(2006)1/REV1
Non classifié

Annule & remplace le même document du 31 janvier 2006

Forum mondial sur la concurrence

ORDRE DU JOUR PROVISOIRE

qui se tiendra au Château de la Muette, 2 rue André Pascal, Paris 16ème les 8 et 9 février 2006, à partir de 9 heures 30.

Français - Or. Anglais

JT00200590

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FORUM MONDIAL SUR LA CONCURRENCE

8 et 9 février 2006

MERCREDI 8 FEVRIER

9H30-9H50 **REMARQUES LIMINAIRES**

Richard **HECKLINGER**
Secrétaire général adjoint de l'OCDE

INTRODUCTION

Frédéric **JENNY**
Président du Comité de la concurrence (France)

9h50-10h10 **ORATEUR PRINCIPAL**

M. Dirk **BRUINSMA**
Secrétaire général adjoint de la CNUCED

10h10-13h00

SESSION I **TABLE RONDE SUR LES CONCESSIONS**

Présidente: Barbara **LEE**
Directeur Exécutif
Fair Trading Commission (Jamaique)

10h10-10h15 **PRESENTATION PAR LE SECRETARIAT**

Note de référence DAF/COMP/GF(2006)2

10h15-10h45 **ANIMATEURS DES DEBATS**

- Alberto **HEIMLER**
  Directeur
  Département des recherches
  Autorità garante della concorrenza e del mercato (Italie)

- Baris **EKDI**
  Directeur de la Formation
  Autorité de la Concurrence (Turquie)

10h45-1h00 DISCUSSION GENERALE

Contributions écrites[1] :

Brésil	DAF/COMP/GF/WD(2006)33
France	DAF/COMP/GF/WD(2006)40
Indonésie	DAF/COMP/GF/WD(2006)24
Mexique	DAF/COMP/GF/WD(2006)1
Pays Bas	DAF/COMP/GF/WD(2006)2
Roumanie	DAF/COMP/GF/WD(2006)3
Fédération de Russie	DAF/COMP/GF/WD(2006)6
République Tchèque	DAF/COMP/GF/WD(2006)43
Tunisie	DAF/COMP/GF/WD(2006)13
Turquie	DAF/COMP/GF/WD(2006)32
Etats-Unis	DAF/COMP/GF/WD(2006)14
M. Alberto Heimler, Animateur des débats	DAF/COMP/GF/WD(2006)35

13h00-14h30 **Déjeuner-buffet** (devant la Salle 1)

14h30-18h00

SESSION II **TABLE RONDE SUR LES POURSUITES CONTRE LES ENTENTES SANS PREUVE DIRECTE D'UN ACCORD**

Président : Daniel **GOLDBERG**
Secrétaire au droit économique
Ministère de la Justice (Brésil)

14h30-14h45 PRESENTATION PAR LE SECRETARIAT

Note de référence DAF/COMP/GF(2006)3

14h45-18h00 DISCUSSION GENERALE

Contributions écrites[1]:

Algérie	DAF/COMP/GF/WD(2006)19
Argentine	DAF/COMP/GF/WD(2006)7
Brésil	DAF/COMP/GF/WD(2006)37
Chili	DAF/COMP/GF/WD(2006)16
Corée	DAF/COMP/GF/WD(2006)38
Croatie	DAF/COMP/GF/WD(2006)25
Estonie	DAF/COMP/GF/WD(2006)8
Etats Unis	DAF/COMP/GF/WD(2006)12
France	DAF/COMP/GF/WD(2006)39
Jamaïque	DAF/COMP/GF/WD(2006)18
Japan	DAF/COMP/GF/WD(2006)28
Lithuanie	DAF/COMP/GF/WD(2006)9
République Tchèque	DAF/COMP/GF/WD(2006)42
Roumanie	DAF/COMP/GF/WD(2006)11

1. Les contributions écrites ne sont disponibles que dans leur langue d'origine.

Contributions écrites (suite)

Fédération de Russie	DAF/COMP/GF/WD(2006)10
Suisse	DAF/COMP/GF/WD(2006)4
Taipei Chinois	DAF/COMP/GF/WD(2006)34
Turquie	DAF/COMP/GF/WD(2006)17
Zambie	DAF/COMP/GF/WD(2006)31
Commission européenne	DAF/COMP/GF/WD(2006)15
BIAC	DAF/COMP/GF/WD(2006)41

JEUDI 9 FEVRIER

9h15-13h00

SESSION III **(accès restreint[2])** — **ETUDES DE CAS SUR LES ENTENTES**

Questions-clés à examiner en sous-groupes DAF/COMP/GF(2006)4

9h15-12h15 **DISCUSSIONS EN SOUS-GROUPES (en petites salles)**

Sous-Groupe 1 : **Président :** Andrej **PLAHUTNIK**
Directeur
Bureau de protection de la Concurrence
(Slovénie)

Japon	DAF/COMP/GF/WD(2006)21
Lettonie	DAF/COMP/GF/WD(2006)22
Pérou	DAF/COMP/GF/WD(2006)27

Sous-Groupe 2 : **Président :** Amadou **DIENG**
Chargé des Questions de Concurrence
(WAEMU)

Indonésie	DAF/COMP/GF/WD(2006)29
Italie	DAF/COMP/GF/WD(2006)5
Roumanie	DAF/COMP/GF/WD(2006)30

2. Accès ouvert uniquement aux représentants des pays et des organisations intergouvernementales.

	Sous-Groupe 3 :	**Président :** Joseph Seon **HUR** Secrétaire Général Korea Fair Trade Commission (Corée)
	Commission européenne	DAF/COMP/GF/WD(2006)23
	Taipei Chinois	DAF/COMP/GF/WD(2006)20
	Ukraine	DAF/COMP/GF/WD(2006)26

12h25-13h00 **SESSION PLENIERE (Salle 1)**

Président : Daniel **GOLDBERG**
Secrétaire au droit économique
Ministère de la Justice (Brésil)

COMPTES RENDUS DES PRESIDENTS DES SOUS-GROUPES

13h00-14h30 **Déjeuner-buffet à l'OCDE** (devant la salle 1)

14h30-17h30

SESSION IV **EXAMEN PAR LES PAIRS DU DROIT ET DE LA POLITIQUE**
(accès restreint[2]) **DE LA CONCURRENCE AU TAIPEI CHINOIS**

Président : Frédéric **JENNY**

Pays examinateurs : **Suisse**
Israël

Pour examen :

Droit et politique de la concurrence au Taipei Chinois

Note du Secrétariat DAF/COMP/GF(2006)1

17h30-18h00

SESSION V **EVALUATION, TRAVAUX FUTURS ET REMARQUES FINALES**
(accès restreint[2])

Président : Frédéric **JENNY**

18h00 **Cocktail offert par la Délégation du Taipei Chinois** (devant la Salle 1)

2. Accès ouvert uniquement aux représentants des pays et des organisations intergouvernementales.

SESSION I

ROUNDTABLE ON CONCESSIONS

DAF/COMP/GF/WD(2006)2

OCDE

OECD

BACKGROUND NOTE

by the Secretariat

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

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ROUNDTABLE ON CONCESSIONS

Background Note

By the secretariat

1. Introduction

1. Over the past decades, governments have increasingly turned towards concessions as a way to raise funds and to improve services by applying private-sector expertise to investment, management and operation of infrastructure. Concessions have been extensively used in both developed and developing economies for infrastructure to provide socially significant services such as water, transport, telecommunications and electricity.

2. Citizen-consumers do not always perceive benefits from concessions. Particularly when the change is accompanied by reduced subsidy or correction of underinvestment, tariffs have sometimes increased after the introduction of a concession. Discontent with such tariff increases has been further fuelled when foreign multinationals are the concessionaire.

3. While concessions are not always capable of achieving stated government policy goals, increased focus on competitive conditions can improve the performance of the process. The purpose of this note is to discuss the main elements for the design of the concession allocation process and identify the competition problems that may arise during the term of a concession.[1] Improved focus on competition is one step towards better design.

4. The design and oversight of concession contracts is particularly complex. Reasons for this complexity include:

- Concession contracts necessarily do not cover all contingencies. They are "incomplete" in economics terms. Uncertainty about costs and revenues cannot be entirely resolved in advance. The uncertainty opens the contracts for renegotiation with its attendant negative consequences.

- Both concessionaires and governments can find it difficult to respect concession contracts over the term of the contract. Concessions typically involve large sunk investments that must be recovered over long periods, on the one hand, and governments are under pressure to maintain or improve services, on the other hand. Thus, there is a risk that governments behave opportunistically after concessionaires sink their costs and there is a risk that concessionaires behave opportunistically when governments have no immediate alternatives.

- Concession contracts often involve the creation of a privately operated monopoly which may, in itself, create competition problems. These may be reduced through a change in the structure of the concession or through ongoing price regulation. Introducing a regulatory structure before a concession auction can reduce uncertainty among bidders.

1. This note limits the focus to concessions for infrastructure and leaves aside the significant topic of concessions for the exploitation of natural resources.

- The success or failure of competitive auctions to award a concession to the most efficient operator can depend on subtle variations in design. Transactions costs—the lemons problem, in which buyers cannot assess the value of the object for sale so the market does not exist—impede selling on a concession to a more efficient operator after a faulty auction awards it to an inefficient operator.

5. The award of a concession should take place within a broader regulatory reform of a sector. Such a reform should include clarifying the service objectives and revenue sources, thereby uncovering cross subsidies that must be addressed in the concession design. Reform also often should included addressing how the sector will be governed during the long period after the concession has been awarded: where competition would be feasible and desirable, what sector-specific laws and regulatory institutions need to be established, and the application of competition law.

6. Competition authorities take an interest in concessions because, through advocacy, authorities may promote the use of a more competitive allocation process which in turn may increase economic efficiency, one of the standard objectives of competition authorities. Authorities may also be able to influence auction design in a way that reduces the possibility of collusion. Competition authorities may also promote better concession design which in turn might reduce subsequent harm to the competitive process such as through denial of access to essential facilities. Further, concessions are used where market entry is not free (otherwise numbers would not be limited). Hence, a market in which a concession is used has already passed through an important screen for attracting competition authorities' interest.

7. A number of key points emerge. These include:

- The design of a concession or concessions is constrained by the regulatory regime that will apply to the concession, the potential for renegotiation of the concession contract, and the feasible way of awarding the concession or concessions.

- The key objectives in auction design are attracting bidders, preventing collusion, and ensuring the integrity of the auction. Auction theory shows that attracting an additional bidder makes the auction more competitive. Theory also shows that an auction with N+1 bidders will always provide a higher price than any negotiation and any feasible auction with N bidders. In other words, if just one more bidder can be attracted to an auction than can be attracted to a negotiation for the same object, then the auction is more competitive. Therefore, auctions are in general preferred over negotiations and beauty contests.

- Designing a successful auction that identifies the most efficient operator is difficult and requires expertise. The examples of successes and failures of auctions can offer some warnings, but are not a substitute for analysis of the actual situation.

- Renegotiation, whether due to contact incompleteness[2] or opportunism, can eliminate the benefits of a competitive allocation mechanism; essentially, the winner of an auction will be the best negotiator not necessarily the best infrastructure operator. In particular, renegotiation means that agreements made by competitive award are superseded by the terms agreed in bilateral, non-public negotiations between concessionaire and government. Strenuous efforts should be made to restrict renegotiation to situations where renegotiation

2. Contracts are incomplete when they are complex or do not specify what happens under all contingencies. Of course, all contracts are to some degree incomplete; courts and other means of arbitration are meant to "fill-in the gaps."

is not opportunistic, that is, to situations where unexpected events, outside the control of the parties, have occurred.

- In sum, both an efficient allocation mechanism, such as a well-designed auction, and credible commitment to the resulting contract are necessary.

- Concessioning is not a substitute for regulation. Where a concessionaire will have substantial market power, then a regulatory structure is likely needed. In any case, competition law should apply to concessionaires as well as to any auction to award a concession.

8. This note begins with a review of the **key economics literature** and a **review of empirical experience** with concessions. The remainder covers the main steps in putting a concession into place:

- **Award of the concession**--the design of the mechanism by which the concession is awarded, with an emphasis on competitive award mechanisms.

- **Performance of the concession**—the problem of renegotiation and an overview of the standard competition issues that might arise in concessioned sectors.

- **Design of the concession**—the main contract elements that are constrained by the award and performance of the concession.

2. Concessions: What they are and what is the experience

2.1 The economics literature

9. Two classic economic theory papers on concessions (also called "franchises" in the literature) are by Harold Demsetz in 1968 and Oliver E. Williamson in 1976. Demsetz pointed out that when competition in a market is infeasible, such as for a natural monopoly, it may be feasible to have competition for the right to supply a market. (In the background is a desire to move away from the inefficiencies engendered by regulation by substituting competition.) It might be possible to organise such competition for the market if inputs to supply the market were available to bidders at competitively determined prices and if there were no collusion so that the outcome of the competition was indeed competitive. If there is a single product, uniform pricing, all bidders have access to the same technology and can produce efficiently, and the number of bidders is sufficiently high, then the bidders would compete away any excess profits and the winning bid will be the minimum price that allows the firm to break even, i.e., earn normal profits. This is a good outcome in the sense of choosing an efficient supplier who will supply at average cost. However, there may be substantial welfare losses by not pricing at marginal cost. If there is more than one product then there is no best way to choose the winning bid. And, as will be explored later in this note, the winner of the competition may try to cheat on the quality provided and attempt to renegotiate the contract.

10. Williamson's 1976 paper was a reaction to Demsetz. He explored further the idea that bidding for a concession or franchise could be a substitute for regulation.[3] He identified difficulties that were glossed

3. Williamson's seven factors that should be considered when deciding between franchising and regulation of a natural monopoly were: "(1) the costs of ascertaining and aggregating consumer preferences through direct solicitation; (2) the efficacy of scalar bidding; (3) the degree to which technology is well-developed; (4) demand uncertainty; (5) the degree to which incumbent suppliers acquire idiosyncratic skills; (6) the degree to which specialized, long-lived equipment is used; and (7) the susceptibility of the political process to opportunistic representations and the differential proclivity, among modes, to make them" [p. 75].

over by Demsetz, namely equipment durability and uncertainty, as the core issues for franchise bidding. Regarding incomplete long-term contracts (the type of greatest interest for concessions), Williamson made three main points. First, he felt that the initial award criterion would be artificial or obscure. Once there is more than one dimension to a bid, e.g., price and quality, or peak- off-peak prices and quality, the criterion by which a winner is chosen is arbitrary. Second, he felt that the steps needed to overcome contract execution problems—adjusting prices to reflect changing costs, specifying quality of service, stipulating monitoring and accounting procedures—converged franchise bidding toward regulation. Other contract execution concerns were that franchising agencies were unlikely to allow a winning bidder to fail. Quoting Eckstein, "publicly accountable decision makers 'acquire political and psychological stakes in their own decisions and develop a justificatory rather than a critical attitude towards them.'" (1956, p. 223) Third, for there to be meaningful competition when the contract is re-bid, the incumbent—the winner the first time—must not gain substantial advantages. But this may be unlikely in practice as his study of CATV showed. Williamson summarizes thus, "The upshot is that franchise bidding for incomplete long-term contracts is a much more dubious undertaking than Demsetz' discussion suggests."

11. Riordian and Sappington (1987) is of less direct interest to policy-makers as they abstract from the complications that Williamson pointed out to be empirically relevant. That is, they assume that consumer preferences are known, quality is not an issue, bidding is not repeated, government and concessionaire can costly commit to the contract, and there is no cost of writing complex contracts. That being said, they find that, under conditions of risk-neutral bidders with private information about production costs, the optimal franchise bidding scheme is for the government to offer a menu of contracts. Each contract defines maximum prices and net transfer payments (production subsidy less franchise fee) as functions of the firm's reported marginal product cost. The winner is the bidder who bids the highest ranked contract. The winner will have the lowest expected costs but prices will exceed marginal cost. Having more bidders increases the franchise fee and reduces the winner's profits.

12. The empirical tradition is somewhat longer. Edwin Chadwick, a reformer in early 19th century Britain, proposed franchising the funeral industry. In 1907 the following comment was made about contract incompleteness and renegotiation in concessions:

> "Regulation does not end with the formulation and adoption of a satisfactory contract, in itself a considerable task….It is a current fallacy and the common practice in American public life to assume that a constitution or a statute or a charter, once properly drawn up by intelligent citizens and adopted by an awakened public, is self-executing and that the duty of good citizens ends with the successful enactment of some such well matured plan. But repeated experience has demonstrated—what should have been always apparent—the absolute futility of such a course, and the disastrous consequences of reliance upon a written document for the purposes of living administration. As with a constitution, a statute, or a charter, so with a franchise. It has been found that such an agreement is not self-enforcing….[Moreover, the] administration may ignore or fail to enforce compliance with those essential parts of a contract entrusted to its executive authority; and legal proceedings…are frequency unavoidable long before the time of the franchise has expired." (Fisher, 1907, pp. 39-40 quoted in Williamson 1976 p. 91)

13. Governments introduce concessions to increase the efficiency of infrastructure by applying private sector expertise in investment, management and operation, as well as to raise cash. Concessions may change who—government, concessionaire, users—bears risk and uncertainty and may provide incentives for efficiency. But concessions are incomplete contracts (i.e., not all contingencies are provided for in the contract) and it is difficult for governments and private companies to commit to those contracts (renegotiation is relatively common). Concessions are a source of popular discontent in developing countries as citizen-consumers have felt abused by foreign multinationals. "The failure of users to benefit from a significant share of those efficiency gains [from private as compared with government enterprises]

has been, to a large extent, the source of their discontent with the infrastructure reform programs in developing countries [citations omitted]" [Guasch, p. 1]

2.2 What is a concession?

14. "A concession grants a private firm the right to operate a defined infrastructure service and to receive revenues deriving from it," in the words of one expert. It might be the right to operate a water system or a cable television system in a municipality, or to use a part of the electromagnetic spectrum. Concessions vary according to their risk allocations and incentives, investment and service responsibilities, and how tariffs are set. Usually, a concessionaire pays a fee to the concession-granting authority, and then incurs investment expenditures and collects payments directly from users over time. At the end of the concession period, there could be compensation for investments that have not been fully amortized. There could be provisions regarding early termination and non-compliance with the agreed terms.

15. Concessions differ from privatization in three main respects. First, the physical assets remain owned by the state, even though the use of the assets and the operation of the enterprise are transferred to the concessionaire. Second, concession contracts are of limited duration, typically 15-30 years. Third, the government typically retains closer oversight of concessions.

Box 1. Types of Concessions

Concessions can take a number of basic forms, but in practice form a continuum.
--Lease and-operate (or *affermage*), "under which the private contractor is responsible at its own risk for provision of the service, including operating and maintaining the infrastructure, typically against payment of a lease fee."
--concession *stricto sensu*, "the private contractor is also responsible for building and financing new investments. At the end of the concession term, the sector assets are returned to the state (or municipality).
The term BOT (build-operate-transfer) is often used to refer to greenfield concessions, and ROT is sometimes used to describe concessions in which investments entail primarily rehabilitation (hence the "R") rather than construction. BOO (build-own-operate) is a similar scheme, but does not involve transfer of the assets.
--Divestiture, "the transfer to the private sector of the ownership of existing assets and the responsibility for future expansion and upkeep."
Source: Pierre Guislain and Michel Kerf (1995), "Concessions—The Way to Privatize Infrastructure Sector Monopolies," Note no. 59, Public Policy for the Private Sector, World Bank

2.3 Why use concessions? What is the experience?

16. Concessions are often viewed as a substitute for privatization when it is not feasible for political or legal reasons. Concessions are generally followed by regulation but, under certain circumstances, substitute for regulation. There is empirical support for substantial efficiency gains from concessioning, but the experience has been marred by substantial renegotiation which can dissipate the gains. These issues are reviewed briefly below.

17. Arguments for concessioning over state provision are that (1) if awarded via a competitive process then the more efficient operator will be chosen, (2) the process facilitates regulatory oversight by revealing some potential providers' private information, (3) the regulation that becomes feasible because of the concessioning and auctioning process can increase cost efficiency over time. Regarding efficient choice of operator, it can be difficult to design an appropriate concession and a competitive process—the topic of a section of this note. Regarding information revelation, an auction provides companies an incentive to apply their experience gained elsewhere and in other activities, to determine what profits they could extract from an activity, and to bid accordingly. The bids reveal information about what the bidder thinks is feasible. Further, during the consultations as part of the process of designing the concession, information can be exchanged to help design the subsequent regulation. The third point refers to the difficulty of

imposing a hard budget and quality constraint on government or government-owned companies—which implies that efficiency is not promoted—in contrast with the efficiency-promoting application of, e.g., price-cap regulation, combined with the hard budget constraint of a privately owned company.

18. Arguments for continued state provision are that (1) concessions require complex design and monitoring systems, (2) it is difficult to enforce contracts and to limit contract renegotiation—a notion that includes both lower-than-contracted service quality and higher-than-contracted tariff increases— and (3) there are insufficient incentives to invest or perform maintenance near the end of the contract. Regarding the first point, a specific concern arises where there are significant externalities or universal service requirements, and these cannot be effectively monitored by a regulator. Then state control may be necessary because a concessionaire will have incentives not to provide costly but unmonitored services. The second and third points are addressed later in this note.

19. One formulation, by Shleifer (1998), for choosing between public and private provision is: Public provision is superior to private provision only when: (1) the opportunity for cost reduction stemming from decreasing quality—in a way that cannot be proven to an arbitrator—is high; (2) the probability of product or process innovation is limited; (3) gaining a reputation as an efficient service provider is unimportant; and (4) competition is weak and consumer choice is ineffective.

20. Concessions can also be substitutes for regulation. Demsetz and others had the idea that concessions could displace on-going, inefficiency-provoking, cumbersome rate-of-return regulation of natural monopolies with the market discipline of a competitive auction for a concession. Williamson's critiques and subsequent experience cast doubt on that idea, at least in many circumstances. However, some short-term concessions in use do have the flavour of Demsetz competition. (See e.g. the box on Norwegian regional air transport.) Nevertheless, much of the debate now focuses on state provision versus concession versus privatisation, with acknowledgement that on-going regulation may be needed.

21. Increased efficiency is a fundamental reason for concessioning. For example, in Latin America and the Caribbean, which have had twenty years experience with concessions, This experience has been studied.[4] There, efficiency gains of concessioned firms show significant *annual* gains, ranging from 1–9 percent.

22. Studies of the Latin American efficiency gains from concessions are summarised in Estache, Guasch, and Trujillo (2003). In electricity, the rate of productivity change is 1 per cent per annum across 39 firms in a dozen countries. For railways, average annual total factor productivity growth has been 5.3% (freight) and 9.8% (passengers) in Argentina. In Brazil, the average annual TFP growth has been 8.4% for the first two years of a concession in Brazil (the 8.4% rate contrasts with the 5.5% rate before the sectoral reform). For ports, between 1996-9 Mexican ports improved efficiency by 2.8 to 3.3% per year. For water, Argentina had TFP efficiency gains of 3.7% to 6.1% per year, depending on the province. Regrettably, there does not appear to be a broader study of post-concessioning efficiency gains. Against these efficiency gains must be set the one-time transactions costs. Transaction costs for concession-type projects—for development activity, negotiations, and the like—are estimated to range from 3 to 5 percent of total project value where concession arrangements are reasonably well understood, but exceed 10 percent of project cost where the concept is new. (Klein, So and Shin 1996)

23. The intent of the regulatory reforms and the concessions was to give concessionaires incentives to make these efficiency gains and then to require some of these gains to be shared with users in the form

4. While Latin America constitutes only a fraction of the experience with concessions, experience with concessions began early there and the region has been the subject of a unique, comprehensive study by an economist at the World Bank.

of lower tariffs. However, the "weak or absent correlation between these efficiency gains and lower tariffs and the perceived profitability of the private operators, often secured through the additional benefits captured through renegotiation, have been at the core of the increasing dissatisfaction among users." A late 2001 Latinobarometro survey found that 63% of people in 17 Latin American and Caribbean countries believed that the privatisation of state companies had not been beneficial. (Guasch, pp 11-12, citations omitted). And, on the other side, profitability was also not very high. One study of 34 concessions in nine Latin American countries found that concessionaires, on average, made losses. The authors warn that the figures may not be reliable due to possible errors of official revenue figures and possible biasing of intra-firm transactions. (Sirtaine, Pinglo, Guasch and Foster 2005)

24. Despite over three-quarters of concessions between the mid-1980s and 2000 in Latin America being awarded by competitive auctions, about 30% were renegotiated (with much higher incidences in some sectors) an average of just over two years after the concessions were awarded. On average, users lost and concessionaires gained in these renegotiations.

25. Moving beyond the Latin American data on concessions, a remarkably candid assessment of concessions in Thailand (Nikomborirak 2004) highlights other problematical aspects of poor design of concessions. First, designing a concession specifically to circumvent domestic law suggests an absence of broad, durable political support. Second, there appeared to be a lack of commitment to the concession contract by both concessionaire and government. According to the report, the concessionaire did not truthfully share profits per the agreement and the government sold a second telecommunications concession in violation of the contract with the first concessionaire. Third, a non-competitive allocation process yields a worse outcome than a competitive process: the negotiated telecommunications concession provides for a concession payment of 16% to 21% of line revenue whereas the contract that was the outcome of a bidding process provides for the payment of 43.1% to 44.5% of line revenue. Finally, there is a need for a predictable regulatory regime.

Box 2. Example of Concession of Zambian Railways

Zambian Railways is state-owned and has no rail-based competitors. A restructuring project began in 1992, followed in 1997 by a management contract with a foreign rail company. It was concessioned in 2004 to a consortium including Spoornet, the South African railway. At least one observer found the process to be a resounding success:

"Years of state mismanagement, neglect and regional conflict ran the railroad off its rods. From 1975–1998, freight traffic decreased from 6 million tonnes annually to a mere 1.4 million tonnes. At the end of that period, the railroad was losing $12 million a year and needed an estimated $45 million for rehabilitation…Since 1998, when the transition process began, freight traffic has increased by 64%. The ending of wars in neighbouring states also means that the railroad is poised to regain its coveted links with Angola and Namibia….[F]reight traffic on the line has increased by 500,000 tonnes this year [2003] to 2.3 million tonnes — and there's every indication that such growth will continue."

But in November 2005, the Parliament resolved unanimously that the agreement for the concession of the railway be revised. MPs complained about loopholes, ignoring maintenance obligations, slower service, unemployment of former employees of the railway, and more. One was quoted as saying, "It is vital that we re-negotiate this agreement by terminating it."

Sources: 10 October 2003, Issue 3, SADC Barometer, "Privatising Zambia's Railway." Published by the South African Institute of International Affairs; 24 November 2005 "Revision of Zambia Railways Concession" Times of Zambia (www.times.co.zm)

26. This introduction has served to highlight the main competition issues raised by concessions. The first set of issues centre on the allocation and agreement of a concession contract. These are discussed in

the next section on auctions, allocation by negotiations, and the problems of renegotiation. The second set of issues centre on competition during the term of the concession. These issues are not fundamentally different due to the presence of a concessionaire. They include exclusion of rivals by denying access to facilities and abusive pricing. They are discussed in section four.

3. Allocating concessions

3.1 Auctions

27. Auctions are used to choose who shall operate a concession because they can identify the most efficient operator. The idea is that the highest bidder will be the person/company who places the highest value on the concession, and that will, on average, be the person who can operate it most efficiently. (In this paragraph and many that follow, we abstract away from the complication that bidders might already own substitutes or complements.) But poor auction design can thwart this line of reasoning, and sometimes the auctioneer does not desire the most efficient operator. Also, where the objective is to provide the best mix of coverage or other aspects of "quality" and price, then it may be difficult to identify which bid was "highest." That is, the choice among a number of weighting systems to incorporate multiple dimensions—e.g., coverage, quality and price—is arbitrary where economic efficiency is the objective of the auction.

28. The extensive auction theory literature provides insights into auction design, but the focus has not been on features of the real world, e.g., collusion and bidding costs, that have important effects on the participation, competitiveness, and outcomes of auctions. For policymakers, auction theory provides two main lessons:

- The best kind of auction for selling an object or a concession depends on the specific circumstances. (Examples of circumstances that matter include bidders' risk aversion and whether the private information other bidders have about an object is relevant for how much a bidder values it—in the extreme, whether they would all value the object the same if they all had the same information. A key feature of auctions is asymmetric information—different bidders have different information and some may have better—more accurate—information than others.) This is described in more detail just below.

- Extrapolation from the better-analyzed single good auction case to the multiple goods auction is difficult and error-prone. (The 3-G mobile phone licenses in European countries were examples of multiple good auctions. Arguably, a series of auctions with the same participants has features of multiple goods auctions.)

29. In practice, the effects of collusion and entry—i.e., attracting more independent bidders—are more important for designing auctions than details of risk aversion, the relationship of one bidder's value of the contract to other bidders' values, and the asymmetry of bidders' information about the value of the contract. Collusion and entry are discussed below.

Box 3. Definitions: The Four Standard Types of Auctions

There are four standard types of auctions which are commonly used and well-studied:

1) **ascending-bid auction** (also called the open, oral or English auction) in which the price is raised until only one bidder is left, and that bidder wins at the final price
2) **descending-bid auction** in which the auctioneer begins with a very high price which is lowered until a bidder announces that he accepts the price, and that bidder wins at that price.
3) **first-price sealed-bid auction** in which each bidder submits a single bid, no bidder sees what the others bid, and the object is sold to the highest bidder at the price he has bid.
4) **second-price sealed bid auction** (also called a Vickery auction after its inventor) which works like the first-price sealed bid auction but the winner pays not what he bid but instead the amount of the second highest bid.

The value of winning the contract may depend only on the bidder's characteristics, like their own costs. This is called a **private value auction**.

Alternatively, the value of winning the contract may depend on factors affecting all bidders, such as consumers' willingness to pay and regulators' future behaviour. This is called a **common value auction**.

The four standard types have a surprising feature; they yield the same expected revenue under certain conditions. This is called the **revenue equivalence theorem**.[5]

30. The various types of auctions have advantages and disadvantages.

31. Collusion is easier in an open auction since bidders can immediately detect cheating on a cartel agreement and punish it. On the other hand, whether the auctions are open or sealed-bid, if the same bidders face each other often, then detection of cheating can be done when the bids are opened and punishment can be meted out with a delay at the next auction. Collusion of another kind, when auctioneers are corrupt and share sealed-bid information with other bidders, transforms the sealed-bid auction into an open auction as bidders can learn about others' bids and change their own.

32. Entry by weaker bidders is promoted by sealed-bid auctions as compared with an open auction. Described in greater detail below, the intuition is that weaker bidders will drop out of an open auction, therefore realise they may as well not enter at all, but that they have a chance of winning a sealed-bid auction, so enter.

33. Second-price sealed bid auctions have the advantage of duplicating the outcome of an ascending bid auction[6] but without the cost of assembling bidders. They have the advantage, as compared with a first-

5. Assume there is one unit of an indivisible good. Assume each of a given number of risk-neutral potential buyers of the object has a privately known signal that is drawn independently from a common, strictly increasing, atomless distribution. Then any auction mechanism in which (1) the good always goes to the buyer with the highest signal and (2) any bidder with the lowest feasible signal expects zero surplus, yields the same expected revenue. (Klemperer, p. 17, who also notes that this is not the most general statement of the theorem) In a private value model, a bidder's value depends only on his own signal. In a pure common-value model, the actual value is the same for everybody but bidders have different private information, i.e., different signals.

   Violating these conditions, e.g., risk-aversion on the part of bidders or information that is not independent, means that the different auctions no longer provide the same expected revenues.

6. The logic is as follows. An ascending bid auction ends when the bidder with the second-highest value drops out. He drops out when the bid is just higher than his valuation. So, the winner pays the second-highest valuation plus a little. If everyone bids their valuation in a second-price sealed bid auction, then the winner pays the second-highest valuation (by definition). But will a bidders bid his valuation? He will not

price sealed bid auction, of allowing a simpler calculation since the rational bid is the bidder's own value and does not require any estimate of the number of other bidders and their values. But second-price sealed bid auctions can also give rise to political difficulties. In particular, they make public how much money was left on the table (the difference between the highest and second-highest bid). The extreme outcome occurred during New Zealand's radio spectrum auction, where the first bid was NZ$100,000 and the second only NZ$6. (McMillan 1994). There was political fallout when taxpayers saw that the state got only NZ$6 when someone was willing to pay NZ$100,000. First-price sealed bid auctions and open auctions are better in this regard, since the first price wins in the a first-price sealed bid and the first price is unknown in the second case (the bidder who wins pays the amount of the standing highest bid when the second-highest bidder drops out of the bidding, so taxpayers do not see what they missed by not selling the license at the highest bidder's valuation).

34. An important question is, In awarding a concession, what should the auction be about? Should bidders bid tariffs or a concession fee? (The problem of multiple criteria is addressed later in the section on non-auction award procedures.) Demsetz promoted bidding on tariffs, but experience since then has shown that this is a poor choice. Tariffs are difficult for both government and concessionaire to commit to because they need to change in response to changes in the environment, and the negotiations with the regulator during this process eliminates the efficiency effect of competitive auction. Therefore, the usual practice is to award on the basis of concession fee, when an auction is used.

35. Both theory and practice show that auction design does matter. Some argue that it does not, claiming that the winner of the auction can sell to more efficient owners to eliminate any inefficiencies in the allocation from the auction. That argument is incorrect because, in the case of licenses or concessions, there are substantial transactions costs. The existence of these costs violates a key assumption of the Coase Theorem on which that argument rests.[7] *Inter alia,* since the value of the license or concession is not known to the buyers and sellers, some sales that increase efficiency will not take place and those which do take place will be delayed. Empirical evidence supports this theory: While there is demand for nationwide wireless telephone networks in the United States, the fragmented licenses that were initially sold were not quickly consolidated into national networks. (Milgrom, p. 20.) Further, today three of the four carriers who operated airmail routes in the United States in 1930 have hubs in cities they served then. (The fourth has gone bankrupt. See the box on U.S. airmail routes.) In Norway, the incumbent continues to win auctions for regional air services at the fourth set of contracts (See the box on Norwegian air services). So, getting it right the first time matters.

Box 4. Key Elements in Auction Design

"My own experience in auction consulting teaches that clever new designs are only very occasionally among the main keys to an auction's success. Much more often, the keys are to keep the costs of bidding low, encourage the right bidders to participate, ensure the integrity of the process, and take care that the winning bidder is someone who will pay or deliver as promised." *Milgrom 2004, p. xii.*

"What really matters in practical auction design is robustness against collusion and attractiveness of entry—just as in ordinary industrial markets." *Klemperer, p.131.*

bid more, of course. If he bids less, this lowers his likelihood of winning and does not lower the price he would pay if he won. If he loses to a bidder who bid less than his valuation, then he regrets his bid—if he had known, then he could have costlessly bid more, up to his valuation.

7. The Coase Theorem (1960) "asserts that an optimal allocation of resources can always be achieved through market forces, irrespective of the legal liability assignment, if information is perfect and transactions are costless." (Tirole 1989) However, other authors have the view that the initial assignment of property rights does indeed constrain the feasible allocations achievable by bargaining. (Varian 1987)

3.1.1 Preventing bidder collusion

36. The three direct strategies for preventing bidder collusion are aimed at interrupting signalling (to impede bidders reaching an understanding), helping cheaters on a cartel to avoid detection, and helping cheaters to defer the cartel's punishment. In addition, promoting entry—the subject of the next subsection—also discourages collusion both by increasing numbers and by obscuring identities—we all know the incumbents, but who might enter? Finally, collusion can be deterred by the credible threat of significant penalties. Sealed bid auctions are better than ascending bid auctions in this respect, since bidders cannot use their bids for signalling and cartelists cannot immediately detect a cheater and punish him.

37. The design of the auction affects signalling. Signalling allows bidders to identify what they wish to win, to threaten what they will do if thwarted, and thereby to reach an understanding of who will win what. Signalling can be done in a number of ways. For example, signalling can take place in the newspapers ("I'll be satisfied with just two of the 12 blocks of frequency on offer," "If the [five other bidders] behaved similarly it should be possible to get the frequencies on sensible terms," but "[I] would bid for a third frequency block if one of [my] rivals did"). (Klemperer, p. 136 citing Crossland 2000) In the instance from which the quotations were taken, six firms won two licenses each at low cost. Moving toward a sealed-bid auction, so the retaliation could not be taken immediately, may have reduced the effectiveness of this signal.

38. Signalling can also be done in various ways during the bidding. Signals can even be contained in the bids, e.g., using the last digits in a bid amount to identify a lot in which the bidder is particularly interested. This actually occurred in some of the telecommunications license auctions in the United States. This form of signalling can be prevented by prohibiting bids not in round numbers or by the auctioneer specifying the bid increment. Another form of signalling used in the FCC auctions was withdrawing a bid after it had been made. I.e., a company would enter a high bid, then withdraw its bid. Where two bidders are bidding against each other in several markets, they can use withdrawals to propose a split. Rule changes limited withdrawals to two rounds.

39. Collusion may be interfered with if bidders' identities are not revealed. If bidders know others' identities, then they can retaliate and cooperate across auctions. Further, bidders can intimidate others. One study found that small bidders avoided bidding against large bidders in the FCC's DEF auction in 1996-1977, and posited that they did this to avoid retaliation. If small bidders avoid large bidders, then it makes any collusion among large bidders easier to reach and more effective. (Cramton and Schwartz 2000)

40. Joint bidding arranged close to the auction date reduces competition without allowing potential entrants time to respond and compete against the cooperating bidders, thus has an economic effect like open collusion. This problem can be addressed by prohibiting joint bidding arrangements announced close to the auction date. (For those joint bidders who could not bid individually, joint bidding does not reduce competition. But it may be administratively difficult to quickly identify and separate these cases from anticompetitive joint bidders.)

41. Reserve prices can affect collusion. A high reserve price changes the calculation of a potential cartelist: With a low reserve price the choice is between colluding to end the bidding early at a low price and bidding longer and higher. With a high reserve price, the first alternative—collusion—is relatively less attractive because the lowest collusive price—the reserve price—is higher. In the extreme, if there are valid suspicions of collusion or not enough bidders show up, it may be reasonable to cancel an auction. Such a policy would need to be pre-announced to limit strategic conduct.

42. In addition to the direct methods for making collusion more difficult—interrupting signalling, prohibiting joint bidding arrangements near the auction date and increasing reserve prices—effective competition law may deter collusion. Indeed, it may be possible that larger penalties can be available in concessioning when there is a requirement that the bidder affirm to the government that he has not participated in any collusion in the bidding process. If the same firms may also bid in future procurement or other concessions tenders, the threat of debarment from future government contracts may be effective deterrence. (OECD 2005)

3.1.2 Promoting entry by bidders

43. More bidders is better. More precisely, in private-value auctions generally and in many common-value auctions, an ascending auction with no reserve price and N+1 symmetric bidders is more profitable than "any auction that can realistically be run" with N bidders. "So it is typically worthwhile for a seller to devote more resources to expanding the market than to collecting the information and performing the calculations required to figure out the best mechanism." (Klemperer p 27, citing result from Bulow and Klemperer 1996; see also the box on U.S. airmail below)

44. Promoting entry by bidders is aimed at encouraging weaker bidders—i.e., those less likely to win the auction—to participate actively. (Presumably those who feel they are likely to win do not need encouragement.) Sealed bid auctions are better than ascending auctions in this regard. The intuition goes as follows: Consider the ascending auction. Near the end of the bidding, only the strongest bidders will remain. The weaker bidders know this. If they are going to drop out of the bidding late, then they do better to not incur the bid preparation costs and not bid at all. By contrast, with a sealed-bid auction, weaker bidders may win at a price that the stronger bidder could have beaten, but did not because he traded-off the increased probability of losing against paying more. In a sealed-bid auction, the stronger bidder cannot change his bid once he sees the weaker bidders' bids, as he can do in an open auction. A second line of intuition is based on bidding strategies in a sealed bid auction being less straightforward than in an open auction, and the conjecture that in practice bidders are not likely to have a common view on the distribution of the true value of a contract. This results in a weaker player being more likely to win in a sealed bid auction. (Klemperer p. 133)

Box 5: Example of Entry in 3G Telecommunications Auctions

The Netherlands had five incumbent mobile-phone operators and sold five 3G licenses by ascending auction. Bidders were permitted to win at most one license each in order to promote competition in the 3G market. "Recognizing their weak positions, the strongest potential new entrants made deals with incumbents, and Netherlands competition policy was as dysfunctional as its auction design, allowing firms such as Deutsche Telekom, DoCoMo, and Hutchinson, who were all strong established players in other markets than the Netherlands, to partner with the local incumbents." In the end, only one potential entrant bid and it withdrew after receiving a threatening letter from an incumbent. The five incumbents won the five licenses, paying about €3 bn, far below the equivalent in the United Kingdom.
By contrast, Denmark's auction was considered to be a success. Denmark had four incumbent mobile-phone operators and sold four 3G licenses by auction. Having watched the earlier 3G auctions, the decision was made to use a sealed bid in order to attract weaker bidders, promote new entrants and scare incumbents into bidding high. The government kept secret the number of actual bidders, as well as all bids other than the fourth highest. All winners paid the fourth highest bid, worth about € 95 per capita. Among the winners was one new entrant. (Klemperer pp. 155-6, 163-4)

45. More generally, auctions with lower bid preparation costs will attract more bidders. This can be accomplished by standardizing auction procedures, including across time and jurisdictions. For some but not all aspects of auctions, this may involve a certain trade-off with designing auctions specific to their circumstances. This may also be accomplished by packaging auctions. The Tunisian Competition

Authority, for example, plays a role of reducing barriers and requirements so that they do not cause prices to rise or deter bidders. (See Sixth Global Forum on Competition, Tunisia DAF/COMP/GF/WD(2006)13.)

46. Also, bids can be encouraged by reducing the cost of providing the service, for example, by setting performance criteria that can be met by various means rather than specifying a particular technical solution. (See box 17 on Norwegian regional air services.).

47. It may be possible to "strengthen" weaker bidders. If the object is worth about the same to all bidders ("common value" in the literature), then a bidder with better information—such as the incumbent—can bid more aggressively than the others. The other bidders recognize that they will only win if they overestimate the value of the object by more than usual (the "winner's curse"), so they bid unusually cautiously. The result is that the incumbent wins more frequently and at a lower price. Providing better information to all bidders may reduce the informational asymmetry and improve the outcome of the auction. Other methods of encouraging entry that are supported by economic theory are set-asides—allowing only e.g., small enterprises to bid on certain licenses and of course restricting re-sale—and bidding credits—requiring e.g. small enterprises to actually pay only a specified fraction of their bids. (Klemperer pp. 234-239) An example of a set-aside, though perhaps aimed more at restricting market power later, is prohibiting incumbents from bidding.

Box 6. Example of Excluding Incumbents: Los Angeles versus Chicago

In the 1995 auction for mobile phone broadband licenses in the United States, licenses were for specified regions. The value of the licenses was probably about the same for all bidders. The licenses were sold by an ascending "English" auction. Fixed-line operators in the same region as the licenses were advantaged over others because they had a database of potential customers, a well-known brand name, and familiarity with doing business locally. Los Angeles has a higher household income, higher growth rate and a less dispersed population. In Los Angeles, the incumbent was allowed to bid and the auction yielded $26 per capita. In Chicago the incumbent was prohibited to bid and the auction yielded $31 per capita, even though the characteristics of the population would have led one to think that the LA license would be worth more than the Chicago license. (Klemperer 2004, p. 107)

3.1.3 Repeated auctions

48. Repeated auctions, such as when a concession has come to the end of its term and is re-auctioned, present special problems because of the incumbent's advantages over the other bidders. If each bidder thinks he values the concession about the same as the other bidders do, but that they each have different information about the true value of the concession, then they will all know that the incumbent has better information and will either not bid or will bid a low price. Requiring information to be provided by the incumbent to all bidders is unlikely to solve the information asymmetry problem, and in any case the incumbent may have reputational advantages that cause outside bidders to shy away from bidding aggressively.

49. There is an obvious trade-off between duration of concession contracts and the repetition of auctions.

50. Repeated auctions can be part of an ingenious design to shift uncertainty. That is, they can be a way for government to bear more uncertainty and thus receive higher concession fees, on average. A recent Dutch railway concession does this.

Box 7. Example of Designing around Uncertainty in the Dutch Betuweroute Concession

The Dutch state granted a short-term rather than a long-term concession for the Betuweroute in order to bear itself the current significant uncertainty about market developments. (The state bears the uncertainty in the sense that the price of the long-term concession which will be auctioned at the end of the short-term concession will reflect what actually happens in the short-term.)

In particular, the concession of the Betuweroute from the harbour of Rotterdam to the German border, which is designated for freight transport, will be granted for the period of 2007-2009/2010, to a consortium. During this period, the uncertainty about the volume of freight is expected to be reduced. Later, a longer concession will be allocated by competitive auction. The price the Dutch government will get for the concession will reflect the expectations held in 2009/2010 about future e.g., freight demand and maintenance costs, and these expectations will be more precise because of the experience of operating the concession during 2007 to 2009. Conceivably, though this is not mentioned in the Dutch discussion, the members of the consortium, since they will have information advantages gained by being incumbents, could be required to bid separately for the second concession.

Source: Submission by The Netherlands to the Sixth Global Forum on Competition 2006

51. Williamson (1976) argued that using recurrent short-term contracting allowed the expense of calculating contingencies to be avoided. Adaptations could be introduced at the contract renewals in response to what events had actually occurred. The Dutch Betuweroute concession seems to be an example of Williamson's theory put into practice.

3.1.4 Other auction issues

3.1.4.1 Auctions for multiple goods

52. The auction theory literature provides less guidance when there are auctions for multiple goods, or multiple auctions involving essentially the same players. While the practice is to extrapolate from the better-analyzed single good case to the multiple good case, that extrapolation is difficult and prone to error. Multi-unit auctions have been used to sell radio spectrum, electric power, Treasury bills and other objects. When the objects can be either substitutes or complements, auctions do not perform well. While for single-object auctions the objectives of higher revenue and allocation to the more efficient owner are aligned, for multi-unit auctions these objectives must be traded-off. The two examples below give a flavour of the considerations in multiple goods auctions.

Box 8. Description of the US Radio Spectrum Auctions

The design of the 1994 Federal Communications Commission auctions to sell spectrum licenses for PCS[8] has inspired a number of subsequent multi-unit auctions. This box describes the first of those auctions.

There was no off-the-shelf design for auctions of multiple objects with potentially highly interdependent values. (The value of one license depended on whether one already owned a substitute or a complementary license.) Among the difficulties was the fact that some potential bidders wanted nationwide licenses whereas others wanted regional licenses.

The basic design chosen was a simultaneous ascending auction. Ten licenses were offered in total, with the country being divided into several large regions. There was an auction for each license. At each round, each bidder would place bids. Bidders did not bid in every auction. At the end of each round, everybody could see each bid that had been made. Bidding increments were set by the FCC at each round. The idea was that bidders could put together their own optimal basket of licenses, taking into account the cost of the various licenses. Thus, at each round, each bidder could re-design its basket of licenses after surveying the current high bid for each license.

The rule for ending the auction, the closing rule, was that the bidding on all licenses ended when there was a round in which there were no bids on any license. The alternative rule that had been discussed was to close the bidding on each license when there had been a round in which there had been no bidding on that license. This alternative rule was not chosen because it meant that a bidder who thought he had won a particular license, but was outbid at the last moment, could not then bid for a substitute license if the bidder there had already closed. To keep the auction from going on for too long, there was a rule that serious bidders either had to have a high bid or place an acceptable new bid in each round. For the same reason, there was also a rule that bidders had to "be active" on a minimum percentage of the auctions for which they were eligible to bid. (Incumbent cellular licensees were barred from holding a PCS license in the same area.)

The auction closed after 47 rounds over 5 days. Fears that the process would be never-ending and too complex for the bidders proved to be unfounded.

Subsequent multi-unit licenses have been larger. From this small auction through March 1998, the FCC has held a total of 5,893 auctions. The rules have been changed as both bidders and the government have identified weaknesses. The FCC says, "Prior to [the 1993 law that gave the FCC authority to use competitive bidding], the Commission mainly relied upon comparative hearings and lotteries to select a single licensee from a pool of mutually exclusive applicants for a license. The Commission has found that spectrum auctions more effectively assign licenses than either comparative hearings or lotteries."

Sources: Milgrom 2004,Cramton and Schwartz 2000, and FCC website fcc.gov/auctions

8. PCS, Personal Communication Service, is the name for the 1900 MHz radio bank used for digital mobile phone services in Canada and the United States.

Box 9. Example of New Zealand Television Licenses

New Zealand sold licenses to deliver television broadcasts using simultaneous second-price sealed bid auctions. (Recall that in these auctions, the winner is the higher bidder but he pays the amount of the second-highest bid.) This kind of auction would work well only when the licenses are neither substitutes nor complements. But in the event, the licenses could be substitutes or complements, so bidders ran a risk of winning too few or too many licenses.[9] The actual outcome suggests that the auction was inefficient because the bids show little connection between the demands expressed by bidders, the number of licenses they won or the prices they paid. Also, bidders could not guess each other's values. For example, it appears that neither Sky—who bid much higher than the others—nor Totalisator—who bid NZ$401,000 for six licenses—made accurate guesses about their competitors' bidding strategies.

Table 1 Winning Bids on Nationwide UHF Lots: 8 MHz License Rights

Lot	Winning Bidder	High Bid (NZ$)	Second Bid (NZ$)
1	Sky Network TV	2,371,000	401,000
2	Sky Network TV	2,273,000	401,000
3	Sky Network TV	2,273,000	401,000
4	BCL	255,124	200,000
5	Sky Network TV	1,121,000	401,000
6	Totalisator Agency Board	401,000	100,000
7	United Christian Broadcast	685,200	401,000

Source: Hazlett (1998) cited in Milgrom, p. 12.

The auction could have been improved by having several rounds. The winner would be allowed the number of licenses desired (up to a limit set by antitrust concerns) at its winning bid, the second round would sell the right to choose next, and so on. Or the auction might have bids consisting of prices and quantities where the highest bidder got to fill its bid, then the second until all licenses were gone.

53. As this small sample has shown, auctions for multiple goods are difficult to design well. The tradeoffs are difficult to identify and much of the design work requires sophisticated modelling.

3.1.4.2 The problem of multiple criteria

54. Where there are multiple criteria, such as an objective to provide the best mix of coverage, quality and price, it may be difficult to identify which bid was "highest." There can be a pre-announced formula that inputs all the bid variables and comes out with a single number, but such formulae—and any scoring to convert quality variables into values—are bound to be arbitrary in an economic welfare sense. It may be better to apply a filter of basic requirements and identify the winner on the basis of the bid among those companies whose bids fulfil those requirements. (See the box on the Swedish Beauty Contest for an example of filtering followed by an auction.) On the other hand, there is an intuitive argument—not yet fully explored in economic theory—that where bidders have different characteristics then multidimensional "scoring" can both increase bidders' profits and the government's value. (Klemperer p. 247)

55. The need to take into account multiple criteria is often cited as a reason to use a non-auction allocation mechanism. Government might want, for example, a combination of coverage commitment,

9. This is not paradoxical. Assume three licenses are being sold and a bidder needs two of them to enter a market. If the bidder already has one licence, the remaining two are substitutes. If he does not yet have a license, two of them are complements.

price formula, and concession fee. But these multiple criteria must ultimately be translated into a single ranking, and then the highest ranking bidder wins the concession. In other words, there must be a formula which translated the different characteristics into a single ranking.

56. With complex concessions, it is reasonable for the concession designer to need to educate himself about the relevant characteristics, various technologies and tradeoffs. This can be accomplished during a public consultation period before any bidding takes place.

57. The issue is when that formula is arrived at. If it is arrived at before the bids are submitted, then one must ask why the formula cannot be publicly announced in advance and an auction be held on the basis of, say, the concession fee. Announcement in advance can also facilitate entry. A variation would be to publicly announce minima for the various dimensions and reject all bids not meeting those minima, then choose on the basis of concessions fees bid. Such an auction would seem to be as feasible as a beauty contest and would have the advantage of increased transparency to ensure that only relevant criteria go into the ranking.

58. If the formula is arrived at after the bids are submitted, it runs the risk of appearing to be arbitrary or to favour particular applicants, and of being prone to corruption.

59. Beyond the concern over corruption, the risk of collusion with the auctioneer would be lessened if the government advertised its objective requirements and the criteria by which bids or proposals would be evaluated since this should attract more bidders. But the risk of collusion by way of leaks from the evaluator would remain.

60. Even with the best of intentions, when comparisons among bids are very complex then the problem of dealing with multiple criteria may be unavoidable. And when bids are evaluated according to criteria that are either unclear or not pre-announced, even competitive auctions can take on some of the characteristics of negotiation.

3.1.4.3. Competition from incumbents

61. When companies are already present in a sector, there allocation of concessions can either strengthen or weaken competition. It may be advisable to disallow bidding from certain companies in order to promote competition from new entrants who enter via auctions or, alternatively, to prevent problems of discrimination by vertically integrated companies. These issues are discussed later under promoting entry by bidders and coverage of the competition law.

3.1.4.4 Collusion between the auctioneer and bidders

62. The common practice of public announcement of all bids received is aimed at uncovering collusion between auctioneer and bidders. This practice is intended to assure bidders that the auctioneer did not unfairly exclude their bid. Unfortunately, it also helps members of cartels to detect cheating.

Box 10. Example of Enhancing Transparency in Procurement in France

In discussion over revision of the French public procurement code (Code des Marchés Publics) an idea was put forward to increase the transparency of auctions. Rather than publicly announcing only the winning bid, all bids received for each public tender would be made public under this proposal. The idea was that stakeholders would be better able to monitor the process and ensure that it was fair. Most of the business community supported the idea, but the competition authority (Conseil de la Concurrence) had strong reservations. They argued that the transparency would discourage would-be cheaters on cartels from making competitive bids since they would be afraid of being found out and punished in a later tender. The competition authority further argued that, since the same firms bid time and time again in procurement auctions, having access to the losing bids as well would help the firms build up knowledge about how their competitors bid. The knowledge gained would facilitate tacit collusion.

Source: Jenny 2005

63. Unfortunately, the use of transparency in the bidding process to reveal unfairness and corruption conflicts with the aim of preventing collusion; transparency makes it easier for a bid-rigging conspiracy to detect and punish cheaters. Solutions are needed which advance both aims. For example, an inspector general or ombudsman could oversee the auctioneer and investigate complaints without necessarily revealing who bid what. Though how would concerns about capture or corruption at that level be satisfied? The optimal level of transparency would also depend on the relative effectiveness of deterrence through penalties for cartelisation and for corruption (more transparency would be in order if corruption is a larger problem than cartelization).

64. Further, the auctioneer should be sufficiently independent to operate in the public interest. *Inter alia*, its incentives should be aligned with that of the public purse, it should have sufficient independent knowledge, and it should have the necessary controls to maintain confidentiality of bids.

3.1.5 Conclusion on auctions

65. A few examples of actual auctions can give a flavour of how design can be improved.

- Switzerland auctioned off four 3-G mobile licenses in 2000. Weaker bidders dropped out, at least one because of the ascending-bidding rules. The government allowed last-minute joint bidding. In the last week before the auction, the number of bidders shrank from nine to four. The licenses were sold at their reserve price, one-thirtieth of the per capita revenues raised in the British and German auctions for similar licenses. [Klemperer 2004, p. 109] Setting a higher reserve price, forbidding last-minute joint bids, and perhaps switching to a sealed bid auction are likely to have improved outcomes for the treasury.

- Turkey auctioned off two telecom licenses sequentially, declaring the reserve price for the second licence would equal the selling price of the first license. One company bid far more than the first license was worth if it would face competition from a second licensee. No one bid for the second license. [Ibid, p. 110]

- The US auctioned off spectrum in 1996-7 using simultaneous ascending auctions for a large number of lots. Most bids were in round thousands of dollars. Two companies were competing heatedly for lot number 378. One company over-bid the other, with bids of $313,378 and $62,378, for lots where the second company had seemed to be the undisputed high bidder. The second company quit bidding for lot 378. [Ibid. p 105 citing Cramton and Schwartz 2002] The obvious inference to make is that one company was signalling that he

would punish the other in other auctions by bidding high prices if the second company would not drop out of the bidding for lot 378. Specifying sufficiently large bid increments can avoid this type of signalling.

66. Both experience and theory supports a few more rules of thumb to help authorities to anticipate and avoid some errors in how they design auctions.

Box 11. Rules of Thumb for Auctions

- Aim to interrupt signalling, help cheaters on a cartel to avoid detection, and help cheaters to defer the cartel's punishment. This can include using sealed bids, prohibiting bids not in round numbers, prohibiting joint bidding arrangements that are not announced sufficiently in advance of the auction date, and having a sufficiently high reserve price. Enforce the competition law effectively.
- Aim to increase participation. This can include wider advertisement of the auction, reducing the cost of bid preparation, and maybe reducing informational advantages of incumbents.
- Where the goods or concessions are complements or substitutes, design the auctions to takes these interactions into account. To take a simple example, simultaneous English auctions (where bidders can continuously assess their likelihood of winning the various goods and continuously adjust their bids) can do that, whereas separate sealed bid auctions do not. Once a seal bid is made, a bidder cannot revise it when it finds it has won or lost the auction for a complement or a substitute.
- Include in the design rules for reassessing the design if there are too few bidders. For example, if three licenses to offer mobile telephony services are offered and only three bidders show up, then the auction will yield much lower revenues than if four or more bidders show up. If the pre-announced rules state that the auction will be postponed until steps are taken to increase participation, then the auction should attract more interest and avoid disappointing outcomes.
- Where the bidders have the same expected value for the object, then if one bidder has a small advantage over the others such as valuing the object slightly more or having slightly better information then this can radically change the revenue that can be raised by the auction. Under these conditions, a sealed bid auction will raise more revenues than an open auction. [Klemperer, p. 12-13 or 236-7] This can be relevant, for example, when a concession is being re-auctioned and the incumbent has advantages over the other bidders, such as having made sunk investments or knowing more about the actual conditions of the concession.
- Auctions need to take account of the environment in which they are held. Experiences elsewhere are informative, but they are not a substitute for analysis and for simulations. The services of an experienced auction designer may substantially improve the likelihood of a successful outcome and would help avoid mistakes.

3.2 Other allocation mechanisms

67. Three allocation mechanisms that do not involve auctions are simultaneous negotiations, negotiation with a single provider, and beauty contests. These are addressed after a short discussion on multiple criteria.

3.2.1 Negotiations

68. In a **simultaneous negotiation** procedure, also called competitive negotiation, several potential bidders are contacted by the government and invited to enter negotiations. During the negotiations, they develop alternatives that would meet the concession requirements. Then the bidders submit their final offers on the basis of the solutions identified during the negotiations. After the government selects the winner, further negotiations finalise the contract terms. This mechanism is permitted in, for example, Romania. This approach might be considered appropriate when project design is complex so that the buyer can use the information exchanged during negotiation with the potential sellers to better design the desired

project. (Bajari et al 2004) *Inter alia* this approach allows various bidders' technical solutions to be incorporated into the final contract. On the other hand, it is not clear why learning about alternative technical solutions could not take place earlier and be reflected in the request for bids.

69. Where there are no agency concerns with respect to the auctioneer, simultaneous negotiation is analogous to an open, or English, auction. An open auction is particularly prone to collusion when there are few bidders and every bidder knows who else is bidding. Further, since competitive negotiation is not open to public scrutiny and involves discretion on the part of the government, it may be more prone to corruption.

Box 12. Example of Tendering Before Negotiating: French Water

There is evidence that preceding the negotiation stage with a public auction can improve outcomes. Open, publicly announced tenders for water concessions in France were relatively rare before 1993. Rather, the same concessionaire almost universally remained as manager of a local water company from one contract to another. In France, three large multinational companies, Vivendi Water, Suez-Ondéo and SAUR-Bouygues, have the largest market shares. They total about 90 %. Corruption scandals and unhappiness at the price of water led to the *loi Sapin* which, since 1993, has required an open tendering process for water management contracts before a second negotiation stage, and limited the length of contracts. A study of several hundred contract renegotiations found that the average length of contracts fell from 17 to 11 years, prices fell by 10%, despite the incumbent operator winning in 80-90% of cases.
Source: OECD Competition and Regulation in the Water Sector *DAFFE/COMP(2004)20 citations omitted and Saussier (2005)*

70. **Negotiating with only a single potential provider** at a time is worse than negotiating simultaneously with several providers. When the government must decide whether to accept the single negotiator's "best and final offer," the choice is not between this and the other negotiators' offers, as it is for competitive negotiation, but rather incurring the costs and delay of new negotiations with a new partner whose "best and final offer" is still unknown. The weaker bargaining position yields a worse outcome.

71. In comparison with negotiations, auctions do well. Auction theory shows that, under relatively innocuous assumptions, an auction with N+1 bidders will always provide a higher price than any negotiation with N bidders.[10] In other words, if just one more bidder can be attracted to an auction than can be attracted to a negotiation for the same object, then the auction is more competitive.[11]

72. In sum, negotiating simultaneously with several potential suppliers rather than using a competitive auction can strain anti-corruption and anti-discrimination systems. Auction theory shows that, under certain relatively innocuous conditions an auction raises more funds than simultaneous negotiations.

10. One assumption, that bidders are symmetric, is less innocuous. With asymmetric bidders, optimal negotiation can yield a higher expected revenue than an auction with an extra bidder. Bulow and Klemperer (1996) have shown that, under certain assumptions, an auction with N+1 bidders will provide a higher price than any negotiation with N bidders. They also show that if a seller could negotiate with N bidders while reserving the right to hold an ascending auction with an additional bidder and without a reserve price, then the seller would always do better to skip the negotiations and go directly to the auction. The conditions are: bidders are risk-neutral, their value functions are symmetric, and their signals are independent, bidders' lowest possible valuations exceed the seller's cost of supply, and bidders with higher signals have higher valuations.

11. One empirical study on refuse collection estimates that competitive auctions yield cost savings of 20% as compared with negotiation. (Dornberger, Meadowcroft and Thompson 1986, "Competitive Tendering and Efficiency: The Case of Refuse Collection." *Fiscal Studies* 7: 69–87, cited in Guasch)

However, where bid evaluation is complex, even auctions can take on some of the characteristics of competitive negotiation. See the Box on Oakland cable television franchising for an illustration.

Box 13. Example of Multiple Criteria and Renegotiation in Oakland Cable Television Franchising 1969

In June 1969 the City Council of the city of Oakland, California, adopted an ordinance setting out the main features for allocating a cable television franchise. City staff began discussions with prospective franchisees and community groups to gather information on costs, demand characteristics, and technical capabilities inter alia to define a standardized "basic service" so that bids would be comparable.
In April 1970, the five applicants were invited to bid. To summarize, the franchise winner should provide two systems, a basic system A with specified channels and a system B with unspecified special programming and unspecified other services. A subscriber would get access to system A by paying a connection fee and a monthly charge of amount "x." Franchise duration was 15 years. The annual franchise fee to be paid to the city was specified. The connection charges were specified. Minimum technical specifications were stipulated. Minimum service quality was described generally. Minimum coverage of the city and schedule was specified. (All areas of the city were to be served after three years.) Proposals to increase the rates to subscribers could be made annually, but the city ordinance did not specify any indexing or other criteria. The basic bid was an amount x that would be charged subscribers each month for the first outlet that would enable them to receive the basic system A.

Bids received were $1.70 from Focus Cable, $3.48 from Cablecom-General and $5.95 from TelePrompTer Corporation. Focus informed the city at the time of its bid that a partner vital to its qualification as a bidder had withdrawn. Focus had submitted the lowest bid, was the only local bidder, and represented an ethnic minority, so the City was reluctant to reject the bid. Two weeks later, TelePrompTer proposed to enter into a joint venture with Focus in which TelePrompTer would end up with 80% of the capital. The City awarded the franchise to Focus in November 1970. Focus asked for and was granted a rate of $4.45 per month for system B.
Focus then asked for the contract to be modified. After negotiation, the main changes were: lowering of technical capacity, increase of annual franchise fee, reduction of penalty for late construction by a factor of 20 or more, slower construction schedule, and a five-fold increase in monthly subscriber fee for additional connections.
In November 1974, 11 131 subscribers were connected. 10 361 had the extended service B and only 770 had the basic service A.

The Oakland experience leads to the following observations:
-- The lack of consumer appeal of basic service A meant that the focus on the monthly fee for basic service A in the award process "resulted in a strained and perhaps bogus competition."
-- The actual relationship between cost and price is not clear. First, the bids for service A raise the question of whether there was an economically meaningful competition. Second, the price of service B was negotiated and not determined by a competitive mechanism. Third, vertical integration (TelePrompTer supplied much of the equipment) and the city staff's lack of auditing capability obscure true cost levels.
-- An inference that Focus' initial bid was only meant to get its foot in the door is supported by the low initial bid, timing and nature of Focus' reorganisation, importance of its local bidder status, and its success in the contract renegotiation.
-- The City was not in fact in a position to take over if the franchisee withdrew. There was no inexpensive way to value the assets, nor a plan to prevent service interruptions.

Source: Williamson 1976

3.2.2 Beauty contests

73. Beauty contests, like their namesake, are rather difficult to define. In one definition, it is a "procedure where criteria of evaluation include technical expertise, financial viability, network coverage, roll-out speed, etc. Such processes are not transparent, and are often prone to intense lobbying and political intervention." (Jehiel and Moldovanu 2003). In another, it is a procedure in which "there are measurable indicators set out against which applicants can be judged" and the concession fee does not vary (it is often zero but it can be any value). Proponents of beauty contests argue that they allow a focus on critical

performance characteristics, such as coverage and speed of provision of that coverage, which encourages applicants to "excel" in those areas. Of course, commitments made in the beauty contest have the same difficulties of follow-up as commitment as those made in an auction.

Box 14. Example of Swedish Beauty Contest for UMTS Licenses

Sweden provides an example of a beauty contest for allocating UMTS licenses. The selection process had two steps. First, applicants were scrutinized on the basis of financial capability, technical capability, commercial feasibility and appropriate expertise and experience. Second, those who passed the first screen were judged on commitment concerning coverage and development rate.

The number of licenses was initially five, reduced to four. Two were reserved for new entrants and permitted them to also build GSM infrastructure.

Ten applications were received. Four applicants were screened out at the first stage. Among them was Telia, the largest and oldest of the established Swedish mobile operators, who was screened out because the selecting agency believed its proposal was technically infeasible.

One licensee—Orange—dropped out of the market in December 2002. At the end of 2003, the deadline for full coverage, coverage by the remaining three was in fact 67.5%, 74% and 66% respectively. (Bjuggren 2004, including cite to *Svenska Dagbladet* 28 March 2004) Clearly, renegotiation has been a problem, raising the question of the effectiveness of the screening and allocation process.

74. Proponents of beauty contests argue that charging a low or zero concession fee promotes lower priced services later. This argument confuses sunk costs with fixed costs and assumes there will be no price regulation later. Regarding sunk costs, once the concession fee has been paid, it does not affect the price of services. (The cost of capital may increase if paying the fee significantly increases the likelihood of bankruptcy, this can in turn affect prices.) Sunk costs do affect the decision to enter a market, but it would be a foolish company indeed to bid a concession fee that it expects will result in losses. Second, if there were a concern that prices would be too high later, then regulation—with details announced before the auction so bidders can take the future rules into consideration in formulating their bids—can be introduced or perhaps the number of licenses could be increased.

3.3 Commitment and renegotiation

75. Opportunistic renegotiation[12] eliminates the benefits of competitive auctions. If concessions are renegotiated soon after their award, then the initial auction becomes a bilateral negotiation between the auction winner and the government. The competitive benefits from the auction are lost. Governments often cannot reject renegotiation due to fear of political backlash and additional transactions costs of re-designing the concession, holding a new auction, and choosing a new concessionaire.

12. Renegotiation refers here to a significant change in the original contract and financial impact. I.e., stipulated tariff adjustments for inflation do not count, nor do stipulated periodic tariff reviews or other adjustments due to contingencies such as devaluation contained in the contract count as renegotiation.

Box 15: Example of a Renegotiation: Lima Airport

"In early 2001 Lima's airport was concessioned to a consortium, led by Frankfurt Airport operator, Bechtel, and a local partner, that submitted the highest bid. The criterion was the percentage of gross revenue that the operator would commit to turn over to the state. The winning bid offered the state 47 percent of gross revenue in addition to a commitment to invest more than US$1 billion and construct a second landing strip by the 11th year of the 30-year concession.

"Although that appears to be a very attractive bid from the government's perspective and as such was lauded, it also appears financially questionable. It means that from the residual 53 percent of gross revenue, the operator will be able to cover operating costs, amortize investments, and earn a fair rate of return on investments. Shortly after the award, the winning consortium began asking to renegotiate the contract. The operator has been delaying agreed upon investments, and the bickering from both sides has been a constant. The concession contract was renegotiated at the end of 2003, adjusting investment obligations and the percentage of the gross revenues to be given to the state each year."
Source: Guasch (2004), p. 47.

76. A study by Guasch (2004) of about 1,000 concession contracts awarded in Latin America and the Caribbean between the mid-1980s and 2000 provides the best empirical study of concession renegotiation. The results provide useful guidance about how to improve concession design to reduce the incidence of renegotiation. The contracts in the study include 17 countries and were fairly evenly distributed among four infrastructure sectors: telecommunications, energy, transport, and water and sanitation. The most important results are listed below.

- Renegotiation occurred in 30% of all concessions. Renegotiation occurred in 55% of transport concessions and 74% of water and sanitation concessions.

- The average time between award and renegotiation was 2.2 years for concessions that were supposed to run 15-30 years.

- Renegotiation was more common when the concession was awarded through competitive bidding (46%) than awarded noncompetitively (8%), excluding telecoms concessions.

- 61% of renegotiations were initiated by the concessionaire whereas 26% were initiated by the government. However, the type of regulatory regime has a significant effect on these proportions. Under price-caps, the concessionaire initiates renegotiation 83% of the time, whereas under rate-of-return, the concessionaire initiates 26% and the government 34% of the time. (Figures do not total to 100% since sometimes both initiated the renegotiation.)

- Renegotiation was more likely when the contract was awarded on the basis of lowest proposed tariff (60%) rather than highest transfer fee (11%).

- Renegotiation was more likely when the contract had investment requirements (70%) rather than performance indicators (18%).

- Renegotiation was more likely under price-cap regulation (42%) than under rate-of-return regulation (13%), and when a regulatory agency was not in place (61%) than when one was in place (17%).

- Renegotiation was more likely when the regulatory framework was in the contract (40%) than in a decree (28%) or a law (17%).

77. Guasch also performed a probit analysis[13] to estimate the effect of the various variables on the likelihood of renegotiation. That is, he looked at features like "the existence of regulatory body" and found that "the existence of regulatory body" had a large effect on whether contracts were renegotiated. He found that if there were a regulatory body then it greatly reduced the likelihood of renegotiation. He speculated that this was a proxy for better enforcement and that better enforcement would reduce claims for renegotiation. He found that the award criteria mattered; awarding tariffs on the basis of lowest tariff rather than highest fee significantly increased the likelihood of renegotiation. The type of regulation—price-cap versus rate-of-return—mattered a lot, with price-cap regulation leading to more renegotiation. The autonomy of a regulatory body was not robust to the specifications tested, i.e., these results should not be relied upon by policy makers. Investment obligations were seen as more likely to lead to renegotiation. Domestic concessionaires were seen as more likely to renegotiate. Macroeconomic shocks favoured renegotiation. Renegotiation was slightly more common after a change of government. Finally, an award process without competition, e.g., bilateral negotiation, led to fewer renegotiations. These findings are summarized in his table 6.15 reproduced below:

Table 6.15 Marginal Effects of Significant Variables on the Probability of Renegotiation

Significant variables affecting the probability of renegotiation	Marginal effect on probability of renegotiation
Existence of regulatory body	20–40 percent
Award criteria	20–30 percent
Type of regulation	20–30 percent
Autonomy of regulatory body	10–30 percent
Investment obligations	10–20 percent
Nationality of concessionaire	10–20 percent
Extent of competition in award process	10–20 percent
Macroeconomic shocks (devaluations)	10–15 percent
Electoral cycles	3–5 percent
Award process	10–20 percent

Source: Guasch (2004).

78. The main outcomes of the renegotiations were to "increase tariffs (62%), delays and decreases in investment obligations (69%), increases in the number of cost components with an automatic pass-through to tariffs (59 percent), and decreases in the annual fee paid by the operator to the government (31%). A small number of renegotiations, however, led to tariff decreases (19%), increases in the annual fee paid by the operator to the government (17%), and unfavourable changes for the operator of the asset base (22%)." (Guasch, p. 18)

13. The term "probit" means "probability unit." A probit analysis is used to analyze data where the dependent variable can have only two possible values. Here, either there was or there was not renegotiation. A probit analysis will discover which independent variables, e.g., the existence of a regulatory body, are most important in influencing the dependent variable, e.g., renegotiation. The traditional linear regression model explains the dependent variable y in terms of the independent variables x in this way, $y=\alpha + \beta x + \varepsilon$. But the probit model explains the probability distribution of the variable y in this way: prob(y=1)=f(x) where y can take the value 0 or 1. See Kennedy 2003.

79. Concessionaires' arguments for starting renegotiation were mainly that there was an imbalance in the financial equilibrium of the concession contract, i.e., they were not getting a fair rate of return on their investments. Governments' main arguments were "changes in government priorities in the sector, political concerns (often linked to the electoral cycle), dissatisfaction with the level and speed of sector development, and non-compliance by operator with agreed-upon terms." (Guasch p. 18)

80. Analysing these results can help to design future concessions that discourage renegotiation.

- The relatively low incidence of renegotiation in telecommunications and energy was attributed in part to these sectors being more competitive, thus providing the government with more alternative service providers and therefore reducing the bargaining power of the concessionaires. Low renegotiation in telecommunications was also attributed to more outright privatization rather than concessions.

- The relatively low incidence of renegotiation of non-competitively awarded concessions was attributed to the surplus having already been extracted in the initial negotiations.

- The effect of different regulatory regimes on renegotiation was attributed to their different risk characteristics. Under price-cap, the concessionaire bears more risk than under rate-of-return.[14] Also, the nature of the renegotiation was typically to change the treatment of cost components so that more were subject to automatic pass-through, thus reducing the concessionaire's risks.

- Using either a criterion that is likely to be modified soon, such as tariffs, or that is subject to manipulation and arbitrary decisions, such as technical proposals, to award a concession eliminates the effect of competitive auctioning. (The logic is as follows. The modification or arbitrariness means that promises made at the auction do not have to be kept in the future. Therefore, there is no cost to making promises which, if kept, would be costly. Hence, these promises cannot be used to identify the least cost provider. Hence, a competitive auction using these promises will not identify the least cost provider.)

81. Further lessons:

- If winners can default cheaply, they have effectively bid for an option to be a concessionaire. (After the winners had been declared in an Australian auction for satellite television licenses, two bidders defaulted on those bids they no longer wished to have. The government did not impose penalties for default. Example cited in Klemperer p. 110 reference deleted)

- If bankruptcy provides a way out of the commitment, then auctions favour bidders who are underfinanced over better-financed bidders who cannot default. Requiring bonds and penalizing defaults may help.

- Another source of pressure to renegotiate is the failure to deliver affordable services to the poor. If subsidies, cross-subsidies and user charges do not provide the necessary revenues to cover costs, then either the concessionaire cannot deliver what has been promised or cannot do so sustainably. Then government is pressured by consumers who insist on better service to

14. Under rate-of-return regulation, the concessionaire can pass through to consumers changes in costs, though often with a lag or smoothing. By contrast, under price-cap regulation, the concessionaire cannot in general adjust its prices to reflect cost changes.

renegotiate or to change concessionaire, or the concessionaire is pressured to renegotiate or terminate the contract.

- Where multiple criteria were used to choose the concessionaire, each criterion is open to renegotiation. Parties are likely to choose to renegotiate on the criterion where they are advantaged in the negotiation.

Box 16. Example of Renegotiation in U.S. Airmail Routes

A study of the allocation by competitive bidding of concessions to provide airmail services in the 1920s and 30s in the United States found that routes with more competition had lower prices, the bidding gave concessionaires incentives to expand demand for the service, but that incumbents gained advantages over other bidders even without franchise-specific investments.

Thirty-two routes were auctioned between 1925 and 1930. The Post Office specified a reserve price and quality standards and bidders bid the amount they would need to be compensated. Contracts were for four years. There was evidence of collusion in at least one auction and it was re-tendered. A series of rule changes, beginning in 1928, had the effect of not subjecting the winners in the initial auctions to further competition. Also, there was a practice of physically extending old routes rather than putting the extensions out to bid. Two routes were put out to bid after 1930. The contracts were awarded after the so-called "Spoils Conference" among the Postmaster General and the four major carriers. In reaction to the Spoils Conference, Congress began investigating the competitive bidding procedure. In February 1934, the new Postmaster General cancelled all route contracts. In May 1934, partly different routes were put out to bid with temporary, 3-month contracts. (The government forbade the participants in the Spoils Conference from participating in this second round of auctions. They therefore changed their names to some which are familiar today, and did participate.) These contracts were extended several times and the same contractors were in place in 1938 when the regulatory regime changed with the establishment of the Civil Aeronautics Board.

The study of these auctions found that more bidders participating in the auction lowered the price. By one measure, doubling the number of bidders lowered price by 30 percent.

The study also found that incumbents had advantages over entrants. In the second set of auctions, 11 routes had no incumbent and 21 had incumbents. In the 12 routes won by incumbents, they faced considerably less competition and the routes were considerably longer (perhaps reflecting that prior operating experience was more valuable on longer routes—in those days, navigation was visual and contractors had to establish their own emergency landing areas). Incumbents won at considerably higher prices. This plus other data suggests that incumbents had an advantage over entrants which was mainly that they could dissuade competitors from entering particular auctions.

As anecdotal support to the argument that subsequent trading will not overcome inefficient auction allocations, it is interesting to note that, "By the end of 1930 American Airlines had the southern transcontinental mail route with flights through Dallas, TWA had a mid-continent route with flights through St. Louis and United had a northern route with flights through Chicago. All three airlines have had hubs in those cities at the end of the 20th century." (Eastern was the fourth re-named member of the Spoils Conference.)
Source: Wolfram 2004

82. Renegotiation is not always opportunistic. The inherent incompleteness of concession contracts[15] means that sometimes renegotiation is necessary. For a concession contract to be credible, renegotiation should be according to clear, pre-established criteria agreed by all parties to the contract. "A renegotiation rule should expose what changed unexpectedly….The public policy criteria for testing whether revision is needed must be pre-established and clearly defined. And any change to the contract that is warranted should be limited to the issue at hand: the entire contract should not be renegotiated." (Crampes and Estache 1996)

83. Formal provision for renegotiation and bailout may encourage opportunistic renegotiation. Formal limitation on the use of renegotiation and bailout might help, but the credibility of these limitations relies on the credibility of the government. To the extent that international institutions or even governments of other countries are more credible, one strategy would be to use them to enforce renegotiation and bailout policies. Trade agreements between countries can address contract negotiation breakdowns involving foreign investors. Also, loans involving the World Bank or IMF may be backed by sovereign guarantees.

(Jamison et al 2005)

Box 17. Example of Entry and Renegotiation: Norwegian Regional Air Transport

This example involves concessions in a market with well-known technology, relatively low entry costs, and fairly straightforward technical and economic regulation. It involves a government administration with a reputation for honesty and competence. And yet, the concessions have not resulted in much entry or much cost savings, and there remain issues of how to improve the contract design with respect to renegotiation and duration.

Service on certain regional air routes are a public service in Norway. Originally provided by a monopoly licensee, Widerøe, a SAS-owned subsidiary, it has been auctioned since 1996. Bids are the required subsidy for each route. The service must comply with pre-announced standards on frequency, seating capacity, aircraft category and maximum fares. Regional airports require short take-off and landing aircraft. Widerøe, who also operated regional air services on a commercial basis, procured the required aircraft meeting the seat capacity requirements, which are no longer in production, on the basis of the monopoly license. It is the only Scandinavian company with a fleet of these aircraft.

Auctioning of the PSO for three-year periods was introduced to conform with EU regulations (Council Regulation (EEC) No 2408/92 Article 4, on access for Community Air Carriers to intra-Community air services). The auctions are simultaneous sealed-bid. I.e., a bid states the amount of subsidy required for each route the bidder wishes to serve. For each route, the winner is the lowest subsidy. In the first auction, held in 1996 for the period 1997-2000, Widerøe won all the concessions. The service standards were amended to encourage more competition. At Widerøe's request, three routes were removed from the PSO and Widerøe began to operate them commercially. (Widerøe 2000) In the second auction, Widerøe won most concessions, apart from some coastal routes won by Coast Air. In the third auction, Widerøe won nine of the 15 routes against six other bidders. In the fourth auction, Widerøe won 11 routes,

15. Concessions are incomplete contracts. For example, neither party knows, at the time of signing, precisely the cost of providing the promised service, the amount of the service that will be demanded at agreed tariffs, nor some of the other variables that affect the profitability of the contract. Further, it is costly to write all the contingencies into a contract. Third, it is costly to monitor and it may not be possible for an adjudicator such as a court to verify the actions and the contingencies contained in a contract. The result is that government and concessionaire may need to negotiate to take into account the contract's incompleteness.

Problems arise when the negotiations go far beyond the bounds of incorporating resolved uncertainty into the contract. Having made sunk investments (ranging from literally digging holes in the ground to preparing voter-consumers to expect the delivery of specific services), the negotiating strengths of the parties will have changed.

Coast Air won three and two others won one route each. The first auction significantly reduced the level of subsidies from the level under the single licensee system. The second auction substantially increased subsidies. The "headline" amounts of the subsidy over the contract periods were 1.0 bn NOK, 1.1 bn NOK, and 965 million NOK in the second, third, and fourth auctions respectively, but details—like the increase of 40 million NOK mentioned next and changing requirements on capacity—limit the comparability across auctions. In sum, auctioning has resulted in some entry and possibly lower subsidy.

The contract rules trade off risk-sharing and renegotiation. A carrier can cancel the contract with one year's notice. This shares risk between the concessionaire and the government, which reduces the overall cost of providing the air service. But it facilitates the following strategy: Bid low to win the contract. Gain experience in operating the route, so as to be better informed than rivals. Withdraw from the contract. Bid in the second auction against rivals with neither the specific operating experience nor the necessary aircraft, that is to say, bid high. Indeed, in July 2003 Widerøe announced a withdrawal from two routes. In the auction that followed, Widerøe won against two competitors. In the initial contract for 01.04.03 to 31.03.06, the subsidy for these two routes was 204 million NOK for the three years. In the replacement contract for the shorter period 07.07.04 to 31.03.07, the subsidy totals 246 million NOK.

Longer and staggered contracts may encourage entry. Three years may be too short for an entrant to recoup sunk costs. This problem is exacerbated by interim tenders for yet shorter terms that are held when a carrier cancels the contract. The Norwegian Competition Authority thinks that longer contracts may increase entry and thus increase competition, but notes that this would require a change in the relevant Council Regulation. The Authority also notes that staggering contracts may promote entry by easing the burden on small bidders to meet requirements to show a capacity to serve all routes on which they are bidding.

The auctions are simultaneous first-priced sealed bid. About half of the auctions are to serve city-pairs, many are city-triplets, and four auctions are larger sets—up to eight—of cities. Bids may be conditional, e.g., a bid could state a price for (1) Narvik-Bodø and a bid for (2) Narvik-Bodø if the bidder also won Røst-Bodø. The concessions seem to be designed to try to capture some of the value of serving related towns. One question is whether simultaneous open auctions would enable the auctioneer to capture more of the value of serving complementary routes, second, whether the additional organizational cost would outweigh any gains, and third, whether the switch from sealed to open bidding would discourage entry by weaker bidders or facilitate collusion. The net effect is unclear.

Sources:
OECD (2003), "Regulatory Reform in Norway: Marketisation of Government Services– State-Owned Enterprises"; various Invitations to Tender, Ministry of Transport and Communications (7 July 2005, 10 April 2002, 1 April 2000) and various press releases (Nr.: 135/05 date 02.11.05 "Regionale flyruter: Tildeling av einerett for drift av 16 ruteområde [Regional air routes: Award of sole right to operate on 16 route areas]" Nr.: 20/04 date 05.03.04 "Flyruter i Finnmark og Nord-Troms: Widerøe tildelt kontraktar," Nr. 96/99 Dato: 20.09.99 "Drift av regionale flyruter: Utvida og betre transporttilbod!", Nr.: 97/2002 date 28.08.02 "Ny tildeling av regionale flyruter: Eit godt tilbod for passasjerar og næringsliv i heile landet") on website odin.dep.no/sd; OECD 2004 *Non-Commercial Service Obligations and Liberalization* DAFFE/COMP(2004)19

84. The standard remedy to reduce opportunistic behaviour is to place it in a repeated context. The thinking goes that if a party recognises that it will be punished for opportunistic behaviour in the future, it will not engage in it today.[16] However, the evidence from the Latin American study shows that concessions

16. Following the logical argument forwards in time, opportunistic behaviour can be eliminated. The theory rests on there being no "final" concession or year (or on no given period being sufficiently likely to be the "final" one), on the opportunities for strategic behaviour occurring fairly soon after each other (or the interest rate by which future profits are discounted is fairly low), and the returns from persistent opportunistic behaviour being not too large relative to playing by the rules.

To provide a simple, imaginary example, assume that a widget company "W" often bids to be the operator of municipal widget concessions. Assume that the hundreds of municipalities share their experiences and that the concessions always last for, say, ten years. In 2005, "W" might consider opportunistically renegotiating its contract with municipality "M." But if "W" does that, then the other municipalities will

cannot always be put in a repeated context. When government is likely to change, e.g., by losing an election, then the government can behave opportunistically.[17]

85. Performance bonds and step-in rights can reduce incentives to renegotiate. **Performance bonds** (bank guarantees that indemnify the public party if the private operator fails to fulfil its obligations) are one way to prevent private partners from walking away from a contract, and they limit the bargaining options after the award. In a water concession in Latin America several partners in a consortium walked away from the concession when a dispute with the conceding authorities became unbearable. But key players stayed and tried to make the concession work, not least because of the risk that a large performance bond would be called. (Klein 1998b). The concession was abandoned in 1999. (Guasch p. 63) Nevertheless, Guasch recommends requiring a performance bond of not be less than (a) 2 percent of the total value of the contract and (b) 20 percent of the estimated annual revenue of the concession in its first year. (Guasch, p. 143)

86. **Step-in rights** allow government to take over the operation of a concession when the concessionaire is not performing according to specified standards. These provisions typically identify the breaches of contracts that justify direct intervention by the authorities; they require that the authorities give notice to the private operator; they provide for a cure period, during which the concessionaire is allowed to take remedial actions; and they specify the maximum duration of the authorities' intervention, as well as the type of measures they can adopt. If, at the end of the intervention, the concessionaire is not in a position to resume its activities, the contract can be terminated with cause by the public party. The Côte d'Ivoire–Burkina Faso rail concession has step-in right provisions. It states that if the concessionaire does not maintain adequate safety standards for the maintenance of rail infrastructure, the state holding companies, after having organized a hearing for the concessionaire, can force the concessionaire to adopt necessary measures. If such measures are not adopted, notice must be given to the concessionaire. Fifteen days later, if the concessionaire has remained inactive, the state holding companies can complete the necessary works with risks and expenses borne by the concessionaire.

87. A concession contract can include an **obligation to continue providing service** until a new concessionaire has been chosen**.** This helps governments overcome their reluctance to terminate a concessionaire due to concerns that basic services, such as water supply, may be interrupted. In Colombia this obligation is imposed by a general law governing concessions. (Klein 1998b)

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learn about it. They will suspect that "W" will try the same thing with them, so they will be inclined to disqualify "W" from future auctions. If a sufficiently large number of municipalities do so, then the loss to "W" from no longer having those concessions that it could be expected to have won is larger than any gains "W" makes from its renegotiation with "M."

However, if we now assume that there are few competitors to "W" then the argument above breaks down. If disqualifying "W" meant that only two serious competitors remained, the other municipalities might not disqualify "W." Then "W" will find it profitable to engage in opportunistic renegotiation as just one additional way to exercise its market power.

17. Concern about renegotiation has led to the development of the "least present value of revenues" criterion by Engel, Fischer, and Galetovic (2001). This criterion is renegotiation-proof. Under this regime, the government sets maximum tariffs and a discount rate (fixed or variable). Bidders bid the present value of total revenue to be received, and the lowest bidder wins. Any revenue reduction is automatically compensated by extending the length of the concession. Once the winning LPVR is received, the concession ends. This approach is better used where service quality does not affect the level of demand. The uncertain duration can raise the cost of capital. This model has not been widely adopted.

3.4 Conclusion on allocating concessions

88. To conclude, the allocation of a concession is vital; misallocation is costly and not correctable by selling on the concession. Competitive auctions can identify the most efficient operator. The idea is that the highest bidder will be the person/company who places the highest value on the concession, and that will, on average, be the person who can operate it most efficiently. But poor auction design can thwart this line of reasoning, and sometimes the auctioneer does not desire the most efficient operator. Also, where there are multiple criteria, it may be difficult to identify which bid was "highest." Auctions can be designed to discourage collusion and encourage more bidders, which are important issues in practice.

89. Alternatives to auctions include simultaneous negotiations, sequential negotiations and beauty contests. Auctions will provide a better outcome than simultaneous negotiations, according to economic theory. Negotiations and beauty contests raise issues of perceptions of corruption, arbitrary scoring, and favouritism. But complex contracts necessarily entail some negotiations.

90. Contract renegotiation—beyond that necessary to respond to contingencies in the contract—can eliminate the advantages of competitive auctions. Essentially, the outcome is a bilateral negotiation between the concessionaire and the government. More concessionaires, a contract where the government bears more risk, raising the cost of opening renegotiations and provision for step-in rights or obligation to continue service can discourage the practice, but renegotiation is common.

4. Addressing competition problems arising during the term of concessions

91. Concessionaires usually have significant market power. The coverage and enforcement of the competition law and other, perhaps sector-specific, laws determines the extent to which they may exercise such market power. In addition, the concession contract or the more general concession law may also have specific competition provisions.

4.1 Coverage by the competition law

92. Coverage by a competition law enforced by an independent competition authority helps government commit to not renegotiate certain aspects of the concession. For example, if the competition law has provisions regarding access to essential facilities, the concessionaire needs access to a facility qualifying as "essential," and an independent competition authority actively enforces the competition law, then this helps to commit the government not to extract profits by mandating high access fees and provides a mechanism for relief if it nevertheless does so. Similarly, if the concession contract does not mention the access fees that a concessionaire may charge, an actively enforced competition law may place a cap on access fees. For example, an electricity generating concessionaire might be "held up" by high electricity transmission fees. The abuse of dominance provision in the competition law might limit the hold up.

93. But rather than rely on *ex post* law enforcement alone, it may be better also to reduce the incentives or ability of the concessionaire to engage in anticompetitive behaviour.

94. One important set of circumstances are when the same company operates both an "essential facility" and competes against rivals who need access to that essential facility. For example, a company may both operate a port and use that port, along with its rivals, to compete in the shipping market. Such a firm has the ability and usually has an incentive to discriminate against its un-integrated rivals in a way that reduces consumer welfare and damages competition. In these circumstances, the OECD Recommendation of the Council concerning Structural Separation in Regulated Industries (2001) recommends that its Member countries "should carefully balance the benefits and costs of structural measures against the benefits and costs of behavioural measures." The Recommendation goes on to say that, "This balancing should occur especially in the context of privatisation, liberalisation or regulatory

reform." Applied in the case of concessions, this would mean considering, during the design of the concession, the costs and benefits of prohibiting a concessionaire for a non-competitive activity from engaging in a complementary competitive activity.

95. Another important set of circumstances are when the same company already owns or operates a substitute for the concession, and controlling both would allow it to engage in anticompetitive behaviour. Concessionaires may be able to cumulate concessions in a way to create market power. For example, if there are only a few ports along the same coastline, winning several operating concessions—or even just those for two adjacent ports—could enable a company to raise price or lower output or quality. This reduced competition can be countered by considering, during the design phase, the costs and benefits of prohibiting a concessionaire from holding competing concessions. Against the lost benefits from competition may be weighed economies of scale or scope, to the extent they can be predicted. (The need to design concessions and auctions to allow the exploitation of complementarities was discussed above.)

Box 18. Example of a Competition Authority Screening Bidders, and Application to Telecommunications: Mexico

In Mexico, the concessioning authority is empowered to allocate concessions and oversee their operation. The competition authority (CFC) has powers to issue opinions on the competition aspects of concessions and even auctions. However, such opinions are non-biding.

Further, the regulatory schemes established for the telecommunications sector and for rail transportation contemplate the need for a favourable opinion from the CFC on prospective concession holders, previous to the award of concessions or to authorize the transmission of concession-related rights. In assessing prospective auction participants, the CFC considers the implications of supply conditions and the participants' market power.

In 2001, an affiliate of Telmex asked permission to offer long distance cellular service. The CFC, noting its previous determination that Telmex held a dominant position in the market for long distance services, concluded that permitting the affiliate to expand into that market could only worsen the situation. In the end, the telecoms regulator, COFETEL, decided to recommend approval of the application, but imposed conditions.

Sources: Submission by Mexico to Sixth Global Forum on Competition 2006 and OECD 2004

96. One issue that can arise is the interaction of the competition law with laws more specific to concessions or with the concession contract. For example, care must be taken to ensure that there is no inadvertent weakening of competition law coverage. From an economic point of view, the allocation of a legal monopoly, such as a concession, by the government does not imply that anticompetitive conduct is less harmful. Indeed, legal entry barriers mean that such conduct can be more effective. The 2005 OECD Guiding Principles for Regulatory Quality and Performance says, in particular, "Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways. Competition law enforcement and sector regulation to promote competition and trade liberalisation should be co-ordinated to ensure consistency." This issue was raised in the Zambian port concession, mentioned below. There, the concessionaire claimed exemption from the competition law on the basis that section 3(f) of the Competition and Fair Trading Act exempts all matters to which the government is a party from the application of the law, and that the government was party to the concession agreement. A Supreme Court ruling appeared to imply that the competition law is applicable to the concessionaire. (Sources: Fifth Global Forum on Competition, Zambia DAF/COMP/GF/WD(2005)21 and An Ex-Parte Application for the Grant of Leave to Apply for an Order of Mandamus Directed to the Zambia Privatisation Agency and the Zambia Competition Commission and the Minister of Finance available at http://www.zamlii.ac.zm.)

Box 19: Example of Merger of Concessionaires: Port Terminals in Argentina

In 1994, auctions for long-term concessions (18-25 years) were held for the six terminals at one of the ports of Buenos Aires, Puerto Nuevo. The government imposed conditions on the auctions to create a market structure that could sustain competition: bidders were allowed to bid for more than one terminal, but they had to express a preference and could be awarded only one. But this condition was not complied with. A bidder who bid highest for terminal 2 and second highest for terminal 1 appealed the award of terminal 1 to a rival bidder. To avoid delay as the case wended its way through the court system, the government agreed to allow the bidders to merge and then jointly awarded terminals 1 and 2.
In 2001 the Argentine Antitrust Commission approved the acquisition of terminal 4 by Maersk Sea Land, one of the world's largest shipping companies. The Antitrust Commission found that Maersk would not be able to foreclose the market because terminal 4 had only a small share (8 percent) of the total capacity in Puerto Nuevo and there was a substitute port.

Source: Trujillo, Lourdes and Tomás Serebrisky (2003), "Market Power Ports: A Case Study of Postprivatization Mergers," Note no. 260 Public Policy for the Private Sector, World Bank, March.

97. Competition law enforcement plays an important role to ensure that the legal monopoly (or, in some cases, oligopoly) conferred by a concession does indeed fulfil its intended role of increasing efficiency for the benefit, at least in part, of users.

4.2 Regulation

98. Concessionaires are often subject to price regulation as a means to curb exploitation of significant market power. Exceptions to this general rule—concessioning unregulated monopolies—occur when raising revenue or protecting national champions takes precedence over economic efficiency or consumer welfare, or when regulation is not feasible. Concessionaires may also be subject to access regulation, i.e., to providing access to essential facilities to unintegrated rivals at regulated terms. The regulatory may also include a detailed description of any public service obligations such as the service to be provided, the obligation to supply, equal treatment of users, continuity of service, and so on.

99. Sector-specific laws and the institutions that enforce them can play an important positive or negative role. Regulators can be a faster, less expensive way to resolve access disputes and set tariffs than under the competition law. But of course they need to have positive attributes including professional capabilities, adequate resources, transparency of decision-making, have an appeals process, and independence from those they are regulating. (See the 2005 OECD Guiding Principles for Regulatory Quality and Performance.) For example, if a regulator also has commercial interests—as when one company is a regulator of a sector in which it is commercially active—its decisions will not reflect broader public policy interests.

100. Two types of regulation that are commonly applied are rate-of-return regulation and price-cap regulation. In the first type, the regulator assigns a value to certain assets necessary to perform the regulated services, sets a rate-of-return on those assets—often the market-determined rate-of-return on assets with similar risk characteristics—and sets prices that will allow sufficient revenue to cover both return on capital as well as costs that the regulator allows the concessionaire to pass through. In the second type, price-cap regulation, the regulator sets maximum prices on the services, often with automatic adjustments to account for changes in costs outside the control of the concessionaire and to account for expected feasible improvements in efficiency within the control of the concessionaire, and a pre-set review date. (Variations include setting a maximum price for a basket of services while possibly requiring certain relationship among individual prices, e.g., that the retail price for a service be at least a specified amount more expensive than wholesale access to facilities to provide the same service.) Rate of return regulation is

seen as less risky, for the concessionaire, than price-cap regulation since, under the former type of regulation, the regulator should adjust prices to reflect cost changes and it does not under the latter type.[18]

101. Access regulation can be necessary when the concessionaire is permitted to also supply a vertically related market. In particular, the concessionaire may try to evade regulation of the natural monopoly by discriminating in favour of its own vertically integrated business, capturing unregulated profits in the vertically related market. Prohibiting vertical integration might be a solution, but at a potential cost of economies of scope. Further, the most efficient bidder may be a long established operator in the vertically related market—a mine with respect to a railway or a shipper with respect to a port, for example— who has particular insight into potential improvements in quality and efficiency, and excluding such a bidder would reduce overall efficiency. Further, where there are successive monopolists, such as a port and the sole railway to that port, it may be more efficient to put the two activities into the same concession. This raises barriers to entry, since now an entrant would need to enter both levels simultaneously, but this may have no practical impact—if entry were likely there would be no need for concessioning—and the vertical integration should reduce hold-up and inefficiencies from uncoordinated investments, schedules, and the like.

Box 20. Example of Abuse of Dominance in Access: Mpulungu Harbour

A 25-year concession to operate Mpulungu Harbour and Port in Zambia was granted by the Zambian cabinet in 1997. The concession agreement provides for review every 5 years, but anti-competitive conduct was not a ground under which it may be terminated.

In addition to being the port operator, the concessionaire is also the largest of seven shipping companies that use the port. Based on tonnage, its share is about 50% of the total. There are no feasible transport alternatives.

The Concession Agreement provides that the concessionaire has complete pricing freedom, but must provide access on the same terms as it does provides access to itself. While in principle the port is regulated by a ministry, the Supreme Court found that, "There has been no coherent exercise of supervisory power" by the ministry.

Investigations carried out by the Zambia Competition Commission revealed that the concessionaire was abusing his position as Port Operator by engaging in various conduct that harmed its rivals in the shipping market. The concessionaire was found to be unfairly allocating shipping space on the vessels using the port, unfairly dictating the type of cargo to be loaded—which has the effect of eliminating competition in lucrative markets for products in high demand—reserving port storage for his exclusive use, and engaging in other conduct. Also, two weeks after taking over the Port, the concessionaire increased tariffs by 46% without consultations and without notice.

The ZCC pursued voluntary compliance with the competition law.
Source: Fifth Global Forum on Competition, Zambia DAF/COMP/GF/WD(2005)21

18. But the two main types of regulation may not be as different as they appear at first glance. A well-known observation is that the expected return on capital under the two regimes should differ by a risk premium. The return on capital under price-cap regulation is influenced by two mechanisms. First, investments under price-cap regulation need to earn at least a market rate to attract future investment. Second, governments face political questions when regulated firms earn much more than a market rate. These two influences mean that the return on capital under a price-cap regulation approaches that under a rate-of-return regime, plus a risk premium. As more cost elements are moved into a cost-pass through category under a price-cap regime, it approaches a rate-of-return regime. Similarly, as the review periods under a price-cap regime become shorter, it approaches a rate-of-return regime.

5. Design of concessions

102. The design of a concession is constrained by the elements that have been discussed in connection with the award of the concession and the competition problems that can arise during the concession. This section will highlight some of the features that can be identified in advance and in general.

103. However, no checklist can be complete. A difficulty of concessioning is that each situation is different. The idiosyncratic physical, historical or political constraints must be taken into account. Vast underinvestment may mean continued substantial subsidies if tariffs are not to rise too rapidly for users' budgetary comfort and it can mean an embarrassingly low "headline" concession fee. Political commitment to preserve jobs can mean that the concession must include provisions to that effect even if it makes the award process inefficient. A second political difficulty can be pressure to design a concession to get a large concession fee, sometimes by unwarranted exclusivity or duration, or by an overly-generous regulatory regime. With these caveats in mind, the following points should be considered in the design of a concession.

- **Number.** Where competition is feasible, as in some telecommunications markets, in general more concessions will promote competition. True, more concessions will mean lower "headline" concession fees, and it can be difficult to explain that a lower fee today but lower tariffs tomorrow benefits consumer-taxpayers. If the number of likely bidders seems unusually low, then a re-examination of the auction rules and the concession design may be in order; efficient potential operators may be discouraged by poor design.

- **Exclusivity**. There are trade-offs involved in granting a unique concessionaire protection from entry by competitors. Non-exclusivity can allow competitive pressure from entrants, especially if the market were incorrectly labelled a natural monopoly or ceases to be one due to technological change. But exclusivity can be necessary if e.g., public service obligations are paid by cross-subsidy rather than from other sources. Exclusivity can also decrease the riskiness of a concession, with a follow-on effect on renegotiation and cost of capital.

- **Duration.** There is a trade-off when determining the duration of a concession. Long concessions create appropriate incentives for the concessionaire to make long-term investments including to invest in maintenance near the beginning of the concession. Short concessions exacerbate the problem of insufficient incentives to make investments near the end of a concession, as well as the problem of incumbents gaining advantages over other bidders in successive concessions. However, short concession allow for more frequent competitive tendering, which can facilitate entry and ensure that any benefits of increased competition are reflected more promptly. Short concessions also allow for uncertainty to be borne by the government rather than the concessionaires, which in general reduces the subsidies or increases the fees gained.

- **Horizontal scope.** Where a concession may have various breadths—one license or several to provide the same service, one port or several along the same coastline—and they are substitutes, then it would promote competition in the market to have different concessionaires in charge of substitute facilities. And having different concessionaires would promote competition for the markets if it reduced the cost of bidding. This may need to be traded off against economies of scale or scope, however. Where a concession could be broken in to parts that may be complements, such as telecommunications licences in over adjacent regions, then consideration should be given to whether fiat—the government defining the scope of the concessions—or market—auctions that allow bidders to price the complements—is likely to yield the more efficient outcome.

- **Vertical scope.** If competition up- or downstream is feasible, economies of scope are small, and effective access regulation is difficult, it may be more efficient to prohibit the concessionaire to also operate in the vertically related market. But this must be weighed against the effect this has on bidders for the concession, since the most efficient bidder may well be a company that has long operated in a vertically related market and has particular insight into potential improvements in quality and efficiency.

- Further, where there are **economies of scope** between activities where competition is not feasible, e.g., a port and the sole railway to that port, it may be more efficient to put the two activities into the same concession. This should reduce hold-up and inefficiencies from uncoordinated investments, schedules, and the like.

- **Competition Law.** The competition law should apply to the concession award process and to the concessionaire, as it does throughout an economy.

- **Regulatory structure**. An appropriate regulatory structure and agency should be in place in advance of the concession award in order to reduce uncertainty faced by potential concessionaires. Elements that can affect profitability such as universal service requirements, restrictions on increases in user tariffs, special "social" tariffs need to be specified, or the objective formula for their calculation, should be specified in advance so that potential concessionaires can calculate any bid or negotiation strategy. The agency should have sufficient autonomy and implementation capacity to ensure high-quality enforcement and to deter political opportunism. In addition, the tradeoffs between price-cap and rate-of-return regulation, including their different allocation of risk, should be considered.

- **Allocation mechanism.** The concession design must also take into account the allocation mechanism. For example, if an auction is to be used to award the concession, then all the dimensions over which competition will not take place must be specified or otherwise prepared for, in order to reduce the scope for renegotiation. If an auction is not to be used, then the pre-design stage is even more important to avoid the appearance of favouritism or corruption in the choice of concessionaire. If the exclusion of a potential bidder is permissible, weigh carefully the consequences of such exclusion, bearing in mind the effect on subsequent market power and on the competitiveness of the auction—both directly and on the decision of weaker bidders whether to bid.

- **Disputes**[19]. Contracts should avoid ambiguity as much as possible. They should define the treatment of assets, evaluation of investments, outcome indicators, procedures and guidelines to adjust and review tariffs. They should include criteria and penalties for early termination, procedures for resolution of conflicts, and well-defined triggers for renegotiation. Consider imposing a significant fee for any renegotiation request, reimbursed if the renegotiation is decided in the operator's favour. Renegotiation should be as transparent as possible, perhaps using external, professional panels to assist regulators and governments in their analysis and decision-making, and with a timely, full public explanation of adjustments.

- Proper **regulatory accounting** of all assets and liabilities should be in place in order to reduce ambiguity about the regulatory treatment and allocation of cost, investments, asset base, revenues, transactions with related parties, management fees, and operational and financial variables.

19. Much of the material in this and the following bullet points is from Guasch, pp. 19-21.

- **Changes**. Bidders should be held to their submitted bids. The first tariffs review should be held only after a significant period, like five years, unless contract contingencies are triggered. Concession contracts should provide for significant compensation, including penalties, to concessionaires if government unilaterally changes the contract.

6. Conclusions

104. Competition authorities have important roles to play at a number of stages in concessioning.

- First, concessions are often awarded in the context of a broader regulatory reform of a sector. Such a reform often includes clarifying the service objectives and revenue sources, thereby uncovering cross subsidies that must be addressed in the concession design. Reform also often includes addressing how the sector will be governed during the long period after the concession has been awarded: where competition would be feasible and desirable, what sector-specific laws and regulatory institutions need to be established, and the application of competition law. Competition authorities can advocate for pro-efficiency and pro-competition regulatory reform at this stage.

- Second, competition authorities can advocate for more competitive design of the concession contract. They can identify provisions to encourage weaker bidders or discourage renegotiation, for example.

- Third, they can advocate for better design of the allocation mechanism. If concessions are allocated by auction, they can identify provisions to encourage more bidders and to discourage collusion. If not allocated by auction, they can promote a mechanism that would tend toward identifying the more efficient applicant.

- Fourth and fifth, during the auction and afterwards, during the term of the concession, they have a role to play as competition law enforcers to deter or prosecute collusion during auctions and to ensure that concessionaires do not abuse their dominance. During the allocation process, they should have a role to exclude from bidding those companies who would gain significant market power if they were awarded the concession.

105. Competitive auctions are more likely to yield the most efficient provider and raise the most funds, all other things equal, under many conditions. But poor design undermines their effectiveness, and renegotiation eliminates their advantages.

106. Renegotiation may have its origins in the incompleteness of concession contracts or in opportunism. Concession contracts are necessarily incomplete because uncertainty about costs and revenues over decades cannot be entirely resolved in advance. Concessions present commitment problems since large sunk investments must be recovered over long periods, on the one hand, and governments are under pressure to maintain or improve services, on the other hand. However, renegotiation, whether due to contract incompleteness or opportunism, can eliminate the benefits of competitive bidding for concessions; essentially, with renegotiation, the winner of an auction will be the best negotiator, not the best infrastructure operator. In sum, both an efficient allocation mechanism—such as a well-designed auction—and institutional arrangements to ensure credible commitment to the resulting contract are necessary.

107. The competition issues that may arise during the term of a concession are not fundamentally different due to the presence of a concessionaire rather than an asset owner. They may include exclusion of rivals by denying access to facilities and abusive pricing. Effective enforcement of the competition law promotes concessions that fulfil their objectives both as regards efficiency and the tariffs users must pay.

REFERENCES

Auctions

Athey, Susan and Philip A. Haile (2005), "Empirical Models of Auctions," NBER. This is a technical review of recent empirical work examining various aspects of auctions, e.g., the size of the winner's curse in auctions to exploit offshore oil tracts, the importance of reserve prices in timber auctions, and the differences in revenues raised by using different types of auctions.

Bulow, Jeremy and Paul Klemperer (1996). "Auctions versus Negotiations," American Economic Review, vol. 86 no 1 (March), pp. 180-194.

Maskin, Eric (2004), "The Unity of Auction Theory: Milgrom's Masterclass," Journal of Economic Literature vol. 17 (December), pp. 1102-1115. This is a book review of Paul Milgrom's "Putting Auction Theory to Work." It provides a non-introductory overview of the main auction theory results.

Milgrom, Paul (2004), *Putting Auction Theory to Work*, Cambridge University Press. This is largely a non-introductory compendium of theorems and proofs and comments about how the design of actual auctions can be informed by the theory. However, some chapters are more accessible to the non-specialist.

Klein, Michael (1998a), "Bidding for Concessions," World Bank Research Working Paper No 1957.

Klein, Michael (1998b), "Bidding for Concessions—The Impact of Contract Design," Public Policy for the Private Sector Note No. 158, World Bank.

Klein, Michael (1998c), "Infrastructure Concessions—To Auction or Not to Auction," Public Policy for the Private Sector Note No. 159, World Bank.

Klein, Michael (1998d), "Designing Auctions for Concessions—Guessing the Right Value to Bid and the Winner's Curse," Public Policy for the Private Sector Note No. 160, World Bank.

Klemperer, Paul (2004), *Auctions: Theory and Practice*, Princeton: Princeton University Press. This is a non-technical description of auction theory, of the application of the standard economics of collusion and entry to auction design, and a discussion of the auctions of third generation mobile telephone licenses in European countries. Chapter 1 had appeared as "Auction Theory: A Guide to the Literature," Journal of Economic Surveys, vol. 13 no. 3, July 1999, pp. 227-286, which was also reprinted in Klemperer, Paul (2000), *The Economic Theory of Auctions, Vol. 1*, (The International library of critical writings in economics 113). Cambridge: University Press. Chapter 3 had appeared as "What Really Matters in Auction Design," *Journal of Economic Perspectives*, vol. 16, 2002, pp. 169–189.

Renegotiations

Guasch, J. Luis (2004), Granting and Renegotiating Infrastructure Concessions: Doing It Right, World Bank Institute Development Studies. This is a superb study of the problem of renegotiation using a data set of Latin American concessions.

Other references

Bjuggren, Per-Olaf (2004), "Allocation of 3G Rights, Credibility and the Rules of the Game: Experiences of the Swedish 3G Beauty Contest," presentation at the 21st Annual Conference of the European Association of Law and Economics (EALE) 2004. Crampes, Claude and Antonio Estache (1996), "Regulating Water Concessions, Public Policy for the Private Sector Note No. 91, World Bank.

Cramton, Peter and Jesse A. Schwartz (2000), "Collusive Bidding: Lessons from the FCC Spectrum Auctions," *Journal of Regulatory Economics*, vol. 17, no. 3 pp. 229-252.

Demsetz, Harold (1968), "Why Regulate Utilities?" Journal of Law and Economics, vol. 11, pp. 55-65.

Estache, Antonio (2004), "Emerging Infrastructure Policy Issues in Developing Countries: A Survey of the Recent Economic Literature," Background paper for the October 2004 Berlin meeting of the POVNET Infrastructure Working Group.

Estache, Antonio, Jose-Luis Guasch and Lourdes Trujillo (2003), "Price Caps, Efficiency Payoffs and Infrastructure Contract Renegotiation in Latin America," World Bank Policy Research Working Paper 3129.

Eckstein, H. "Planning: The National Health Service" in R. Rose, ed., *Policy-Making in Britain*, London 1969: pp. 221-237.

FAO (2001), "Governance principles for concessions and contracts in public forests," FAO Forestry Paper 139.

Fisher, W.L. (1907), "The American Municipality," in Commission on Public Ownership and Operation, *Municipal and Private Operation of Public Utilities*, Part I., Vol. I, New York, pp. 36-48.

Heimler, Alberto (2005) "Public or Private Provision of Infrastructure Services? If Private, Fixed Term or Full Privatization?" presented at 32nd Annual Conference on International Antitrust Law & Policy, Fordham University.

Jamison, Mark A., Lynne Holt, and Sanford V. Berg (2005), "Measuring and Mitigating Regulatory Risk in Private Infrastructure Investment," *The Electricity Journal*, July, vol. 18, no. 6.

Jehiel, Philippe and Benny Moldovanu (2003): "An Economic Perspective on Auctions." *Economic Policy*, vol. 36, April, pp. 271-308.

Jenny, Frédéric (2005), "Competition and Anti-Corruption Concerns in Public Procurement," in *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD.

Kennedy, Peter (2003), *A Guide to Econometrics*, fifth edition, Malden.

Kerf, Michel (1998), "Concessions for Infrastructure: A Guide to Their Design and Award," World Bank Technical paper no. 399 Finance, Private Sector, and Infrastructure Network.

Kikeri, Sunita and Aishetu Fatima Kolo (2005), "Privatization: Trends and Recent Developments," World Bank Policy Research Working Paper No. 3765 (November).

Klein, Michael, Jae So, and Ben Shin (1996), "Transaction Costs in Private Infrastructure Projects," Public Policy for the Private Sector, World Bank (September).

McMillan, John (1994), "Selling Spectrum Rights," *Journal of Economic Perspectives*, vol. 8, pp. 145-162.

Nikomborirak, Deunden (2004), "Private Sector in Infrastructure: The case of Thailand," ADB Institute Discussion Paper No. 19, December, www.adbi.org/files/2004.11.dp19.case.thailand.pdf.

OECD (2004), *Competition Law and Policy in Mexico*.

OECD (2005). *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation*.

Riordian, Michael H. and David Sappington (1987), "Awarding Monopoly Franchises," *American Economic Review,* vol. 77, pp. 375-87.

Saussier, Stéphane (2005), "Public-Private Partnerships and Prices: Evidence from Water Distribution in France," *Review of Industrial Organization*, forthcoming.

Shleifer, Andre (1998), "State versus Private Property," *Journal of Economic Perspectives*, vol. 12, p. 133.

Sirtaine, Sophie, Maria Elena Pinglo, J. Luis Guasch and Vivien Foster (2005), "How Profitable Are Infrastructure Concessions in Latin America? Empirical Evidence and Regulatory Implications." PPIAF: Trends and Policy Options No. 2, World Bank.

Tirole, Jean (1989), *The Theory of Industrial Organization*, MIT Press: Cambridge.

Varian, Hal R. (1987), *Intermediate Microeconomics: A Modern Approach*, Norton: New York.

Widerøe (2000), Widerøe's Flyveselskap ASA "The PSO services."

Wolfram, Catherine (2004), "Competitive Bidding for the Early U.S. Airmail Routes," December.

World Bank (2003), "Infrastructure Action Plan," Informal Board Meeting, July 8.

Williamson, Oliver (1976), "Franchise Bidding for Natural Monopolies—In General and with Respect to CATV," *Bell Journal of Economics*, vol. 7, pp. 73-104.

DAF/COMP/GF/WD(2006)33

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2006

ROUNDTABLE ON CONCESSIONS

1. ***To better understand the context of your answers to the questions which follow, please summarise the overall regulatory objectives for concessions for infrastructure. What are the government's major objectives when it considers infrastructure concessions? These may well vary from sector to sector, e.g., maximize revenue or reduce subsidy, improve productivity, improve coverage, increase capacity. What are the circumstances under which concession is chosen rather than privatisation or continued public provision?***

2. By the end of the 1980s, Brazil was facing huge difficulties in its economy. The high level of public debt did not allowed the government to maintain investments and expand public services that had been – until then – mainly provided by state-owned companies. Even where public services were provided in good standards, the classic inefficiency of state-owned companies could be noticed. It was necessary to reduce government participation in the economy.

3. Due to this fact, Brazil started to review the role of the State in the economy. The result of this process was a wide privatisation plan, called National Privatisation Program (PND), that presented the principles to be observed in order to delegate public services to the private sector.

4. The main objectives were determined by the PND Law:

- to reorganize the strategic position of the State in relation to the economy and to transfer non-public activities to the private sector (e.g. the steel industry);
- to reduce the public debt;
- to allow investments to be retaken in privatised companies and sectors;
- to contribute to industrial modernisation in Brazil, by increasing their capacity to compete;
- to allow that public administration focus its efforts in activities that can not be provided properly by the private sector;
- to contribute to financial market strengthening, by offering privatised companies shares to the society.

5. Among the sectors that were included at the PND, there were a large number of infrastructure sectors, such as: telecommunications, ports, water and sanitation, electricity, gas transport and roads.

6. ***Briefly describe the overall regulatory system with respect to concessions. Is there a law on concessions?***

7. The overall regulatory system with respect to concessions in Brazil is based on the Federal Constitution, the Auctions and Public Contracts Law (no. 8666/93), the Concessions Law (no. 8987/95), and the Public Partnership Law (no. 11079/04).

8. The Federal Constitution (1988) establishes that the private sector can only provide public services through concessions and permissions, always preceded by public auctions.

9. In order to implement the privatisation plan in the early nineties, the Auctions and Public Contracts Law and the Concessions Law were approved by the Congress. In summary, what these two laws established that infrastructure services privatisation could only be done through concessions, and that a private partner could only be contracted through public auction, as determined by the Constitution. This is the rule for all concessions to Federal Government, States and Municipalities in all infrastructure sectors. Exemptions are only accepted in emergency cases, when services are interrupted and for a short and limited period of time.

10. Although both laws apply for every infrastructure sector, each sector has also a legal framework that establishes the sector regulatory agency and that establish some particularities of the concession awarding process. Some of these laws are:

- Law 9472/97 – telecommunications;
- Law 10233/01 – roads, railways, surface and water transportation;
- Law 9427/96 – electricity.

11. ***Which government bodies are involved in designing and overseeing the allocation of and operation of concessions? For example, what are the respective roles of the concessioning authority sector regulator (if any), and competition authority?***

12. In Brazil, there is a separation of function between ministries, regulatory agencies and competition authority. The role of planning and deciding if some service shall be privatised is executed by sectoral ministry (for example, Ministry of Transportation, Ministry of Telecommunications etc.). The role of designing and overseeing the allocation and operation of concessions is conducted by the sector regulatory agency.[1]

13. In order to describe the role of competition authorities, first it is important to present the Brazilian Competition Policy System (BCPS). It consists of three government bodies: CADE, the Administrative Council for Eonomic Defense, an autonomous agency which has dispositive adjudicative authority in BCPS cases; SDE, the Economic Law Office in the Ministry of Justice, which has the principal investigative role; and SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in BCPS proceedings and for providing competition advocacy in regulated sectors. [2]

14. In summary, the role of competition authorities consists in analysing anticompetitive conducts and merger operations, and in promoting competition advocacy in regulated sectors. All sectors are submitted to CADE's jurisdiction. What may vary from sector to sector is who is responsible for analysing mergers and conducts. The general rule is that all cases are analysed by SEAE and SDE and then judged by CADE. However, in some of them, the regulatory agency may be requested to issue its opinion about the case. An exception is observed only in telecommunications, where the National Agency for Telecommunications (ANATEL) is the only responsible for sending CADE an analysis on the case (if CADE finds it necessary, it may ask SEAE and SDE to also do an analysis).

15. Competition advocacy is the most important role of the competition bodies in relation to concessions designing and it is mostly played by SEAE that acts as the Ministry of Finance representative in the different inter-ministerial groups involved in the discussion of regulatory issues. Through this participation it is possible to influence auctions and concessions designs to foster more competition in the contracting process.

16. ***Which levels of government may award concessions?***

17. The three levels of government may award concession: federal government, States and Municipalities. The general rule, based on the Federal Constitution, is that one level of government may only award concessions for the public services which it is responsible for. Following this rule, federal government is responsible for: electricity generation and transmission, telecommunications, railways and federal roads. States are responsible for gas, electricity distribution (although the regulatory agency is federal) and state roads. Municipalities are responsible for water and sewage and local roads.

18. ***Are the regulatory frameworks and institutions established in legislation, or are they established in administrative procedures or presidential decrees?***

19. The general regulatory frameworks for almost all sectors and institutions are established in legislation. Specific rules are established in administrative procedures and presidential decrees, always based and restricted by the law.

20. ***How are disputes between government and concessionaire handled?***

21. Disputes between government and concessionaire first must be solved administratively by sector regulatory agency. If both parts do not arrive to reasonable solution they may go to the Judiciary. In 2005 the possibility of arbitration was introduced in the Law of Concessions in order to allow faster solutions for both parts.

22. ***Does the general competition law apply?***

23. In Brazil, the general competition law (Law 8884/94) applies to all regulated sectors. The only exception to this general application of competition law is the banking sector, which has its competition issues solved by Brazilian Central Bank.

24. ***Does the competition authority have jurisdiction over concessionaires?***

25. The competition authority has jurisdiction over all concessionaires and companies operating in regulated sectors.

26. ***Do other bodies also have jurisdiction to enforce the competition law in these circumstances, or to circumscribe the enforcement of the competition law by the competition authority?***

27. Each regulatory agency has the power to promote competition at the regulated sector of its jurisdiction. Regulatory agencies are also responsible for competition advocacy. However, regulatory agencies do not have the power to analyze mergers or to condemn an anticompetitive behaviour. CADE is the only agency with power to judge mergers and uncompetitive behaviour. When facing an anticompetitive behaviour, the regulatory agencies must notify CADE so that it can act.

28. ***What is the role of the competition authority in the design of concessions?***

29. As already said, in Brazil, there are three competition authorities: CADE, SDE and SEAE. SEAE is the one most responsible to promote competition advocacy in regulated sectors. Usually, SEAE participates in discussions with other ministries and regulatory agencies about concessions design in order to promote competition. SEAE does not have a binding opinion, but it may influence decisions as a representative of the Ministry of Finance.

30. ***Briefly summarise the experience with infrastructure concessions. What have been the major successes and failures in infrastructure concessions in your country? (A table could be useful, with columns for year awarded, sector, whether the award was by competitive or non-competitive means, whether the concession was renegotiated subsequently, whether the project was subject to rate-of-return or to price-cap regulation or no tariff regulation, and whether there was a regulatory body with specific responsibility for that sector.)***

Year Awarded	Sector	Award by competitive or non-competitive means?	Was the concession renegotiated subsequently?	Rate-of-return, Price-cap, or no tariff regulation?	Is there a regulatory body with specific responsibility for that sector?
1994	Roads	Competitive.	Yes	Rate-of-return	Yes. ANTT (for federal roads).
1996	Railroads	Competitive.	Yes.	Price-cap.	Yes. ANTT.
1997	Ports	Competitive.	No.	Price-cap	Yes. CAP and ANTAQ.
1997	Electricity	Competitive.	Yes.	Price-cap	Yes. ANEEL.
2000	Water and sanitation	Competitive.	-	-	No.
1997	Telecommunications	Competitive	Yes.	Price-cap	Yes. ANATEL.

31. Although the Brazilian privatisation process has faced some problems, it may be considered a successful case: it reduced the participation of the State in the economy; it allowed investments to recover in the infrastructure sectors; it contributed to the reduction of public debt; and it allowed more efficiency and more competition in these sectors.

32. Obviously, the effects described above vary in intensity from sector to sector, but they can be taken as a general consequence of privatisation. One can observe that some sectors were more successful than others and this is a consequence of how each process was designed: in some sectors, privatisation occurred after the sector regulatory law had been approved by the Congress and the regulatory agency had been implemented; in others public services had already been privatised some years before the creation of a regulatory agency. In the first group, there are electricity and telecommunications, in which one can observe the best results in terms of competition and efficiency gains. All transportation sectors are in the second group, in which, though one can observe a huge progress, some regulatory changes have been studied by the government in order to improve efficiency.

33. Water and sanitation sector differs from the others, because they are not public services provided by federal government. The provision of these services is the responsibility of states and municipalities and there still is no general law regulating it, nor proper regulatory agencies. Only few companies were privatised and only few states have a regulatory agency in charge of regulation. As a result, this is probably the sector that requires more attention in terms of developing an efficient regulation nowadays.

34. ***Do the contracts for financial advisers and investment bankers to implement concession transactions align their incentives with the objective of long-term efficiency and competition in the sector(s)?***

35. In the beginning of privatisation process, contracts for financial advisers and investment bankers were concerned about auctions and business evaluation. Efficiency was not the main issue by that point, because government was worried about trying to maximize the price of the concessions. After this first stage, the government became more concerned about efficiency incentives and competition, and these started to be a main issue in concessions (as seen in telecommunications, e.g.).

36. ***Before the concessions are designed or awarded, is restructuring considered in line with the OECD Recommendation of the Council concerning Structural Separation in Regulated Industries (2001), which relates to the separation of potentially competitive activities from those which are not, as well as horizontal splitting to promote competition where it is feasible?***

37. Structural separation was considered and implemented in the two major sectors privatised (telecom and electricity). In telecom, long distance and local loop operations were already run as separate state enterprises and distinct and multiple licenses were sold in each area. In electricity, although most of the state owned enterprises already were operating in distinct areas (generation, transmission and distribution) laws were passed to move progressively from accounting to structural separation of generation, transmission and distribution.

38. ***If your country has significant experience with subsequent concessions, what particular issues arise during the re-allocation especially with respect to asymmetries between incumbents and others?***

39. Brazil has not had a case of subsequent concessions yet.

40. ***If an analyst in another country were interested in the experience of infrastructure concessions in your country, are there any books or research papers by your agency or others which provide a useful summary to which you would direct him or her?***

MOURA ROCHA, Bolívar, A Regulação da Infra-Estrutura no Brasil – Balanço e Propostas, São Paulo: IOB-Thomson, 2003

SALGADO, Lucia Helena; DA MOTTA, Ronaldo Seroa, Marcos Regulatórios no Brasil: o que foi feito e o que falta fazer, Rio de Janeiro: IPEA, 2005

SUNDFELD, Carlos Ari (org.), Direito Administrativo Econômico, São Paulo: Malheiros Editores, 2000

DI PIETRO, Maria Sylvia Zanella, Direito Regulatório: Temas Polêmicos, São Paulo: Fórum, 2004

PINHEIRO, Armando Castelar; Regulatory reform in Brazilian infraestructure - where do we stand? Rio de Janeiro: IPEA, 2003.

PINHEIRO, Armando Castelar; A experiência brasileira de privatização - o que vem a seguir?. Rio de Janeiro: BNDES, 2000.

1. Role for Competition in the Allocation of Concessions

41. ***Under what circumstances are the different means of allocating concessions employed? For example, when is competitive auction used? Competitive negotiation? Direct negotiation with a single firm? Under what circumstances have these different means been successful*?**

42. According to the Federal Constitution and to the Law of Concessions, all concessions in Brazil must be allocated by auction. There is no exception.

43. ***Having in mind one or a very few specific instances where concessions were allocated by competitive auction:***

44. ***How was the auction design arrived at? That is, who designed the auction? What was the role of the competition authority in the design of the auction?***

45. In the beginning of privatisation process, auctions were designed by each sector ministry because regulatory agencies did not exist yet or were being implemented. After their implementation, they became responsible for auctions design. The competition authority has the role of exercising the competition advocacy during the design proccess.

46. The case of roads concession is a good example were one can see the changes in auction design process. During the first stage of federal roads' privatisation ANTT had not been created and the Ministry of Transportation was responsible for auction design. Nowadays, as the second stage of privatisation is being carried out, the regulatory agency is responsible for auction design and SEAE has an important role on trying to make auctions more competitive.

47. ***What was the auction design? E.g./ were several parts auctioned or only one? If there were several parts, were the auctions simultaneous, and how were bidders able to address the complementary or substitutability of the various parts? Was the auction sealed bid or open bid?***

48. The auction design varies from sector to sector. For federal roads, for instance, in the first privatisation stage, auctions had several bidders, but they were mainly constructors. Auctions were sealed bid, not simultaneous and there was no possibility of complementary bids.

49. To the second stage, some changes are being carried out in order to increase competition: possibility of participation of bidders other than constructors; simultaneous auctions; and possibility of complementary bids.

50. ***Was the process, in fact, competitive? If not, how, in retrospect, could the auction or award process have been made more competitive?***

51. The process is competitive, but it does not mean that some improvements do not have to be made. The number of competitors must be enlarged, by reducing restrictive requirements for participation in the auction increasing the number of bidders.

52. ***Was the contract subsequently renegotiated? If so, how long after the contract award? Who initiated the contract renegotiations and what changes resulted?***

53. Brazilian legislation establishes that renegotiation are possible, since concessions prove that they have a disequilibrium in their economic and financial situation, cause by some factor that is not in the contract. The frequency of this ocurrency varies from sector to sector. Some sector laws establish that renegotiation may only occur after five years while others do not mention this. This is the case of road concessions that as a consequence have had many case of renegotiation in the beginning of their existence. In fact, renegotiations in roads concessions used to happen until the second year of contract and in some cases; it continued to happen during the years. Renegotiations were usually initiated by companies and resulted in higher tolls.

54. ***Have you investigated allegations of collusive behaviour during auctions for infrastructure concessions? What were the outcomes of those investigations?***

55. There has been no investigation of collusive behaviour during auctions in BCPS.

56. ***What is your policy regarding joint bidding in auctions for infrastructure concessions? E.g., under what circumstances would two "likely to win" bidders be forbidden to submit a single bid?***

57. There is no specific rule against joint bidding in Brazil. A company is free to associate with other companies in order to participate on auctions. The only prohibition made by the Concessions Law is that a company cannot participate in more than one consortium of companies.

58. Although no previous control of the companies in each consortium is made, BCPS analyzes if the auction winning consortium is an anticompetitive operation or not.

2. Role of Competition during the Term of Concessions

59. ***If the concession contract, decree or law include clauses related to competition, such as ensuring fair and non-discriminatory access, what are they?***

60. To illustrate law clauses related to competition, some parts of regulatory laws will be transcribed below:

61. For telecommunications, Law 9472/97 establishes that:

> *"Article 3. The user of telecommunication services has the right:*
> *I - of access to telecommunications services, with standards of quality and regularity adequate to its inherent nature, anywhere within the National Territory;*
> *II - to freedom of choice relative to his/her service provider;*
> *III - of non discrimination as to the access and utilisation conditions of the service;"*
>
> *"Article 6. The telecommunication services shall be organised based on the principle of free, wide and fair competition among all providers, having the Government to act towards promoting them, as well as to correct the effects of imperfect competition and to repress violations against economic order."*
>
> *"Article 7. General protection rules to the economic order are applicable to the telecommunications sector, when those do not conflict with this law.*
>
> *Paragraph 1. The acts involving a telecommunications service provider, under public or private system, aiming at any form of economic concentration, either through merger or incorporation of companies, establishment of holding companies to control enterprises or any form of partnership conglomerate, shall be subject to controls, procedures and conditions provided in the general protection regulations to the economic order.*
>
> *Paragraph 2. The acts provided in the preceding paragraph shall be submitted to the appraisal of CADE - Economic Defense Administrative Council, by means of the regulatory body.*
> *Paragraph 3. The telecommunications service provider will be in violation of economic order when, upon entering into contracts for rendering goods and services, adopts practices which may limit, falsify or any way hinder free competition or free initiative.'*
>
> *"Article 19. The Agency shall take the necessary measures to satisfy the public interest and for the development of telecommunications in Brazil, acting independently, impartially, legally, impersonally and publicly, and especially:*
> *(...)*

XIX - to exercise legal authority in connection with telecommunications, in the control, prevention, and repression of violations against the economic order, except for the authority belonging to the Economic Defense Administrative Council - CADE;"

"Article 73. The telecommunications services providers of collective interest will be entitled to the use of poles, ducts, conduits and rights of way, belonging or controlled by the telecommunications service provider or the provider of other services of public interest on a non-discriminatory manner and under fair and reasonable price conditions.

Sole Paragraph. The regulatory agency of the licensee whose means are to be utilised will be responsible for defining the conditions necessary to satisfy the provisions of this article."

"Article 127. The regulation of the exploitation of services under the private system, shall aim at the feasibility of compliance with the laws, especially those in connection with telecommunications, as regards the economic order and consumer rights, so as to guarantee:
(...)
II - free, ample and fair competition;"

"Article 152. The provisioning of interconnection shall be made in non discriminatory manner, under adequate technical conditions, thus ensuring equal and fair prices, complying with the strict requirements to the rendering of services."

62. For electricity, Law 9427 establishes that:

"*Article 3. - In addition to duties pursuant to articles 29 and 30, Law 8987, dated February, 13, 1995, applicable to electric energy services, Aneel shall also be responsible for:*

(...)
VIII - with a view to fostering effective competition among the agents and preventing the economic concentration of electricity services and related activities, establishing constraints, limits or conditions for corporations, corporate groups and shareholders in terms of obtaining and transferring concessions, permissions and authorisations, as well as monopolies and doing business among themselves;
IX - strive to ensure compliance with anti-trust laws, monitoring and overseeing the market practices of the agents in the power sector;"

63. For surface and water transportation, Law 10233/01 establishes that:

"Article 20. The objectives of the National Surface and Water Transportation Agencies are:

(...)
b) to harmonize, under public interest, the objectives of consumers, concessionaire, licensee and authorised agents, along with lessees/tentants and other delegated entities, by arbitrating conflict interests or preventing any violation of the economic order."
"Article 31. Whenever the Regulatory Agency takes notice of any fact that can constitute a violation of the economic order, it should communicate it to the competition authorities."

64. ***If the concession contract, decree or law, or a sector-specific law, include clauses establish regulatory institutions for the concessioned infrastructure, then please describe the institutions such as their degree of independence from the concessionaire, transparency of decision-making and technical capacity***.

65. In Brazil, the regulation of public services, in almost all sectors that have been privatised, is executed by regulatory agencies. These agencies are created by law and have the following characteristics:

- Independence from the government – regulatory agencies have their own budget;
- Autonomy – presidents and directors of regulatory agencies are chosen by the President of the Republic and must be approved by the Federal Senate. They have fixed mandates of 4 to 7 years, depending on what is established by the sector law, and cannot be dismissed.
- Transparency – regulatory agencies' rules and decisions must be preceded by public hearings and must be published, if possible, in the internet.
- Technical capacity – in the beginning, technical staff composed by those who used to work with the public services in each sector ministry before privatisation. Also some staff was hired for a short term period. During the last 2 years, agencies have been contracting technical staff through public contest (the only way that someone can work for the government in Brazil with guarantee that he/she cannot be dismissed without reason) based on technical knowledge in engineering, economics and law.

66. ***Are there rules on pricing, coverage, and quality standards for the service provided by the infrastructure and which institution enforces them?***

67. Usually there are rules on pricing, coverage and quality standards for the service provided. They are enforced by the regulatory agencies.

68. ***Are there rules on pricing and non-price terms for access to the concessioned infrastructure by non-integrated rivals and which institution enforces them?***

69. Usually there are rules on pricing and non-price terms for access by non-integrated rivals. Regulatory agencies are responsible for their enforcement and also to propose new rules if it is necessary.

70. ***Have you investigated complaints of abuse of dominance by infrastructure concessionaires? Was this abuse related to access to essential facilities? Would a line of business restriction (preventing the operator of the essential facilities from entering a vertically related market) have reduced the incentive on the concessionaire to abuse its dominance? What were the outcomes in these investigations?***

71. There have been some cases of abuse of dominance by infrastructure concessionaires investigated by BCPS. Some examples are as following:[3]

72. Telecommunications:

> In 2001, CADE addressed an abuse of dominance claim against the Globo Group, Brazil's largest broadcast television network. Globo controlled both the Globo Channel, the prime broadcast channel in Brazil, as well as Sky TV, the most important Brazilian pay TV satellite company. The complainant was TVA Sistema de Televisão, the owner of competing satellite company DirectTV. TVA asserted that Globo wrongfully refused to license the Globo Channel to TVA for satellite broadcast. ANATEL investigated and concluded that there was no abuse of dominance because the Globo Channel was not an essential facility for satellite TV service. CADE agreed and dismissed the case, observing that TVA was a viable competitor even without

the channel and that requiring satellite TV services to share programming would reduce competition and retard incentives for innovation.

73. Railroads:

With respect to railroads, much of CADE's case activity has focussed on Companhia Vale do Rio Doce (CVRD), a large mining and steel company that were privatised in 1997. CVRD holds operating concessions for a number of freight railway lines and harbour terminal facilities that provide services both to its own mines and steel production facilities and to other customers as well. Some of the customers served by CVRD's lines are competitors in mining or steel production, a circumstance that has led to a series of cases alleging discrimination by CVRD. Where the discrimination does not involve tariffs regulated by ANTT, CADE has prime jurisdiction. One case, for example, dealt with a contract between CVRD and the Samitri Mineral Company for the transportation and export of Samitri's iron ore production. The contract barred Samitri from selling its ore in certain foreign markets and from selling any ore at prices lower than CVRD's. In its 2004 decision, CADE undertook what was in essence a joint venture analysis to conclude that the agreement was not unlawful; noting that CVRD had made a large investment to construct a dedicated rail line to Samitri's mine site, and that CVRD therefore had a legitimate interest in the exploitation of Samitri's iron ore assets...

Other pending rail sector cases involve mergers, including one 2000 transaction in which CVRD acquired four iron ore mining companies and their associated rail lines in the southeast region of Brazil. SEAE and SDE agreed that adverse effects could arise in both the iron ore and the rail service markets and proposed various remedial conditions to CADE. ANTT, in consultation with SDE, invoked its own statutory authority to issue a precautionary order imposing certain restrictions on CVRD until CADE issued a determination. In 2005, CADE determined that the transactions could proceed subject to conditions designed to forestall anticompetitive effects.

74. Ports:

Each of Brazil's seaports is controlled by a Port Authority, which grants concessions authorising private parties to operate terminals and to provide cargo handling services within the port facility. At some ports, there are also independent, privately-owned terminal facilities just outside the port boundaries. A case recently decided by CADE, known as "THC2," involved terminal handling charges assessed by terminal operators against independent warehouses. The case involved allegations that certain terminal operators raised rivals' costs by charging disproportionately more to deliver a cargo container to a warehouse located outside the terminal than they did to deliver the same container to a warehouse within the port. CADE found the price differentials to be an abuse of dominance because they constituted a significant part of storage costs and induced shippers to use the terminal operator's warehouse, thus impairing competition in the warehouse storage market.

NOTES

1. The regulatory agencies responsible for the infrastructure sectors that will be analysed in this paper (i.e. roads, railways, electricity, telecommunications, water and sanitation) are: National Agency for Telecommunications – ANATEL, National Agency for Electricity – ANEEL, National Agency for Surface Transportation – ANTT (for roads and railways) and National Agency for Water Transportation – ANTAQ (ports). There is no federal regulatory agency for water and sewage because it is a municipality competence to provide this service.

2. OECD – Competition Law and Policy in Brazil – a Peer Review, 2005.

3. Examples taken from OECD – Competition Law and Policy in Brazil – a Peer Review, 2005.

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CONTRIBUTION FROM THE CZECH REPUBLIC

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON CONCESSIONS

1. Introduction

1. The following contribution describes the current situation in the area of concessions in the Czech Republic and the experience of the Czech Office for the Protection of Competition (hereinafter referred to as "the Office") relevant to this issue, particularly in relation to infrastructure in the sectors of energetic (electricity, gas manufacture, heating plants), water supply, telecommunication and transport.

2. The restructuring and privatisation in the above-mentioned sectors in the Czech Republic has been under way since the mid-nineties. The conditions in these sectors were completely modified by means of new legal acts; there were set up new regulatory bodies and new private undertakings gradually enter the markets.

3. Present law system in the Czech Republic does not include the general legal regulation of concession contracts. This drawback has been addressed by compilation of the draft Concession Act in 2004 that would enact the concession in all parts of the economics, including the area of access to infrastructure. It also aims at participating of the private investors (PSP – private section participation) in operation of infrastructure. The draft Act is currently being discussed in the Parliament of the Czech Republic.

2. Goals of the new regulation

4. The main principals of the new regulation are:

- consistent enactment of the concept of concession contracts
- transparency
- assurance of effective and long term sustainable providing of services and infrastructure

5. The draft Act considers concession contracts as a means of implementing the public administration obligations and providing public services. It is assumed that the new enactment of the concession contracts will lead to cost economies in public funds due to the fact that providing of public services will be assured by the private sector with the assumption that the private entities would be economically interested in proper functioning of the system. The draft Act on Concession enacts conditions and procedure of signing concession contracts within the framework of cooperation among the contracting authority and other entities. Pursuant to the draft Act, public contracting authority shall be deemed to mean the state, a municipality or an undertaking, established or settled in order of satisfy public needs, on condition that it is funded mainly by the state.

6. Pursuant to the draft Act, the Act will not be applied on the concession contracts objectives of which are security interests, sensitive intelligence etc.

3. Characteristics of concession contracts

7. Concession contracts are generally considered to mean the contracts that have a long term status (usually 15 – 25 years) and are characterised by partial transfer of risks associated with providing of services or exploitation of infrastructure in question. This feature is the main difference between concession contracts and public contracts.

8. The specific features of concession projects are:

- concession contract with its specifications;
- preparation of approval of so called important concession contracts;
- study of feasibility;
- definition of status of the public entities in the process of preparation and realisation of concession contracts;
- concession procedure;
- framework projecting company;
- fiscal control by the Ministry of Finance;
- index of concession contracts.

9. The draft Act sets financial limits to be kept. The Office is authorised to perform supervision over observance of this Act. The Office decides on whether the contracting authority followed the rules set by the Act, imposes remedial measures and fines. Maintaining the register of concessions falls within the scope of powers of the Ministry for Regional Development.

10. With regard to the fact that the legal regulation currently finds it only in the process of approval by the Parliament, the Office has not yet been in the position to apply it and therefore has acquired no experience relevant to it until these days.

4. Other laws related to concessions

11. Entrepreneurship in individual sectors of economy is comprehensively regulated by relevant sector regulations defining the conditions for business and state administration in a given sector.

12. In the area of energy such regulation is contained in the Act on Energy (Act. No.91/2005 Coll.) defining, in line with the EU law the conditions for entrepreneurship, performance of state administration and non-discriminatory regulation in the energy sectors, i.e. electric power production, gas industry and heat production, along with related rights and duties of natural and legal persons.

13. The area of telecommunications is regulated by the Act on electronic communications (Act No. 127/2005 Coll.). The regulation is aimed at satisfying the needs of consumers and the interests of licence holders, together with ensuring reliable, safe and stable supplies in respecting the rules of competition.

14. In the area of rail transport infrastructure there is **the Act on Rails** (No. 266/1994) and the area of road infrastructure is subject to the Act on Traffic on Terrestrial Communications (No. 361/2000).

15. All the abovementioned laws have in common that they do not contain particular regulation of concession procedure, however, they regulate the conditions for business in the given areas, especially as regards the substantial technical issues, and they must be taken into consideration in the concession proceedings.

16. In the course of drafting these Acts, the Office, as a mandatory commentary spot in the legislative process, enforced and applied its comments aimed at support of competitive environment. This approach was applied by the Office especially in the area of energetic. In doing so, the Office took utmost regard of the OECD recommendation, contained in the Report on Structural Separation in Regulated Industries (2001).

5. Sector regulators

17. In the areas of energy and telecommunications there are independent sector regulators – in the energy sector (comprising electric power market, gas market and heat production) this is the Energy Regulatory Office, in the area of telecommunications this role is played by the Czech Telecommunications Office. Establishment of an independent regulatory office is currently under consideration. Carrying business in the given sector falls within competence of relevant sector regulator. Establishment of sector regulators has been supported by the Office in long term. Application of procompetitive principles and support of competition is also one of the main goals of sector regulators.

6. Access to infrastructure and the Act on the Protection of Competition

18. From the competition law´s point of view, concept of concessions is related to the concept of so called essential facilities regulated by the Act on the Protection of Competition (No. 143/2001 Coll., hereinafter referred to as "the Competition Act").

19. The infrastructure, which is a condition for use of provision of socially important services, is regularly of essential facility character. It is impossible to provide given services, such as i.e. electric power and drinking water supply etc., without such a facility.

20. The issue of refusing access to essential facility is covered by the demonstrative listing of the possible forms of prohibited abusing dominance under Article 11 of the Competition Act. The Article states in its letter f) that:

> "Refusal to grant other undertakings access, for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, if other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use; the same proportionately applies also to the refusal of access, for a reasonable reimbursement, of other undertakings to the use of the intellectual property or access to the networks owned or used on other legal grounds by the undertaking in a dominant position, if such use is necessary for participation in competition in the same market as the dominant undertakings or in any other market"

21. In other words, the provision covers cases, where the dominant entity commands, on the basis of whatever reason, privileged access to an essential facility and the other undertakings that do not have such access may not access to any alternative facility, without use of which they are unable to provide their services. At the same time, the dominant undertaking may be justifiably required to enable access to its

facility. Even under meeting these conditions, the dominant undertaking is obliged to enable access to its facility only if the other party is willing to pay an adequate compensation for it. In line with the decision of the Czech High Court in Olomouc proving existence of an essential facility may be a precondition for finding dominant position of an undertaking.

7. Activity of the Czech Competition Office related to the issue of Concession

7.1 Decision making activity

7.1.1 Refusal of access to the bus central station – application of the concessions principle

22. The Office recently dealt with a case, where the operator of a local central bus station (hereinafter referred to as "the Station Operator") in the municipality of Znojmo, Czech Republic, refused to provide some of the operators of public bus line transportation with access to the area of the central bus station. The Station Operator carried out its business on the basis of licences issued by the municipality in the role of the operator of national public line personal bus transportation and carried out most of its line transportation in the framework of ensuring basic transport services within the public service obligation (i.e. including subsidies for settlement of provable loss). Furthermore, the Station Operator was the lessee of the bus station.

23. The new local carriers asked the Station Operator for enabling access to the Station and use of the departure stands. However, this requirement was rejected by the Station Operator. The Station Operator reasoned this step by claiming that it was impossible to enable almost double amount of vehicles departure from the Station at the same time, be it for the cause of capacity, safety or technical issues. The new carriers were thus forced to establish bus stops for their lines at other places in the municipality.

24. However, the Office found within the proceeding on this matter that the Station Operator enabled certain carriers access to the Station. This was true especially in case of distance lines. In the course of the proceeding the Office dealt especially with the question whether the Bus Station constituted an essential facility in the sense of the Competition Act. The Office dealt also with the issue whether the Station Operator was obliged to enable access to the Station in line with the non-discrimination principle and on the basis of a concession agreement. During an on-spot inspection the Office found that the Station area was not a classical enclosed facility, as it is usually the case, but that it forms sort of integrated transportation terminal, where it was possible to use various means of transportation – railway, bus and local ones.

25. The Bus Station operated by the party to the proceeding is only a part of this transportation terminal. It was assessed in this case whether it was possible for the carriers to operate the public line personal transportation also without using the services/bus stands of the Station. After considering all circumstances the Office came to the conclusion that the participation of the bus carriers in competition on the market of bus transportation was not depending solely on the use of services/bus stands within the terminal as essential facilities. The carries were capable of carrying out their business even in situation where they would have been using bus stops outside the terminal. For this reason neither the terminal in Znojmo nor its part may be considered an infrastructure facility in the sense of the Competition Act. Therefore the Station Operator was not obliged as a concession provider. In case that it would have been considered an essential facility within the meaning of the Act, the access would have had to be granted subject to principles of non-discrimination and concession application.

26. As regards the detriment in competition caused to other competitors, the Office found that realisation of departures/arrivals of buses from other stops than those situated within the terminal did not endanger or restrict the new bus carriers from the viewpoint of their competitiveness. Concerning possible

detriment caused to consumers – passengers, the Office found that the individual stands located within the terminal are not significantly different. Therefore the Office did not find any damages caused to competitors or consumers.

7.1.2 Conditions imposed in case of a concentration between undertakings - application of solutions alternative to concessions

27. The Office has not dealt with the concessions related issue of access to essential facilities only in the area of abuse of dominance, but also in the area of concentrations between undertakings. In number of decisions the Office imposed conditions for realisation of a concentration that assisted support of competitive environment and enabled access of third parties to infrastructure.

7.2 "Virtual power plant" as a condition for approval of a concentration

28. In the case of a concentration between the dominant producer of electricity with certain regional distribution companies the Office applied a condition consisting in creation of a so called "virtual power plant". In this way, the auction principle was applied as alternative to concession, with the same goal of ensuring transparent and non-discriminatory access. The solution consisted in enabling a part of the production capacity of the dominant producer to independent competitors, which subsequently compete with the electricity produced by the given capacity/facility on the energy markets. The sale of electricity is realised in the form of an auction, which allows transparency of the transaction. The virtual power plant appears to be the only measure for creating a functional and non-discriminatory market that would ensure access of independent traders to the free electric capacity.

29. The first auction round already took place in the beginning of 2006. The representatives of local and foreign undertakings participated in the auction and the demand exceeded the supply more than five times. The prices resulting from the auction assume 15% increase in the wholesale electricity prices for 2006. This increase follows from the high fuel prices and growing lack of production capacities.

7.3 Competition advocacy

7.3.1 Comments of the Office on the draft Act on Water Ducts and Sewers

30. In its comments on the draft amendment to the Act No. 274/2001 Coll. on Water Ducts and Sewers, the Office presented its view that from the viewpoint of competition environment in the area of water industry it is more advantageous to enforce so called operational model of infrastructure ownership and services operation consisting in separation of the entity holding the water infrastructure (usually a municipality) from the entity operating this infrastructure. The Office therefore recommended enacting the operational model into the submitted draft Act as the only possible model. Such an arrangement would enable performance of tenders and granting concessions for operation of infrastructure. Such a possibility does not exist in case when the owner and operator are one person.

31. The Office also enforced the principle that the Act stipulated the maximum period for which it is possible to conclude contracts on operation of water infrastructure. Such a measure should prevent closure of the market as a result of existence of a series of long term contracts between the operators and municipalities leading to actual elimination of functioning "competition for the market".

32. Enacting the operational model and setting maximum period of duration of concession contracts on operation of water infrastructure would have following positive effects:

- Pressure on lowering prices and increasing quality of services
- Better position of the customers by means of strengthening the position of a municipality as the infrastructure´s owner
- More transparent operation of the water infrastructure

33. The abovementioned principles will be further enforced by the Office in the future amendments to the relevant legislation.

DAF/COMP/GF/WD(2006)40

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CONTRIBUTION DE LA FRANCE

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

TABLE RONDE SUR LES CONCESSIONS

1. Procédé ancien et original, la concession constitue l'une des multiples modalités de la délégation de service public pratiquée par l'administration en France. Elle a été utilisée notamment dans des secteurs assez diversifiés tels que l'eau, l'électricité, le gaz ou encore les chemins de fer. De nos jours, elle est le mode privilégié de la délégation et joue un rôle essentiel dans la modernisation des infrastructures économiques en France.

1. Le régime juridique de la concession en droit français

2. Le droit français est caractérisé par la coexistence de plusieurs types de contrats administratifs, dont la concession. Cette pluralité a été renforcée en juin 2004 par la création d'un nouveau contrat administratif, à savoir « le contrat de partenariat public-privé ». Or, chacun de ces contrats obéit à des régimes juridiques différents qu'il convient, de ce fait, d'examiner successivement.

1.1 La délégation de service public proprement dite

3. La délégation de service public est une catégorie générale de contrat administratif dont les principaux types sont la concession, l'affermage, la régie intéressée, la gérance et le bail emphytéotiques dans certains cas. C'est la loi dite « loi Sapin » du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques qui a consacré l'existence et le régime juridique de la convention dite de délégation de service public, tout en restant muette sur sa définition. La loi du 11 décembre 2001 portant mesures d'urgence à caractère économique et financier est venue combler cette lacune majeure et a défini cette notion de délégation de service jusque là un peu floue.

4. A cet égard, l'article L. 1411-1 du Code général des collectivités territoriales (ci-après CGCT) dispose :

> *« Une délégation de service public est un contrat par lequel une personne morale de droit public confie la gestion d'un service public dont elle a la responsabilité à un délégataire public ou privé, dont la rémunération est substantiellement liée aux résultats de l'exploitation du service. Le délégataire peut être chargé de construire des ouvrages ou d'acquérir des biens nécessaires au service ».*

5. Selon cette définition, il est possible de dégager deux caractéristiques principales de la délégation de service public : d'une part, celle-ci suppose qu'un service public soit dévolu par voie contractuelle au délégataire et que, d'autre part, le risque financier lié à cette exploitation soit supporté par l'entreprise délégataire. Or, c'est notamment cet aspect financier qui différencie en droit français, la délégation de service public des marchés publics proprement dits. Alors qu'un marché public est conclu à titre onéreux au profit de l'entreprise soumissionnaire, la délégation de service publique suppose que la rémunération du délégataire soit substantiellement tirée de redevances perçues sur l'usager.

6. Du point de vue du régime juridique, cette loi de 1993 a eu pour but essentiel d'instituer ***une procédure préalable de mise en concurrence visant à la plus grande transparence***, pour l'octroi de toute délégation de service public (il s'agit de la mise en œuvre du principe de « concurrence pour le marché » suivant la terminologie du secrétariat de l'OCDE). Une procédure de publicité permettant la présentation d'offres concurrentes est imposée à l'autorité délégante, la durée de la délégation est désormais limitée et

des conditions strictes relatives à l'élaboration de ces conventions sont mises en place. Ainsi, l'article L. 1411-1 du CGCT impose l'envoi par l'autorité délégante à chacun des candidats d'un document définissant *« les caractéristiques quantitative et qualitative des prestations ainsi que, s'il y a lieu, les conditions de tarification du service rendu à l'usager ».* Par ailleurs, toujours selon cet même article, les offres ainsi présentées sont librement négociées par l'autorité responsable de la personne publique délégante qui, au terme de ces négociations, choisit le délégataire.

7. Par la suite, la loi du 8 février 1995 relative aux marchés publics et aux délégations de service public a inclus dans le champ d'application du droit de la concurrence interne, notamment dans l'article L. 410-1 du Code de commerce, les conventions de délégation de service public, qui sont ainsi rentrées dans le domaine de compétence du Conseil de la concurrence.

1.2 La concession

8. Comme il a été déjà dit, la concession fait partie da la catégorie plus générale des conventions de délégation de service public. Elle constitue le mode de gestion privilégié retenu pour la mise en place de nombreux équipements et infrastructures en France. Pourtant, il n'existe pas de définition législative ou réglementaire de la concession, sous réserve de la loi n° 91-3 du 3 janvier 1991 transposant la directive communautaire « travaux ». La doctrine la définit comme « un contrat par lequel le concessionnaire est chargé de construire un ouvrage public et de gérer le service public à ses risques et ses périls en se rémunérant directement auprès des usagers ou étant substantiellement rémunéré par les résultats de l'exploitation ».

9. La concession implique la réalisation des infrastructures nécessaires pour l'exploitation du service public dévolu par le concessionnaire lui-même. Cela engendre des risques financiers considérables pour ce dernier, ce qui explique l'établissement des contrats de longue durée en fonction des investissements réalisés par le délégataire (10 à 20 ans, voire même plus selon les ouvrages). Les ouvrages que le concessionnaire construit pour l'exploitation de service public reviennent à la personne publique comme « biens de retour » à la fin du contrat en question.

10. Compte tenu des longues durées caractérisant ces contrats de concession et de leur importance financière, le processus de désignation des concessionnaires revêt une importance particulière, notamment en ce qui concerne le respect des règles de concurrence.

1.3 Les contrats de partenariat « public-privé »

11. L'ordonnance du 17 juin 2004, prise sur le fondement de la loi d'habilitation du 2 juillet 2003, a mis en place ce nouveau contrat administratif, aux côtés des marchés publics et des délégations de service public. La particularité de ce nouveau procédé découle du fait qu'il n'est soumis à aucun des régimes juridiques existants. Autrement dit, le contrat de partenariat n'est ni soumis au Code des marchés publics, ni à la loi Sapin de 1993 régissant les délégations de service public.

12. Ce nouveau contrat, qui est conçu comme une alternative entre marchés publics et délégations de service public, est fortement inspiré des contrats anglo-saxons de *Private Finance İniative (PFI)* développés depuis une dizaine d'années.

13. Il se définit selon l'article L. 1414-1 du CGCT comme « des contrats administratifs par lesquels la personne publique confie à un tiers, pour une période déterminée en fonction de la durée d'amortissement des investissements ou des modalités de financement retenues, une mission globale relative au financement d'investissements immatériels, d'ouvrages ou d'équipements nécessaires au service public, à la construction ou transformation des ouvrages ou équipements, ainsi qu'à leur entretien, leur

maintenance, leur exploitation ou leur gestion, et, le cas échéant, à d'autres prestations de services concourant à l'exercice, par la personne publique, de la mission de service public dont elle est chargée. »

14. Par ailleurs, toujours selon l'article précité «… la rémunération du cocontractant fait l'objet d'un paiement par la personne publique pendant toute la durée du contrat. Elle peut être liée à des objectifs de performance assignés au cocontractant. »

15. Donc, on voit bien que les contrats de partenariat se distinguent des marchés publics par la possibilité de recourir à des contrats qui peuvent s'étendre sur un long terme. Par ailleurs, l'objet même du contrat est beaucoup plus global que celui d'un marché public, pouvant aller de la conception d'un ouvrage et de sa construction jusqu'à sa maintenance et à son exploitation. Enfin, à la différence d'une délégation de service public, le cocontractant est rémunéré par la personne publique durant toute la durée du contrat de partenariat.

16. Le recours à un contrat de partenariat est strictement encadré par la loi qui impose à l'autorité publique une évaluation qui sera appréciée par l'assemblée délibérante de la collectivité territoriale ou par l'organe délibérant de l'établissement public sur le principe du recours à un contrat de partenariat. Cela est justifié par l'importance de la délégation dans le cadre d'un contrat de partenariat dont l'essentiel intérêt est de permettre aux personnes publiques d'échapper à des difficultés de financement s'agissant des services publics nécessitant des équipements et des investissements lourds.

17. Comme dans le cadre des délégations de service public, le contrat de partenariat est précédé d'une procédure de publicité permettant la présentation de plusieurs offres concurrentes. Par ailleurs, la procédure de passation d'un contrat de partenariat est soumise aux règles de la commande publique, à savoir, les principes de liberté d'accès, d'égalité de traitement des candidats et d'objectivité des procédures. Enfin, le contrat est attribué au candidat qui a présenté l'offre économiquement la plus avantageuse.

2. L'interaction entre le droit de la concession et le droit de la concurrence

18. L'importance des contrats de délégations au plan financier, notamment dû à leur longue durée, nécessite une attention particulière de la part de l'autorité nationale de concurrence qui doit veiller sur les comportements des opérateurs privés dans un environnement susceptible de faciliter les pratiques anticoncurrentielles nuisibles au bon fonctionnement du marché.

2.1 La soumission des autorités délégantes et des délégataires au droit de la concurrence

19. Comme il a été dit au préalable, les délégations de service public rentrent, depuis la loi n° 95-127 du 8 février 1995, dans le champ d'application du droit de la concurrence interne.

20. Ainsi, l'article L. 410-1 du Code de commerce dispose :

> *« Les règles définies au présent livre s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le* ***cadre de conventions de délégation de service public****. »*

21. Comme on le sait, selon l'article L. 1411-1 du Code des collectivités territoriales, l'attribution d'un contrat de délégation de service public est subordonnée à une mise en concurrence, par appel public à candidatures et à une sélection des candidats éligibles à remettre une offre. Or, la grande transparence qui entoure l'attribution d'un contrat de délégation, notamment en raison de la procédure de publicité préalable, donne lieu à une asymétrie entre les informations qui doivent être données aux opérateurs privés par l'autorité publique et le respect du libre jeu de concurrence nécessitant l'autonomie et l'indépendance

des offres soumises, afin de ne pas induire l'acheteur sur la situation réelle de la concurrence sur le marché en question.

22. Ainsi, dans son avis du 18 mars 2003[1] relatif aux conditions propres à assurer le libre jeu de la concurrence entre les candidats lors d'une procédure de délégation de service public, le Conseil de la concurrence énonce que *« le déroulement de la procédure de délégation de service public doit respecter les règles du droit de la concurrence. La collectivité est responsable devant le juge administratif de ses propres manquements à ces règles (conditions d'accès à la mise en concurrence, clauses du contrat de délégation) mais pas des pratiques anticoncurrentielles imputables aux candidats à la délégation, à l'entreprise sortant, ou à l'entreprise retenue ».* Il ajoute à cet égard que *«…s'agissant de marchés sur appels d'offres, que le libre jeu de la concurrence impose, d'une part, l'existence chez les candidats de la plus grande incertitude possible quant à l'issue de la consultation et, d'autre part, l'autonomie totale des offres déposées ».* Donc, on voit bien que l'attribution d'un contrat de délégation de service public peut donner lieu à des ententes entre les opérateurs soumissionnaires prohibées par l'article L. 420-1 du Code de commerce. Le risque d'entente entre opérateurs peut être ainsi accru par le volume important des informations communiquées sur le marché par les opérateurs publics, de même que la prévisibilité à moyen terme sur l'ensemble de leurs politiques d'achats publics, du fait des obligations découlant des règles de marchés publics : en d'autre termes, ***le droit des concessions ne se conçoit pas sans le corollaire indispensable représenté par le droit de la concurrence***.

23. De la même manière, mais cette fois-ci au titre de l'article L. 420-2 du Code de commerce, le Conseil peut être amené à sanctionner un opérateur privé dans le cadre du renouvellement d'une délégation de service public parce que ce dernier abuse de sa position dominante sur le marché en question. C'est notamment le cas de la décision du 3 novembre 2005[2] relative à des pratiques relevées dans le secteur de l'eau potable en Ile-de-France. Il s'agit en l'espèce du marché de la production d'eau en Ile-de-France qui est dominé par trois opérateurs essentiels. Or, les communes ou syndicats de communes sont, soit de petite taille et ne possèdent que la partie terminale des réseaux de distribution les concernant, soit des entreprises intégrées de grande taille confiant la gestion de la totalité de la chaîne de production et distribution qu'elles possèdent à l'un des deux grands opérateurs : la CGE pour le Sedif et la Sagep (rive droite de Paris), la Lyonnaise des Eaux pour la Sagep (rive gauche).

24. Dans sa décision, le Conseil de la concurrence précise que la Lyonnaise des Eaux se trouve en monopole de fait sur la fourniture de l'eau. En effet, celui-ci reproche à la Lyonnaise de recourir à des pratiques de couplage s'agissant notamment de la production et de la distribution de l'eau, pour pouvoir rester le délégataire du service de distribution de l'eau de plusieurs communes franciliennes en abusant de sa position dominante. A cet égard, le Conseil constate que lors des différentes procédures d'attributions de délégation, le contrat a toujours été remporté par la société qui produit également cette eau. En l'occurrence : la Lyonnaise. Ainsi, le Conseil précise que *«…aucun renouvellement de délégation n'a permis le changement de l'opérateur quand il est en monopole sur le réseau d'apport de l'eau ».*

2.2 Les problèmes soulevés dans le cadre des contrats de concessions au regard du droit de la concurrence

25. La concession, le mode privilégié de la délégation de service public en France, implique, comme on l'a déjà dit, une dévolution du service au profit d'un opérateur privé. Or, les risques d'ordre financier incombant à ce dernier sont beaucoup plus importants que dans le cadre des autres contrats administratifs,

1. Avis n° 03-A-02 du 18 mars 2003 relatif aux conditions propres à assurer le libre jeu de la concurrence entre les candidats lors d'une procédure de délégation de service public

2. Décision n° 05-D-58 du 3 novembre 2005 relative à des pratiques relevées dans le secteur de l'eau potable en Ile-de-France

ce qui suppose l'établissement des contrats de longue durée. En d'autres termes, du point de vue économique, force est de constater que l'opérateur retenu pour une quelconque concession est en quelque sorte *« sauvé pour la vie »*.

26. Cela nécessite notamment qu'une attention particulière soit portée par l'autorité de la concurrence aux conditions dans lesquelles les opérateurs sont amenés à présenter une offre afin d'obtenir la concession du service public au terme du processus concurrentiel. Concrètement, cela signifie que des pratiques anticoncurrentielles telles que la répartition du marché entre les opérateurs concessionnaires ou encore des pratiques d'abus de la part de l'opérateur titulaire, sont susceptibles de se produire dans le cadre de ces contrats de concessions.

27. Ainsi, dans sa décision du 24 avril 2001[3] relative à des pratiques relevées à l'occasion de la construction du tramway de Grenoble, le Conseil a précisé que si le choix par l'autorité publique de confier une concession n'est pas un acte de production, de distribution ou de services relevant de la compétence du Conseil de la concurrence, *« des concertations entre entreprises en vue de répondre à une demande d'un maître d'ouvrage relative à la réalisation de travaux peuvent constituer des pratiques détachables de la décision administrative d'attribution et sont susceptibles de tomber sous le coup des dispositions du livre IV du code de commerce »*.

3. Décision n° 01-D-16 du 24 avril 2001 relative à des pratiques relevées à l'occasion de la construction du tramway de Grenoble

Annexe1

Communiqué de presse du Conseil de la concurrence du 7 novembre 2005
Le Conseil de la concurrence souhaite plus de concurrence sur le marché de la fourniture d'eau en Ile-de-France

A l'occasion de la publication de la décision 05-D-58, relative à des pratiques relevées dans le secteur de l'eau potable en Ile-de-France, le Conseil de la concurrence souhaite attirer l'attention des collectivités de la région Ile-de-France sur l'importance d'introduire une réelle concurrence sur le marché amont de la fourniture d'eau.

La particularité du marché de la fourniture d'eau en Ile-de-France

Le marché de la production d'eau est dominé par trois opérateurs : le Syndicat des eaux d'Ile-de-France (Sedif) avec 37 % du marché, la Société anonyme de gestion des eaux de Paris (Sagep) avec 33 %, et le groupe Lyonnaise des Eaux avec 19 %. A eux trois, ils couvrent 90 % des besoins franciliens.

La production d'eau est largement excédentaire en Ile-de-France, puis qu'elle représente le double de la consommation, ce qui va bien au-delà de la marge nécessaire au titre de la sécurité générale de l'approvisionnement et pour couvrir les pics de consommation en été.

En outre, les réseaux des producteurs d'eau sont interconnectés au niveau des canalisations principales ou secondaires de transport notamment pour les besoins de l'alimentation de secours.

Les fournisseurs d'eau ne proposent pas de tarif de vente d'eau en gros à destination d'une demande située en dehors de leur zone de distribution respective, ce qui empêche la formation d'un prix de gros par des mécanismes de marché.

Le marché reste cloisonné entre les différentes zones contrôlées par chacun des producteurs

Les communes ou syndicats de communes sont, soit de petite taille et ne possèdent que la partie terminale des réseaux de distribution les concernant, soit des entreprises intégrées de grande taille confiant la gestion de la totalité de la chaîne de production et distribution qu'elles possèdent à l'un des deux grands opérateurs : la CGE pour le Sedif et la Sagep (rive droite de Paris), la Lyonnaise des Eaux pour la Sagep (rive gauche).

Bien que toutes les conditions techniques -en termes de ressource et d'interconnexion- soient réunies pour la mise en place d'un marché de gros de la fourniture d'eau, on constate aujourd'hui que le marché reste cloisonné entre les différentes zones contrôlées par chacun des producteurs.

Faute de marché de gros, il n'existe aucune concurrence possible entre les producteurs d'eau lors de la mise en concurrence des délégations de distribution de l'eau, et il n'arrive que très rarement que la délégation soit obtenue par une entreprise autre que celle qui produit l'eau.

Les communes ont un rôle particulier à jouer pour introduire davantage de concurrence sur le marché de la fourniture et du transport de l'eau

Le Conseil insiste sur la possibilité pour les communes de la région Ile-de-France de dissocier désormais le marché de la fourniture d'eau de celui de sa distribution lors de la remise en concurrence des délégations de service public de distribution d'eau.

Ce dégroupage permettrait aux communes de pouvoir appeler prioritairement les ressources disponibles en eau les moins chères au bénéfice de leurs usagers et de pouvoir parallèlement bénéficier des meilleures prestations en matière de distribution.

Les communes sont, en effet, en droit :

- de cesser de s'adresser exclusivement à l'offreur d'eau en gros qui détient le monopole du réseau de moyen débit qui dessert leur territoire ;
- et de dégrouper leur délégations de service public, lorsqu'elles sont remises en concurrence, en séparant ce qui concerne le service de la fourniture d'eau en gros du service de sa distribution dans la commune.

La décision 05-D-58 que le Conseil de la concurrence vient de rendre, sanctionne le comportement de la Lyonnaise des Eaux et celui du Syndicat des eaux d'Ile-de-France (Sedif)
Le comportement de la Lyonnaise des Eaux illustre, de façon concrète et éclairante, par quels moyens un opérateur en monopole de fait sur la fourniture de l'eau, a obtenu d'être choisi par un syndicat comme délégataire du service de distribution de l'eau.
La Lyonnaise des Eaux a offert au Syndicat du nord-est de l'Essonne (NEE), un prix de vente en gros de l'eau -en cas de fourniture seule- supérieur de 17 % au prix consenti dans sa proposition globale « fourniture + distribution ». Cette pratique de couplage visait manifestement à handicaper toute offre concurrente sur la partie distribution, puisqu'elle permettait à La Lyonnaise de se réserver de manière discriminatoire un prix inférieur à celui de son offre dissociée de vente en gros.

Le comportement du Syndicat des eaux d'Ile-de-France montre, par ailleurs, comment un opérateur en monopole de fait sur la fourniture de l'eau, est intervenu pour empêcher toute ouverture, même très ponctuelle, du marché de l'eau en gros. Ce syndicat est intervenu afin de peser sur la finalisation d'un contrat de fourniture d'eau entre l'un de ses principaux clients, la Semmaris (société gérant le Marché d'intérêt national de Rungis) et son concurrent, la Société anonyme de gestion des eaux de Paris (Sagep), qui disposait d'eau en gros livrable au MIN de Rungis à un prix plus faible de 22,5 %.

- ***Décision n° 05-D-58 du 3 novembre 2005 relative à des pratiques relevées dans le secteur de l'eau potable en Ile-de-France***

DAF/COMP/GF/WD(2006)24

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Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON CONCESSIONS

1. Introduction

1. The granting of concession is an important issue in the development of the infrastructure sector. In the perspective of business competition, there are at least two important aspects of the granting of concession. The first aspect is the concession granting process through solicited and competitive bidding, and or unsolicited bidding or direct appointment through negotiation. The second one is the implementation of concession, especially in relation to the limitation and anticipation of potential abuse of monopolistic position caused by such concession.

2. This paper is intended to elaborate on both issues of competition in relation to the granting of concession in Indonesian context.

2. Regulatory System

3. Since the end of 1990s until the reform era, the use of concession concept in the management of economic sectors in Indonesia, especially in public sectors categorised as natural monopoly industry, was very limited. The industrial management pattern in almost all of those economic sectors was implemented by the Government through state enterprises, such as toll road, electricity, telecommunication, seaport and potable water industries.

4. Regulations on the management of concession in each sector may be different from one another. Several sectors, such as potable water and seaport, cannot be fully managed by private parties. However, private parties may be involved in cooperation with state/regional government-owned enterprises, which usually take the form of joint operation. This practice is applied in the management of seaport and potable water industries.

5. In other sectors, however, there are regulations encouraging private companies to obtain full concession for managing public infrastructure through full ownership or joint venture with state owned enterprise. This can be found, for example, in telecommunication and toll road sectors.

6. Prior to the reform era, the planning of various infrastructure developments (including by way of the granting of concessions) was conducted by BAPPENAS, as the development planning authority at the national level. Whereas the approval and allocation process was mostly delegated to the relevant technical ministries. Therefore, despite the coordination at the planning level, the implementation was sectoral in nature. In many cases, the granting of concession was often used as a facility for collusion by certain parties having the access to the authority to obtain concession in those sectors. As the result, concessions could not fully achieve the designated objectives. This was indicated by the poor performance of several sectors which management was delegated to concessionaires.

7. Learning from this condition, several regulations have been revised to promote transparency and accountability in the management of economic activities especially those related to the public sector. This includes the enactment of competition law through Law No. 5 Year 1999. Based on such law, concession granting process must be conducted in an open, transparent and competitive manner. In order to further ensure a more objective and competitive concession granting process, the government issued special Presidential Decree regulating procedures for the government procurement of goods and services. Especially for infrastructure projects (mainly the large-scale ones), the government has also issued Presidential Regulation No. 67 Year 2005 regulating procedures for government cooperation with business entities in the development of infrastructure. In general, the objective of such Presidential Regulation is to

accelerate the development of infrastructure and improve government cooperation with business entities. The Presidential Regulation stipulates the planning of the infrastructure development by a special inter-ministerial committee, scheme and procedures for government partnership with the private sector in the development of infrastructure (through agreement and or license granting scheme) as implementing guidelines for public-private sector partnership projects. The scope of the aforementioned Presidential Regulation includes all infrastructure sectors, namely transportation, roads, irrigation, drinking water, waste water, telecommunications, electricity as well as oil and gas. In the mean time, the regulation of such procedures includes, among other things, partnership, due diligence, risk management, government support, competitive procurement, unsolicited project and tariff adjustment activities. Based on such Presidential Regulation, infrastructure projects will be planned by a special committee (KKPPI = Coordinating Committee for Infrastructure Project Development) the operation of which will be subsequently run by the chairman of the head of the related agency/department. The aforementioned Presidential Regulation also regulates cooperation procedures between the government and business entities, including therein the selection of private sector partner through a transparent and competitive tender/bid. Therefore, although not specifically regulating the granting of concession, upon the establishment of such Presidential Regulation, planning, supervision, construction implementation and infrastructure development functions involving the role of private sector are currently conducted at the central government level through a special committee the membership of which constitutes the representatives of several related departments.

3. Allocation of Concession

8. As explained, prior to the reform era, the process of the granting of concession was mostly in the form of picking the winner, especially through direct negotiation. Meanwhile, a transparent tender/bid process for the granting of concession (in the form of agreement or license approval) was relatively rare. Even if conducted, in general a transparent tender process was limited to large-scale projects and only involve a relatively limited number of companies. In short, the process of the granting of concession prior to the reform era was still far from being the form of competitive, open and transparent tender.

9. Upon the coming into effect of Law No. 5 Year 1999 regarding Prohibition against Monopolistic Practices and Unfair Business Competition, competition law officially comes into effect fully and is cross-sectoral in nature. Accordingly, all stages and procedures for the selection of cooperation with private sector partners (through the granting of concession) must be conducted through a transparent and non-discriminative process. Based on such law, the Commission for the Supervision of Business Competition (KPPU) as a competition supervision authority has two main functions, namely law enforcement towards business actors and the submission of recommendations to the government. Therefore, in the context of the granting of concession to private business entities, the KPPU has a full authority to enforce law upon business actors, if the indication of anticompetitive conduct is found in such concession granting process. The KPPU may also play a role to further ensure a transparent and fair concession granting process through the submission of recommendations to the government, especially with regard to various regulations on the granting of concession that are deemed not in line with the principles of fair business competition.

10. Following the issuance of Presidential Regulation No.67 Year 2005, cooperation between the Government and its private partners, especially for infrastructures projects, must go through a fair, open, transparent and competitive tenders (or auctions for permit/license granting). The form and model of such cooperation must be based on the mutual benefit principle, with responsibility and mutual support among the relevant parties. In general, there are various reform efforts for the above regulation in accordance with the spirit and objective of Law No.5 year 1999 namely creating a healthy business climate for the achievement of national efficiency and guaranteeing the principle of fair and just business opportunities for all business actors.

4. Implementation of Concession

11. Basically, the granting of concession rights although through a competitive bidding process is still defined as delegation of a monopoly right to a certain business actor. Under such condition, regulations are needed for prevention of abuse of monopoly position in the form of excessive pricing and or other anti competitive behaviours that are detrimental to consumers. To anticipate the above, provisions on pricing policy, coverage regulation and minimum service quality standard are needed. Such various regulations can be set forth in a cooperation agreement (as one of the sub clauses) so that the engagement of business actors as the holders of concession rights will be clearer. Supervision on the potential anticompetitive behaviours may also be conducted through mechanism other than agreements such as through formal regulation (such as presidential decree and/or ministerial decree) and also through business competition law. For the context of Indonesia, implementation of general and cross-sectoral competition law enables KPPU as the business competition authority to perform its legal enforcing function on business enactors as the holder of concession rights, if there is indication of competition law violation by the a party[1].

12. In particular, the Presidential Decree No.67 Year 2005 contains provisions which must be included in cooperation agreements between the Government and its private partners. Some points that have the substances of business competition such as determination of tariffs (prices), the right and obligations of the parties (including allocation of risks), service performance standard, sanctions and supervision mechanism on private partners must be stipulated in such agreements. Therefore, the inclusion of those points can serve as a "tool" to anticipate various anticompetitive behaviours especially by private partners as the holders of concession rights.

13. However, special regulations on regulatory and supervisory function have not yet been included in the presidential decree. Hence, regulatory/supervisory function must still be referred to sectoral policies or regulations. For the case of Drinking Water Provision, the regulatory function is performed by BPP SPAM (Regulatory and Supervisory Body for Drinking Water Management System, pursuant to Government Regulation No.16 year 2005 concerning Provision of Drinking Water System). The same is the case for the telecommunication sector where the regulatory function is performed by BRTI (Regulatory Body for Telecommunication, pursuant to Decree of the Minister of Transportation No.31 2003). Therefore, supervision on the implementation of concession right will also be automatically sectoral in nature which will be performed by each regulatory body. Based on the ICN scheme or model concerning the cooperation between sectoral regulatory body and business competition supervision authority, the coverage of the sectoral regulatory body should be in general economic-technical specific to that sector, while the aspect of business competition will fully become the duty and responsibility of the business supervision authority. Hence, the issue of coordination between the regulatory body and business competition supervision authority is an important issue that needs further discussion with respect to the granting of sectoral concession right.

14. Based on the development in the concessed sector, there is a different result between one sector to another. This is greatly dependent on several factors among other things the condition of business environment of the concessed sector, the bidding process and some other factors. In general, the granting process of concession rights and business permits without competitive process have resulted in an imbalanced terms or agreement, especially as it gives more advantages to private partners, for example too broader delegation of authority to the private partner and disproportional allocation of risk (more risk on the government). In some cases, such problem leads to low performance of the concessed sectors.

1. JICT (Jakarta International Container Terminal) case (No.4/KPPU-I/2003): KPPU found that there has been an abuse of monopoly power by the company holding concession right at the seaport sector as a terminal operator. The KPPU decision obtained final legal enforcement *(inkraacht)* by Supreme Court.

Ironically, although the performance is low the government often cannot do much on the matter, considering the nature of the cooperation agreement that does give much room for the government or the public, as a result of unfavourable making process of the agreement. Under such condition, the best option available to the government is making legal adjustment/revision to the cooperation agreement by giving priority on the interest of the public.

15. This is seen for example in the harbour sector, which until today still serves as the source of inefficiency due to its very low performance. The investment of infrastructures is also not realised as promised by the concession holders. The output of concession implementation today is the increasingly high price without relative improvement in services. The same is the case in the drinking water sector. Until today, the performance is far from satisfying. This is reflected for example from the very limited improvement in the leakage restoration in the drinking water industry, which until today reaches almost 49%.

16. Different is the case in the telecommunication sector. The concession granted to a number of business actors to operate in this sector has been utilised by business actors to penetrate the market and to compete with other existing business actors. The condition of this telecommunication sector is different from other sectors, where in this sector monopoly tendency has started to fade in line with the increasingly varied telecommunication facility alternatives. Concession holders in the telecommunication sector (especially for frequency spectrum) have supported increasingly strict competition with existing (incumbent) business actors. The results are very positive, where telephone use teledensity continuously increases, tariff tends to decrease, and quality and service continuously increase.

5. Lessons Learned

17. Learning from the experience of concession process, in order to keep the concession achieving its purposes, it is required some arrangement directing the following:

- Concession should be granted through transparent, competitive and accountable process and is kept away from collusive process.

- Concession agreement must be made specific and clear, using measured indicators so that the reward and punishment measures can be performed properly.

- Concession planning and implementation must minimize the potential misuse of dominant position, inter-competition behaviour, especially by concession-holding companies.

- It is required cooperation and coordination between business competition authorities and sector regulatory bodies, in order to guarantee the achievement of concession granting purposes technically and economically, and to maintain fair business competition climate.

DAF/COMP/GF/WD(2006)1

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2006

ROUNDTABLE ON CONCESSIONS

1. Concessions in Mexico

1. During the 1990's Mexico began a process to modernise and widen its basic services infrastructure, by promoting private investment and efficiency in areas like railroads, telecommunications, ports, and airports.

2. Several legal amendments were necessary to intensify private-sector participation in expanding and operating infrastructure. These legal changes included both amendments to the Constitution and the issuing of new sector-specific laws. The process encompassed the privatisation of infrastructure, the granting of concessions to allow the provision of services through the use and exploitation of infrastructure, and the creation of a specific area in charge of regulations for each transport mode within the Ministry of Communications and Transport (SCT) and, in telecommunications, the creation of the Federal Telecommunications Commission (CFT).

3. In short, during the first years of the Federal Competition Commission (the CFC or Commission), the development of competition in sectors and activities traditionally characterised by a low number of participants —or even dominated by a single firm— was an essential aspect of competition policy and of the CFC's activities.

4. Restructuring in railroads, telecommunications, ports, and airports has shown relative success. However there is a need to develop better regulatory frameworks that favour competition and promote efficiency in such sectors. The CFC has an important role in initiatives to develop, review, or revise sector regulations.

2. The institutional and legal framework

5. Article 28 of the Mexican Constitution establishes as the overall objectives of concessions: i) efficiency in the provision of public services and, ii) the use of state resources by the private sector taking into account social benefits. On these grounds, sector-specific laws ordinarily include the objectives of promoting competition, access rights to essential resources and preventing anticompetitive practices and concentrations, among others.

2.1 Scope of concessions

6. The scope of public sector functions and activities is established in the Mexican Constitution and in some sector-specific laws, such as the regulatory law of the oil industry and the electricity public service law**.** According to such legislation, the following activities can only be performed by the federal government, and therefore the granting of concessions is not allowed:

- Mail services and telegraphs.
- Oil, hydrocarbons and basic petrochemistry. Specifically:

- The exploration, exploitation, refining, transportation, storage, distribution and first-hand sale of oil and products deriving from its refining;

- The exploration, exploitation, elaboration and first-hand sale of gas, as well as the transportation and storage required to interconnect its exploitation and elaboration, and

- The elaboration, transportation, storage, distribution and first-hand sale of oil derivatives susceptible of becoming basic industrial raw materials, and gas derivatives used as basic petrochemicals.

- Nuclear energy generation.

- Public provision of electricity[1].

7. On the other hand, the legal framework does allow the federal government to award concessions to:

a) establish and operate public telecommunications networks;
b) use and exploit radio spectrum;
c) use satellite orbital positions;
d) construct and operate rail track systems and provide public rail transport services;
e) construct and operate ports and port terminals;
f) construct and operate airports.

8. Telecommunications, railroad, port, airport and airline services are completely open to private participation. This policy is firmly established in the corresponding sector-specific laws under the following provisions:

- The government is obliged to grant concessions to establish and operate public telecommunications networks and provide public air transport services to any interested party that fulfils the requirements established in the laws and regulations concerning telecommunications and civil aviation.

- The government should call for a public auction of any of the concessions for radio spectrum, railroads, ports and airports when an interested party requires so. A negative answer from the government must be grounded in law and based on hard facts.

- The government should determine the radio-spectrum frequencies assigned to specific uses and issue a program to concession them.

2.2 Rules governing concessions

9. Under Mexican law, concessions are a legal tool to implement sector-specific law regulations, aimed at promoting private involvement and opening up telecommunications and transport sectors to competition.

10. There is no an specific law on concessions. The sector-specific laws establish the regulatory frameworks and the institutions charged with granting and supervising concessions, as well as the administrative procedures for awarding them.

11. Only the federal government is empowered to grant concessions. The SCT in the case of the transport sector and the Cofetel in telecommunications are in charge of designing and overseeing the allocation and operation of concessions.

12. These government bodies are in charge of handling disputes between the federal government and concession holders through administrative procedures. When not solved at this level, cases are taken to judicial courts.

13. There have been different allocation mechanisms. Concessions to establish and operate public telecommunications networks are granted to any party that fulfils the requirements provided for in sector-specific law. All other concessions are allocated by public competitive auction (sealed-bid auction); which is established as mandatory in the respective sector-specific laws. In the case of radio-spectrum concessions, they are generally allocated through simultaneous auction, in which the bidders are able to take into account the complementarity or substitutability of different band frequencies through successive rounds. So far no concession has been renegotiated or revoked.

3. Competition issues in concessions

3.1 The competition authority's role in concessions

14. The concessioning authority is empowered to allocate concessions and oversee their operation. The CFC has powers to issue opinions on the competition aspects of concessions an even auctions. However, such opinions are non-biding.

15. Additionally, the regulatory schemes established for the telecommunications sector and for rail transportation all contemplate the need for a favourable opinion from the CFC on prospective concession holders, previous to the award of concessions or to authorise the transmission of concession-related rights.

16. The Commission is the sole agency empowered to enforce the Federal Law on Economic Competition (LFCE). The LFCE applies to every economic activity including those developed under federal concessions. Therefore concession holders are subject to all provisions in the competition legislation.

17. Agreements among bidders both on participation in auctions and on prices are considered illegal *per se* by Article 9 of the LFCE, as they are considered absolute monopolistic practices (horizontal agreements).

3.2 Sectoral rules to limit or prevent anticompetitive conduct

18. The sector-specific laws on telecommunications, railroads, ports and airports prohibit discriminatory practices and refusal to deal when access to essential facilities is involved. These regulations are often included in the concession titles themselves.

19. The sector-specific laws also establish price and tariff regulation imposed by the regulator agency if the Competition Commission finds effective competition to be absent in the relevant market or, in telecommunications, when there exists an economic agent possessing substantial market power.

20. Generally, there are no rules on pricing, coverage, and quality standards for services provided by the infrastructure given in concession. However:

- The economic agent interested in obtaining a public telecommunication network concession is required to define the network coverage when submitting his application.

- At present all airport concessions include price-cap rules. This regulation could be removed if the CFC determines the existence of effective competition conditions.

- The telecommunications concession granted to Teléfonos de México (Telmex) during the privatisation process, established price-cap regulation on the telephony services provided by this company. It is important to notice that this regulation considered that Telmex would be the only provider of telephone services, at that time.

21. Rules on pricing and terms of access are enforced by the SCT in the case of railroads, airports, civil aviation and ports. This Ministry and the Cofetel enforce such rules on telecom concessions. In particular, in the railroad sector, the SCT has the right to intervene and impose access rates and conditions if no agreement between private operators is reached within 90 days.

4. Performance of concessions

22. In general terms the concession scheme in the transport sector (ports, airports, railroads) and in telecommunications has promoted investment and the development of infrastructure. New investments have enhanced efficiency and competitiveness and have led to more modern and safe systems.

23. In particular, in the railroad sector, following privatisation, real freight tariffs have fallen and productivity indicators show significant improvement. In spite of these improvements, investments in infrastructure and railroad equipment have remained unchanged; for example, average annual investment for the periods 1990-1996 and 1997-2003 is practically the same. This suggests that productivity enhancements following privatisation cannot be attributed to the elimination of a budget restriction. Rather, investment has been more focused towards increasing productivity by modernising locomotives, acquiring specialised equipment, upgrading operation systems and logistics, strengthening capacity of trunk lines, and improving crossings[2].

24. However, there are some concerns regarding the implementation of intra-modal competition, particularly in interlinear traffic, derived from a lack of effectiveness of the regulatory framework relating to interconnection fees and access conditions. This has made the problem of interlinear traffic a competition problem, as will be shown in the next section of this contribution.

25. The communications sector[3] has registered constant growth. In the last 5 years investments reached almost 18 billion dollars, driving a 15% average growth of telecom GDP[4].

26. The main feature of the telecommunications sector is the constant introduction of technological innovations. A case in point is cable and microwave television, which can offer internet access since 2003, and is expected to reach more than 16 million users at the end of 2005[5].

5. Competition cases involving infrastructure concessions

5.1 Relative monopolistic practices in freight railway transportation[6]

27. In November 2001, Transportación Ferroviaria Mexicana (TFM), the holder of the concession for the Northeast Railway, filed a complaint against Ferrocarril Mexicano (Ferromex), the holder of the concession for the North Pacific Railroad, alleging relative monopolistic practices in the interlinear service of freight transport in some of the routes it operated. The alleged conduct consisted in: i) artificially raising tariffs for interlinear traffic and registering them as the Unique Tariff for Express freight (TUCE); and ii) charging car hire services twice to increase TFM's costs and to displace it from the market. The effect of these practices was to leave Ferromex as the sole provider of this service along its exclusive routes.

28. The Commission defined the relevant market as railway lines given in concession to TFM and Ferromex, which, if integrated, created a network that covered a number of cities that had as their interconnection point the City of Celaya, Guanajuato. In October 2003, the Commission determined that Ferromex was guilty of relative monopolistic practices in violation of the LFCE. These consisted of cost increases for interconnection and transport in traffic along several interlinear routes where the origin railway was TFM, as well as duplicate charges for car hire services.

29. Based on these findings, the CFC ordered Ferromex to suppress its practices and implement corrective measures in the relevant market. These measures consisted in setting interlinear traffic service tariffs per kilometer no higher than the minimum tariff charged by Ferromex to its exclusive route customers transporting similar products. The CFC also ordered Ferromex to charge car hire tariffs in traffic along interlinear routes no higher than the minimum tariff charged to its exclusive route customers. In February 2004, the Plenum of the Commission resolved an appeal by Ferromex, which was considered unfounded. Therefore, the Commission confirmed its previous resolution.

5.2 Absence of competition conditions in airport services

30. In order to prevent any abuse of dominant position from private concessionaires of Mexican airports, the SCT asked for the CFC's opinion on competition conditions in airport service markets. According to the Airport Law, any tariff regulation imposed by the Ministry has to be based on a CFC decision about the inexistence of competition conditions. Following this procedure, in 1999 the CFC made an assessment of competition conditions in the markets related to airports controlled by Grupo Aeroportuario del Sureste[7] and Grupo Aeroportuario del Pacifíco[8], and in 2000 for airports controlled by Grupo Aeroportuario del Centro Norte[9]. The following elements were taken into account:

- the existence of legal barriers to entry to build airports and to provide airport services;
- priority granted to the present concession holder for building alternative airports;
- technical and economical difficulties to build new airports.

31. Based on those elements, the CFC determined the inexistence of competition conditions in the relevant markets of airport services, and of leasing of airport areas for the provision of airport-related services. As a result, the SCT imposed price-cap regulation on the airport concessionaires.

6. Concluding remarks

32. The concession scheme in Mexico has had a positive effect on investment and the development of infrastructure. These benefits have promoted efficiency and competitiveness and have led to safer and more modern networks and systems.

33. Competition could be enhanced through amendments to sector-specific laws to facilitate the efficient functioning of infrastructure networks. These amendments should also strengthen the powers of regulatory bodies to effectively enforce the regulatory frameworks. In the CFC's view, its own participation and involvement in this process is necessary.

34. Mexico's experience shows that it is not enough to grant concessions; it is essential to consider competition issues in designing the specific concession scheme to be adopted in each case, in order to prevent anticompetitive conditions and guarantee access to essential facilities. In addition, effective enforcement of the competition law is also needed to guarantee, *ex post*, the efficient functioning of markets related to concessions.

NOTES

1. The private sector is allowed to engage in cogeneration, small production, self-supply generation and electricity generation for sale to the government agency in charge of providing the electricity public service.

2. Mexico´s contribution to the Roundtable on Structural Reform of the Rail Industry of Working Party No.2 of the Competition Committee.

3. The communications sector includes telecommunications, postal and telegraph services.

4. Source: Fifth report of activities 2004-2005. SCT.

5. Idem.

6. CFC case numbers DE-57-2001 and RA-50-2003.

7. CFC case number AD-78-98.

8. CFC case number AD-24-99.

9. CFC case number DC-01-2000.

References

CFC (1998) “La competencia en los mercados de telefonía”, Federal Competition Commission, 1998 Annual Report.

García Alba, Pascual (2004) “Regulación y competencia”, chapter III in *Competencia Económica en México*, edited by the Federal Competition Commission, Porrúa: México, DF.

Estrada, Ernesto (2004) “Regulación y Competencia en los Ferrocarriles Mexicanos”, chapter XIII in *Competencia Económica en México*, edited by the Federal Competition Commission, Porrúa: México, DF.

Landa, Ramiro (2004) “Política de competencia y regulación en el sector de telecomunicaciones”, chapter XII in *Competencia Económica en México*, edited by the Federal Competition Commission, Porrúa: México, DF.

OECD (2005) Mexico´s contribution to the Roundtable on Structural Reform of the Rail Industry

Sánchez González, Álvaro and Victor Paredes (1997) “Privatización y Política de Competencia en Servicios Financieros”, Federal Competition Commission, 1997 Annual Report.

Ten Kate, Adriaan and Rebeca Escobar Briones (1997) “Apertura a la competencia en la comunicación satelital”, Federal Competition Commission, 1997 Annual Report.

World Bank (2002) *Private solutions for infrastructure in Mexico.* Country framework for private participation report for in infrastructure. Washington, DC.

DAF/COMP/GF/WD(2006)2

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CONTRIBUTION FROM THE NETHERLANDS

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON CONCESSIONS

1. Summary

1. Recently the Dutch government has decided which companies are to be the infrastructure managers of the conventional main-lines railway network with mixed rail transport and of two new rail infrastructure lines, the high speed line from Amsterdam/Schiphol to the Belgian border (HSL), which is a line designated for high speed passenger transport, and the Betuweroute from the harbour of Rotterdam to the German border (BR), which is a designated line for freight transport. The concessions differ from each other. Those differences are caused by the specific characteristics of the rail network, respectively the railway lines HSL and BR. For example the differences in the uncertainties about the volume of transport services, the possibilities of optimize (the maintenance of) the infrastructure, the insight in (the quality of) the infrastructure-elements, the number of private companies which could supply infrastructure elements and systems and the necessity and possibilities of private funding. These different characteristics influenced to a high degree the choice of using competitive mechanisms during the allocation process of the concessions.

2. A concession of the conventional main-line railways network has been granted to ProRail for the period 2005-2015 without an auction or tendering. The concession of the Betuweroute will be granted, for the period of 2007-2009/2010, to a new formed consortium of four private and public companies to bridge the first years with big risks in the amount of freight transport. After this period a concession will be granted for a longer period to a private company after a tender for the concession. The overall management of the High Speed Line will probably be granted to ProRail, but the construction and maintenance of the rail infrastructure will be managed and done by Infraspeed, a contractor combination that has won the contract after a tendering organised by the Dutch Ministry of Transport for the construction of the line (5 year period) and the maintenance (25 year period). A new Railways Act, which is in force since the 1st January 2005, was enforced to make it possible to issue these concessions.

2. The old Railways Act of 1875

3. The old Railways act of 1875 was based on the idea that private companies build, maintain and operate rail infrastructure lines. A private company had to ask permission of the King (since 1848 the Crown) to build, maintain and operate a new line including the transport of passengers and freight. The permission was given for a concession for an indefinite period. It was an exclusive vertically integrated concession (infrastructure and transport). During the first period (the first concession was given in 1835) a lot of different private companies existed. The King did not subsidize either the building or the maintenance or the operations of these companies. He only gave, if necessary, state guarantees during the construction period. But during the thirties of the last century companies performed badly. New ways of transport came into use: buses and private cars. This, combined with economic depression times, caused big losses for the companies. Though a number of mergers took place at that time, it was not enough. In the end, in 1937, the government intervened severely and took over all the shares of the remaining companies and created one railway company: the Dutch Railways (NS). So the model with competitors ended at that time and continued until 1995. During this period there was one railway company with an indefinite concession.

3. The new Railways Act

4. In 1995 the government signed an agreement with NS to make competition possible in the railway sector. The predecessor of the currently existing vertically separated infrastructure manager ProRail was formed and freight transport was liberalised. In the agreement provisions were made for the new Railways Act which had to be drawn up. Nearly ten years later, since the first of January of 2005, this new Railway Act is in force. In this Act not only the directive 91/440/EEC is implemented but also the first Railways package (EU-directives 2001/12/EG – 2001/16/EC). Although the European directives only prescribe the separation in the accounting system of the infrastructure manager and the railway company, the Dutch Government went further. The Railway Act states that the Minister of Transport is obliged to give a concession for the management of the rail infrastructure to a (private) infrastructure manager. There is no obligation for a competition auction or to tender before the allocation of the concession, but it is possible to do so. A concession can be issued per corridor or railways network. It is also possible to split up rail infrastructure management into three processes: the allocation process of rail infrastructure capacity, traffic control activities and the maintenance of the infrastructure. Each process/task can be given to a different company. In the Railway Act the duration of the concession period is not mentioned.

4. Allocation of transport services in the Netherlands

5. Although it was decided in 1995 to liberalize the rail transport market, it was unclear for a long period in what way competition would be introduced in the public transport market. A lot of discussions and an experiment later, the Dutch Government decided for competition-for-the-market and not for competition-in-the-market. The New Concession Act, in force since the 1st January 2005, prescribes a tender process before the allocation of national and regional public passenger transport concessions. The duration of the concession period has been appointed. The Dutch Parliament decided to grant the first concession for the mainline network to the NS until 2015 without any auction or putting out a tender. The transport of international public passenger transport, realised by a cooperation of railway companies and private passenger transport, is liberalised.

6. At present, besides the NS, there are already 23 new railway companies operating on the Dutch Railway network, a network of only 2800 kms (6500 kms of rails).

5. The allocation of three Dutch infrastructure concessions

7. Since the new Railway Act came into force (1st January 2005) the Dutch Government has granted only the concession of the infrastructure management of the conventional main-line railway network to ProRail. This network is used for passenger as well as for freight transport services. It is the existing network in which the oldest line has been in use since 1839 (Haarlem-Amsterdam) and the most recent since 2005. Besides this existing network the Minister has made the main decisions about the concessions for two new lines: the HSL and BR. The HSL is the High Speed Line from Amsterdam/Schiphol to the Belgian border, a line designated for high speed passenger transport, and the BR is the Betuweroute, a line designated for freight transport from the harbour of Rotterdam to the German border. These new lines will be in use on 1st January 2007.

8. Each concession has its own quality. Characteristics related to specific features of the network, respectively for the HSL and BR, are, for example, the differences in the uncertainty about the volume of transport services, the possibilities of optimising the maintenance of the infrastructure, the insight in (the quality of) the infrastructure-elements, the amount of private companies who can supply infrastructure-elements and systems and the need and possibilities of private funding. These characteristics influenced to a high degree possibilities for the use of the competitive mechanisms during the allocation process of the concessions. The characteristics will be described below in a systematic way.

6. Factors influencing the possibilities to use competitive mechanisms

6.1 First mover advantages for the incumbent operators

9. The incumbent rail infrastructure manager in the Netherlands is ProRail. ProRail is the legal owner of the ground under the rail infrastructure which is already in use, although the transfer of ownership is foreseen in the Act. As long as this transfer is not realised it is not possible to allocate a concession after an auction or tendering procedure. Another stand-in-the-way of an auction for the conventional network is the exclusive right of NS to exploit all the existing railway stations. The government owns the ground of the new lines, the HSL and BR. ProRail is an infrastructure manager which contracts out the construction and maintenance of the infrastructure. The allocation of the infrastructure capacity and traffic control activities is done by its own employees. Especially the traffic control employees are specialised personnel only employed at ProRail.

10. The competitive chances for new entrants can also be influenced by informational disadvantages. This depends for instance on the fact whether the infrastructure is new or not. The infrastructure to which the three concessions were granted, differ highly in this respect. The HSL is a completely new infrastructure, fitted out with the new European systems for safety (ERTMS/ECTS) energy (25 kV) and telecommunications (GSM-R). The BR concession exists as a new line combined with existing lines in the port of Rotterdam. The conventional main-lines railway network are lines in use, the oldest one having been in use since 1839, the newest since 2005. Asset management is not yet completely introduced in rail infrastructure management. Because there is no complete register of the infrastructure elements, their technical remaining lifecycle period and the quality, it is impossible for other rail infrastructure managers to asses the maintenance costs of the whole network. Moreover, on these lines typical Dutch systems are in use, for instance the energy system (1500 V) and the safety system (ATB). For the safety system there is only one company which can supply the necessary infrastructure components. Competition mechanisms are less easy to introduce in a market with only one supplier who owns exclusive rights.

11. These characteristics in the infrastructure were jointly responsible for the decision to give the first infrastructure concession to ProRail. In this concession provisions have been made for the set up of an infrastructure register and to implement asset management. As a competitive mechanism in this concession, ProRail is obliged to make a benchmark every four years with comparable infrastructure managers in other states.

6.2 Efficiency considerations

12. It is possible to split rail infrastructure management into three processes: the allocation process of rail infrastructure capacity, the traffic control activities and the maintenance of the infrastructure. In the Netherlands each process/task can be given to a different company. In a small country such as the Netherlands, besides the problem that only ProRail employs specialised personnel, it is difficult to split the allocation process of the rail infrastructure capacity and traffic control activities into networks of a smaller scale than the Netherlands. The possibilities of realising efficiency in these tasks by splitting them into smaller networks is difficult and this will cause new coordination problems. In all three concessions (conventional network, HSL and BR), ProRail, the Dutch rail infrastructure manager has a leading role in the allocation process and the traffic control activities. The concessions do not differ in this respect.

13. Our experience is that the best possibilities of introducing competitive mechanisms are in the third task: the financing, construction and maintenance of the rail infrastructure. The possibilities are influenced in a high degree in the uncertainties about the volume of transport services. Uncertainties in volume of transport are translated into concession-price.

6.3 Uncertainties for future profits

14. Uncertainties of future profits are highly influenced by the uncertainty of the volume of transport. The uncertainty of the volume of transport differs per concession. The uncertainty is the greatest in the BR-concession. On this line there is no long term appointments with transport companies because this is a liberalised freight market. The competition with other transport modes (inland water transport, road transport) is great, especially for container transport and influenced by political decisions; for instance the introduction of the Maut in Germany and the decision to close the coalmines in Germany. Besides which, the volume of freight transport in the Netherlands is highly influenced by economic developments in Germany, because a great amount of international rail freight transport goes to Germany. In addition the BR is not the only East-West freight line. There are parallel routes, for instance the line Rotterdam-Utrecht-Emmerich and Rotterdam-Venlo. Which route a freight transport company will use, will be dependent of the price for the use of the infrastructure, the availability of train paths and the costs for the railway company. Typical for the BR is that the railway companies have to use locomotives fitted out with the new European safety system ERTMS/ECTS. None of the railway companies nowadays have locomotives fitted out with this system. Rebuilding existing locomotives or buying new locomotives generates extra investment costs. After consultation of the market the government decided that the uncertainties at that moment concerning these aspects made it impossible to get a good concession price for a long period concession. The government decided to give a short term concession for the Betuweroute for the period of 2007 to 2009/2010 to bridge the first years, with big uncertainties about the volume of freight transport services. After this period a concession will be given for a longer period to a private company after a competition auction. The short term concession will be given to a new formed consortium of four private and public companies: the port authority of Rotterdam, the port authority of Amsterdam, Prevail and Towrail. The port authorities have influence on the complete transport chain from shipment to the end destination and has contacts with a lot of transport operators in this chain. Towrail is a new company with the ambition of improving the way the maintenance can be carried out and to introduce new infrastructure related services for railway companies.

15. For the other concessions there is less uncertainty about the volume of transport, because the transport market is mainly public passenger transport. Because of the concession system for this market the government has made an agreement with a public transport company during the concession period for the infrastructure. The problem of the parallel routes of the HSL are less then the BR because the passenger transport company of the HSL does not have transport rights on the parallel routes and the quality for the passengers of the HSL is better because it is used as a high speed line.

6.4 Other factors

16. The maintenance costs are highly influenced by the maintenance roster. In a passenger market there is much pressure from the railway companies to do the maintenance work during night time and in a short period. The safety regulations, the noise nuisance regulations and the regulations concerning working conditions make it very expensive to do the maintenance during night time and in short periods. Nevertheless the government decided to prescribe the maintenance roster for the maintenance contractor of the HSL (every night for two hours). In the allocation process of this concession there where the least possibility of reducing the maintenance costs by optimising the maintenance roster. Optimising was possible using infrastructure elements during the construction period which was lacking maintenance. The infrastructure manager of the conventional main-lines railway network has a maintenance roster with longer periods for maintenance, at night time as well as during daytime. The infrastructure manager of the concession for the Betuweroute is free in the choice of reducing the maintenance costs and is not forced to a maintenance roster prescribed by the government.

17. Besides the above mentioned characteristics of the HSL (the government is owner of the infrastructure, it is a new infrastructure, European systems, prescribed maintenance roster, more certainty about volume of transport, less competition on parallel routes) there were other aspects that made it possible to introduce competitive mechanisms for allocation of the concession of the HSL for the task of building, financing and maintaining the infrastructure. The government decided to tender the combined order for building finance and maintenance of the infrastructure during a lifecycle period (25 years of maintenance after building). This combined order made it possible for the contractor to invest more in building if this investment has an economic profit during the maintenance period. The government decided to pay for the availability of the infrastructure (output financing) and has prescribed very precisely the quality of the infrastructure at the end of the concession period. The last requirements prevent the destruction of the infrastructure at the end of the concession period.

7. Result of the allocation process

18. The result of the allocation process in the Netherlands of these three concessions is that the concession of the conventional rail network has been given to ProRail for the period of 2005-2015 without a competition auction. The concession of the Betuweroute will be given for the period of 2007-2009/2010 to a newly formed consortium of four private and public companies to bridge the first years with large risks in the amount of freight transport. After this period a concession will be given for a longer period to a private company after a competition auction. The overall management of the High Speed Line will probably be given to ProRail, but the building and maintenance of the rail infrastructure will be looked after by Infraspeed, a contractor combination which has won the contract after a competition auction organised by the Dutch Ministry of Transport for the building of the line (5 year period) and the maintenance (25 year period). The most competitive mechanisms were used in the allocation process of the building, finance and maintenance of the HSL.

8. Conclusions

19. The use of competitive mechanisms is very limited to nihil in the following situations: if the government does not own the infrastructure; if specialised personnel employed only by the incumbent infrastructure manager is necessary; if economies of scale aspects have a negative influence on the possibilities of splitting the network; if there is not a good register of the infrastructure elements, their technical remaining lifecycle period and their present quality; and if the uncertainty in the volume of transport services is great. In the Netherlands we have positive experiences with using competitive mechanism in the construction and maintenance of the infrastructure including the financing of the task of newly constructed infrastructure lines. Used mechanisms: putting a tender; output financing (availability of infrastructure); the obligation of making benchmarks during the concession; giving the infrastructure manager possibilities to reduce the maintenance costs by optimising the maintenance roster and giving him the opportunity to use infrastructure elements during the construction period, when no maintenance is required. It is necessary to prescribe very precisely the quality of the infrastructure at the end of the concession period to prevent destruction of the infrastructure. A concession period which fits in with the technical lifecycle of the infrastructure (under the condition of certainty about the volume of transport services) gives the best concession price possible. Sometimes, if the uncertainty in the volume of transport services is too great, it is necessary to grant a short term concession to bridge these uncertainties.

DAF/COMP/GF/WD(2006)3

OCDE

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CONTRIBUTION FROM ROMANIA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

THE CONCESSIONS SERVICES FOR INFRASTRUCTURE

Chapter I: Overview and environment for concessions

1. Objectives and circumstances of the concessions allocation for infrastructure

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9. Clauses related to competition

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11. Rules on pricing, coverage and quality standards

12. The access for non-integrated rivals to the concessioned infrastructures

13. Investigations regarding complaints of abuse of dominance by infrastructure concessionaires

Chapter I: Overview and environment for concessions

1. Objectives and circumstances of the concessions allocation for infrastructure

1. The main regulatory objectives directed towards co-operation with business environment, through concessions consist in supplementing the budget shortcomings of the regulators by the private financial resources, implementing the know-how and the working methods developed by the private sector in the public sector.

2. It results from the assessment of the primary and secondary legislation regulating the concessions that the common objectives for concessions are the following: the financing of the operations of maintenance, mending, modernisation or replacing the infrastructure elements for the concession services under the terms and on the basis of the program approved through the bid specifications which leads to the process of allocating the concessions. Depending on the sector which is the object of the concessions contract, the objectives may vary, for instance, in the sector of municipal services, the objectives may be obtaining the sequence, the enforcement of the social programs, the best ratio between costs and quality, acquiring of the minimal indicators of performance established through the regulation of organisation and functioning of the respective service in the field of public railway infrastructure, the performance of the railway or public transport in maximum security, the maintenance and the mending of the railway infrastructure as well as granting access to the respective sectors to other railway operators.

3. The circumstances under which concession is chosen rather than privatisation or continued public provision are decided on one hand, by the social policy of maintaining an acceptable and monitoring tariff for services and on the other hand, by the performance of the required investments and the cutting off of some expenditures (such as, those for staff, for maintenance and modernisation of infrastructure) that would burden the authorities' budgets and by the necessity to increase the economic activity's output in that sector.

2. The concessions' regulatory system

4. The primary legislative framework that regulates the concessions services for infrastructure covers:

1. Law no. 219/1998 on the concessions regime, amended and completed through Law no. 528/2004;

2. Law no. 213/1998, on the public property and its juridical regime, amended and completed.

5. Thus, law no. 219/1998 on the concessions regime, amended and completed through Law no. 528/2004 has as objective the regulation and organisation of allocating concessions of the activities, of the goods (constituting private or public state ownership or belonging to territorial administrative units) and of the public services of national or local interest instead of a royalty.

6. Law no. 213/1998, amended and completed, on the public property and its juridical regime stipulates that public properties may be awarded only in administration, concession or rent. It also stipulates that the renting and concession may be done only by auction, under the law provisions. Goods, activities or public services which are not regulated by specific authorities, their opinions being compulsory as concerning the prices or the tariffs used by the concessionaires, can not be the object of concessions.

7. The Government, the local or county councils may approve through ordinance, the concession of other properties, activities or services belonging to the State private property.

8. There are legal provisions with respect to concessions in the fields of economic activity which are subject to the present work paper, as follows**:**

1. In the field of municipal public services : Law no. 236/2001, amended and completed, on municipal public services and the respective secondary legislation,

2. In the field of public services of railway and port infrastructure: Government Ordinance(GO) no. 22/1999, republished (on the administration of ports and navigation roots as well as the performance of port transport activities in ports and navigation roots), Emergency Government Ordinance (EGO) no. 12/1998 (regarding transport on the Romanian railways and re-organisation of the Romanian railways), republished,

3. In the field of public services related to the transport networks through pipes and to the distribution of oil and fuel gas: Law of gas no. 351/2004 amended by Law no. 288/2005, oil Law no. 238/2004.

4. In the field of public services related to the transport networks and to the distribution of electric and thermo energy: Law no. 318/2003 of electric energy.

2.1 Authorities involved in designing and overseeing the allocation of and operation of concessions

2.1.1 Within the stage of designing the concessions

9. The proposal of concession may be done by an interested investor, the conceder (hereinafter named authority who awards the respective concession in infrastructure) being obliged to draw up the feasibility study within a term of 30 days, in case parties do not agree upon another term for taking a decision regarding the concession. In certain cases, this study is mandatory advised by the State Central Office for Special Problems and The Office of General Headquarters as concerns the including of the concession object in the infrastructure of the national defence system.

10. The bid specifications are elaborated on the basis of the feasibility study and provides for the minimal terms necessary for participating in the auction. It may be drawn up by a private company, upon the request of the conceder, its cost being reimbursed from the conceder sale at the premises or in other places settled by him and stipulated in the advertisement. The bid specifications' price is established by the conceder. The enclosed documentation required is subject to the methodological norms which are approved by the Government.

11. The guidelines on the organisation and the carrying on of the concession procedure are elaborated by the conceder and are made available upon the draft sale. The guidelines contain the procedure for public auction and for direct negotiation.

2.1.2 Within the stage of allocation of the concession

12. The participants' offers in this stage are assessed by the commission of examination, whose members are appointed through order, ordinance, or decision by the conceder, varying from case to case.

13. The commission is made up of:

a) representatives of the conceder, among which, at least one, with juridical background;
b) representatives of the Finance Ministry or of the general directorate for public finance and State financial control;
c) a representative of the competent environment authority, if the good, activity or public service that is the object of the concession launches environment procedures.

14. The examination commission President is appointed by the conceder among his representatives of the examination commission.

15. At the meetings of the examination commission, the President may invite, for consultancy distinguished personalities notable for their experience and competence in the field subject to the concession.

16. The selection criteria of the offers and the weight of their importance are settled by the conceder, depending on the public service subject to the concession contract.

2.1.3 During the operation of concessions

17. During the operation of concession, the conceder has the right to check the observance of the obligations undertaken by the concessionaire (i.e. to inspect the goods, to verify the stage of carrying out the investments and whether the public interest is fulfilled).

18. Besides the conceder, the Ministries of resort and the Ministry of Public Finance are empowered to monitor the concessions of national interest. Also the general directorates for public finance and for financial State control are entitled to monitor the concessions of local interest, pursuing, in particular, the observance of the provisions related to:

1. the decision of concession;

2. publicity;

3. the enclosed documentation submitted for the granting of the concession;

4. the membership and the working tools of the examination commission when analysing the offers;

5. the terms provided for by law (during the process of granting the concession);

6. keeping informed the interested parties on the granting or ceasing of the concession;

7. the fulfilment of the contractual obligations by both the conceder and the concessionaire.

2.2 The role of the concessioning authority sector regulator

19. The authority sector regulator attests/authorises/licenses and oversees the operators of the public services subject to the concession (the operators which have concluded contracts by the date of entering into force of the legislative framework are obliged to submit the documentation required for receiving the

certification as operator. Afterwards, an additional act to the concession contract is concluded, stipulating the operators' entire obligations according to that legislative framework).

20. The operation of the concession public service without the existence of the certification/license for operating, of the authorisation for functioning or of the delegation contract of administration and the delivery of a public service concession contract without the observance of the legal provisions or to an operator unlicensed/ unauthorised, constitute offences, being fined.

21. The offences acknowledgement and the sanctions application are done by the empowered personnel of the public administration ministry, of the ministry of resort (for instance, the sanitation, water and sewerage services are in the jurisdiction of the ministry of environment and waters management), to the President of the National Regulatory Authority for Municipal Services (in the field of municipal services), to the villages, towns mayors, to the general mayor of the Capital or their empowered staff.

2.3 The role of the Competition Council in the concessions

22. The competition Law observance is a general obligation, so it is applicable both for the concessionaires and for local and central public administration bodies. When receiving a complaint on the organisation or the handle of an auction, the Competition Council may interfere whether a suspicion arises, related to the breach of the provisions of art. 5 (1), f of the Competition Law no. 21/1996 republished (hereinafter named Law) providing for an agreement between undertakings or associations of undertakings aimed at participating in auctions with rigged bids, and having as an object or as an effect the restrain, the prevent, or the distortion of the competition on the Romanian market or on a part of it. Also, the Competition Council may interfere whether a suspicion regarding the infringement of art. 6 of *the law* arises (abuse of dominant position by the imposing of the tariffs or of the unequal clauses, the exploitation of the dependency situation). In all these situations, Competition Council interferes through the opening of an investigation and the sanctioning of the involved parties in the infringement of the law.

23. Competition Council may interfere also, through the opening of an investigation, by applying the provisions of art. 9 of the *law*, whether there is a suspicion on the interference of a public authority which may restraint, prevent or distort the competition on a given market.

24. The observance of the rules specific to a market economy is a general obligation addressed both to the undertakings and to the bodies of public administration. The latter, under the limits of executing their legal functions, can not interfere in the activity performed by the undertakings, confining thus the trade freedom or the undertakings autonomy or establishing discriminatory conditions.

25. The central or local public administration bodies, which performed anticompetitive practices according to those provided for in art. 9 of the law, are compelled to observe the Competition Council decision; the Competition Council can not sanction them by applying fines but it is entitled to impose any terms or measures to be observed by the central or local public administration, so that the situation prior to the breach of the law may be re-established.

26. According to the provisions of article 26 lit. l) and m) of *law*, the Competition Council may make recommendations to the authority sector regulator in order to be adopted measures or amended certain law provisions that could ensure a competitive mechanism of designing and allocation of the concessions and of pursuing its carrying on (for instance, the delimitation of the services having a competition potential from those that do not have such a potential, horizontal separation, if it is feasible, prevention from related concessions, conditions related both to the technical and operational capacities and to the reliability and financial capacity, ensuring thus not to be restraint the number of participants in the auction, or that the

execution of the bid specifications not to create incentives in favour of a certain offer– particularly in favour of the operator that already performs the service subject to the concession).

2.3.1 Governmental levels that may allocate concessions

27. The following bodies are entitled as a conceder, on behalf of the State, county, town or village:

1. the ministries or other specialised bodies of central public administration in jurisdiction for goods representing public or private State propriety or activities and public services of national interest;

2. counties or local councils, or public institutions of local interest in jurisdiction for goods representing public or private county, town or village propriety or activities and public services of local interest.

2.3.2 Regulation framework and institutions' position within Romanian Legislation

28. Obviously, the regulation framework and the institutions are regulated by law, the administrative procedures being applications of the norms included in this framework.

2.3.3 Ways of handling litigations

29. In order to handle the potential litigations arisen from the concession contract execution, the parties may provide for a special clause of reaching an agreement, granting the competence of handling the litigations to the commission of experts, on the basis of a contract (in some cases, two levels of experts may be established – the Commission of Experts made up of three foreign natural persons (technical expert, economic regulator and financial analyst) and the technical expert, all presenting view points on the analysed matters sent by the conceder, the concessionaire and the independent authority that oversees the contract execution), and the Romanian or international arbitration courts.

30. Any person, having a legitimate interest related to a certain concession contract that might have suffered or risk to suffer from a prejudice, as a direct consequence of an unlawful act, has the right to use the appealing provided for by law. In case that person suffered from a prejudice, he/her may require through legal actions remedies, within the terms of the administrative contentious law. The legal action is introduced at the section of contentious administrative of the court in which circumscription the headquarters of the respective authority is located. Against the law court decision, one may appeal in front of the section of contentious administrative of the Court of Appeal.

2.4 Competition Rules and institutions that enforce them

31. The general law of competition is applicable in the allocation of the concessions contracts, together with the observance of the principles of free competition, transparency, equal treatment and **confidentiality and the observance of the contract-frame and the regulation framework of the respective public services, that are subject to the concession.**

32. For instance, the local public administration authorities are responsible for the organisation, the regulation, the managing, the administration, the coordination, the monitoring and the control of the functioning of the local administration services. Their strategies will mainly pursue through the creation of a competitive environment that stimulates the private capital, the promotion of the specific mechanisms of a market economy. The concessionaire has the legal obligation to enforce performing management methods that would lead to the reduction of the operating costs, inclusively through the application of

competitive procedures stipulated in the due legal norms for the acquisitions of operations, goods and services.

33. All the Governmental bodies (ministries, regulatory authorities) involved in the field of concessions besides the conceder perform their activity with a view towards promoting economic efficiency and mechanisms for a market economy, creating and ensuring a competitive environment, stimulating the access of the private capital in the scope of the public services and encouraging the forms of delegated administration (one of them being the concession).

34. The relations between the competition authority and the regulating authorities may take the form of cooperating agreements having as purpose the prevention and limitation of distort agreements on these markets, monitoring activities, raising economic agents' awareness regarding the measures in case of infringement of Competition Law, cooperation on competition sensitive issues.

35. Within the process of strengthening the functional market economy, the Competition Council plays an active role in favour of liberalising the markets of public interest services. Therefore it is extremely necessary and useful for all the concerned factors to know the policy and the rules on competition, the legal framework and to promote them in a coherent and consequent way.

36. Therefore, the Competition Council ensures the implementation of Competition Law through the ex-post regulations (having a sanctioning character), while the regulating authorities have as main responsibility the ex-ante implementation of specific economic and technical regulations (related to the certification/authorisation of the operators/grantors/providers of public services, elaboration of the methodology of fixing, adjusting and amending the prices and tariffs for the respective public services, the advice and the control of the tariffs approved according to the normative acts in force, the surveillance of the auction's process in case of the administration delegation for services. Its actions are focused on maintaining and stimulating competition as economic process, rather than on the individual monitoring of competitors.

3. The experience within infrastructure concession

37. Our institution does not hold a data basis at national level, reflecting an overview of the concessions in infrastructure. In this respect, the possibilities of intervention of Competition Council were explained above.

38. In most cases of concessions in infrastructure, financial consulting contracts have not been concluded as a result of both the dimensions of the respective infrastructures and the direct allocation to the companies subordinated to the conceder (reorganisation of the "regies autonomes" - french equivalent for the Romanian expression which designates a form of state owned company – and of those with state capital). Although, there are cases in which financial consultancy takes place on the basis of a contract, the contractual terms (including the price) being in line with the long term efficiency objectives and competition in the respective sector.

39. Most of the concession contracts had been concluded before 2001. However, it is stipulated in the GO no .32/2001 amended and completed, regarding the organisation and functioning of the public services of water supply and sewerage that the concession particularisation should be done through framework regulations specific to the public services of water supply and sewerage, according to the internal legislation and the European Community regulations, this representing a premise to the application of the OECD 's recommendations made by the Counsel for structural separation within the OECD regulated industries (2001). However, the legislation stipulates that either the delimitation of activities having a

competition potential from those without such a potential or horizontal separation for promoting competition is likely.

40. For instance:

1. In the field of local administration, the local public administration authorities may ask for the carrying out of the service to one or more operators to whom they transfer by means of a delegate administration contract (particularly, the concession contract), totally or partially the own tasks and responsibilities related to the service administration and the exploitation, functioning and infrastructure's modernisation of the respective public service.

2. In order to ensure the local public transport, the local councils may use one or more transport operators, authorised under law provisions, to which they transfer by means of an auction the respective concession contract. In case the local public administration authority appointed two or more transport operators, a concession contract would be concluded with each of them for different routes or for the same route, if that route can not be operated by a single operator.

3. In the field of railway transport, the railway infrastructure is state property (public or private) and it was granted in concession to the National Railway Company "CFR" SA, ensuring the administration of the railway infrastructure. In order to carry out new elements of the public railway infrastructure or to develop, up-date and rehabilitate those existing, which financing could not be ensured by CFR, the Ministry of Transports may conclude concession contracts with other legal entities, Romanian or foreign under law observance. Since the approval date of the concession, the contract concluded by the Ministry of Transport with the company CFR is amended accordingly. The railway transport social public service may be chartered by the Ministry of transports, constructions and tourism, on the basis of an auction and under the observance of law provided for the railway operators.

4. In the field of naval transport, the normative acts stipulate that the ministry is the one who establishes the activities that may be operated only by the authorised undertakings as well as the authorisation criteria and the activities that may be performed by the management, directly or through the undertakings and under the control of the respective management.

41. In case of non-observance of the contractual obligations by the concessionaire, the concession contract ceases through one-sided cancellation of the conceder provided that compensation by the concessionaire is granted. For instance, in the field of local administration, it is stipulated that that local public administration authority, signatory of a contract, would organise a new public auction for the delegation of administration (a form of it is the concession) whereas the service operator did not fulfil its contractual obligations related to the service quality and the financial-economic performance during two running years. Also, another explanation for the contract cancellation may be the non-observance of the commitments related to the accomplishment of the investments in the respective infrastructure. The practice proves that the two reasons presented above represent the main grounds leading to the contract cancellation by the conceder.

42. As concerning second and subsequent concessions, we do not have a practice, due to the fact that most concession contracts are in course of execution. However, the law institutes in the field of local transport, a pre-emptive right in the benefit of the transport operator, titular of the concession contract in two cases:

a) if the transport operator, titular of an ended concession contract participates in a new auction regarding the concession of local public transport,
b) in case of the enlargement of the local public transport on new routes after the concluding of the concession contract, the existing transport operator benefits from a pre-emptive right on the occasion of the auction for the concession of new routes.

43. Regarding this right, we would like to underline the following:

- The pre-emption right is lost when more operators are benefiting from the concession contracts having as object the local public transportation.

- In case of extension of the transportation network through augmentation of the traffic on one route, the supplementary traffic will be granted to the owner of the concession contract on the specific route. In case of refusal from the owner, the respective supplementary traffic shall be granted by means of public auction.

- In case of expansion of the local public transportation on new routes, part of a group of routes, those shall be granted to the owner of the concession contract on that specific group. In case the owner refuses or the new routes do not form part of a group of routes, the former shall be subject to concession through public auction.

- The operator or the operators' association fully or majority taking over the local public transportation system, benefit from the preemption right at the concession or renting of the transportation means park and of the corresponding infrastructure, if these support him in the carrying out of the respective service.

44. The concession duration is mainly established depending on the amortisation period of the investments which are to be made by the concessionaire, and cannot extend beyond 49 years. The concession contract can be extended by a period at most equal with half of its initial duration, on the basis of mutual consent. In some sectors, the concession duration is established by the law.

45. The situation within the sanitation field is as follow:

a) for a period of maximum five years - activities of arranging, maintenance and cleaning of the grass plot, as well as public disinfection;
b) for a period of maximum eight years- pre-collection, collection and transport of household waste, as well as the cleaning and watering of the public road routes, clearing of snow and their maintenance on frosty winter time;
c) for a period of maximum 20 years- waste incineration activities and thermo energy production through this procedure, as well as the establishment and management of ecological landfills of waste, selection and waste recycling inclusively.

46. In the field of local transportation, the duration of the concession contract of the public local transport cannot be less than five years.

4. Bibliography (books or research papers) regarding the experience with infrastructure concession

47. We do not have books or papers regarding experience within infrastructure concession.

Chapter II: Role for competition in the allocation of concessions

5. The allocation mechanism for concessions

48. According to the provisions of the law, the allocation of the concession of a good, activity or public service is carried out by means of opened public auction or public auction preceded by pre-selection, through direct negotiations, competitive dialogue or direct allocation.

49. The opened public auction is that when any natural or legal person of private law, Romanian or foreign, may present an offer.

50. The public auction preceded by pre-selection implies that natural or legal persons of public law, Romanian or foreign, which the conceder selects on the basis of previously established criteria, have the right to present offers. Pre-selection requests are assessed and the persons selected by the evaluation commission participate with offers in the auction.

51. In case no winner is named following the second public auction, the conceder shall decide upon initiating a direct negotiation procedure. Following this procedure, the conceder allots the concession to the natural or legal person of private law, Romanian or foreign, at his choice.

52. The conceder has the obligation of publishing in the Romanian Official Journal, Part VI, in a national and a local newspaper, in the Official Journal of the European Communities or/and in a largely spread international journal, the intention of following the direct negotiation or competitive dialogue procedure. The conditions of the direct negotiations concession cannot be inferior to those of the best rejected offer in the public auction.

53. The competitive dialogue is a recently introduced procedure, through the last completion of the concession law, which grants the contracting authority the possibility of initiating candidates consultations, with a view to develop one or more alternatives capable of meeting the contracting authority's requirements and on the basis of which the candidates are invited to bid. At the end of the competitive dialogue, the candidates are invited to submit the final offer on the basis of the solution identified during the dialogue. The transparency and equal treatment principles shall be observed. Prior to the privatisation of national or commercial undertakings, established through the restructuring of the "regies autonomes", these can be subject to concession through direct allocation of goods from the state public or private propriety, corresponding to the field of activity, for the setting up of new public infrastructure. At the privatisation of national or commercial undertakings established through the restructuring of the "regies autonomes", private investors are selected on the basis of a competitive procedure, as defined by the law. Public services operators with state capital can be privatised, this decision being taken by the local or regional council under the authority of which the respective operator carries out his activity. The privatisation, meaning the partial or total sale of private goods from the administrative territorial unity, is carried out through public auction exclusively, simultaneously with its concession.

6. Case study

54. As a practical example, we can present specific case of allocation of a concession in this field. In 2000, an international auction preceded by pre-selection was organised by the local council, according to the law. Prior to the auction, a reorganising, restructuring and privatisation plan of the respective "regie autonome" was elaborated, according to the provisions of EGO no. 30/1997, stipulating that the "regie autonome" was transformed in commercial undertaking (the local council being assisted by a specialised firm), the specifications and the concession contract between the municipality and the newly created commercial undertaking were elaborated, privatisation of the firm through share sale, implementation of the restructuring programme and the transfer to the private investor. A condition for the consultant was the

ensurace of the same consultants' core, led by a director in charge of the whole activity. The selection criterion was established as the minimum tariff of the services and the medium tariff for the offer, as stipulated in the Levels of general services and, as well as of a gradual and limited evolution of the tariff (at that precise moment) in the first years, up to the performance of some of the Levels of services.

55. After the winning of the action and the signing of the concession contract, the local council became shareholder for this firm, the concentration being previously notified. Since pre-selected firms participated in the auction, the process was competitive.

56. By now, the contract has not been re-negotiated. No clues or claims from other participants with regard to the carrying out of the auction, nor to a possible agreement between them (or part of them) to bring advantage to the winner were identified.

7. Investigations regarding allegations of collusive behaviour during auctions

57. By now, no investigations on the existence of supposed agreements between participants at auctions organised in the field of infrastructure concessions have been reported.

8. Joint bidding in auctions for infrastructure concessions

58. Undertakings may temporarily associate in order to participate in the auction. This joint bidding in auction for infrastructure concession has pro-competitive effects for small firms and anti-competitive effects whereas bigger firms are involved. Therefore, if a single firm meets all the requirements of the conceder, the temporary undertakings joint must be forbidden.

9. Clauses related to competition

59. Public administration authorities have the following obligations, with a view to ensure free competition, versus public services operators:

a) to apply an equal treatment to all operators and to ensure, through norms adopted in the execution of the prerogatives established through normative acts, a transparent business environment.
b) to ensure the advertising and free access to public information, mainly to information ensuring the preparation of the offers and participation at the action.
c) Public services operators have, among others, the following obligations:
d) Service management based on competitiveness and economic efficiency criteria (reducing operating costs, by means of implementation of the competition procedures stipulated by the legal acts in force inclusively, for the acquisition of works, goods and services).
e) Submission to the central or local public administration authorities, as well as to the regulating authorities, the requested information and to ensure the access to all necessary information for the assessment and evaluation of services performance, according to the concession contract provisions and the legal provisions in force.
f) Ensuring free access to that service for all consumers, in the same conditions.

10. Regulatory institutions for the concessioned infrastructures

60. All regulating authorities are organised, have functions and operate under the same principles. As an example, the regulatory authority in the field of municipal services, National Regulatory Authority for Municipal Services (hereinafter named NRAMS) is a public institution of national interest with legal

personality and is organised and operates under the coordination of the prime minister, having as main objective the regulating, monitoring and control at central level of the activities in the field of municipal services in its area of regulation, according to the law, and the authorisation of agents providing those services.

61. NRAMS performs its activity in order to ensure the promotion of the economic efficiency and of the market economy's mechanisms, the creation and the maintenance of a competitive environment, incentives for the access of private capital within the scope of public municipal services and the promotion of the delegated management forms and of the public-private partnership.

62. NRAMS is exercising its competences and attributions with all operators providing municipal services, as well as with the operators not subordinated to the local public administration authorities, according to the law, regardless of the propriety type, of their organisation and management of the municipal services.

63. NRAMS supervises the legality of the process delegation (mainly the carrying on of the auction) of the management of municipal services.

64. NRAMS elaborates and controls the implementation and the observance of the system of regulations, al national level, regarding the organising, coordination and functioning of the municipal services, as well as of these services' market in efficiency, free competition and transparency conditions, in view of meeting the consumers' needs, according to the European standards. Thus, NRAMS elaborates and sets for approval, through Government Decision, the Regulation on awarding licenses and authorisations in the municipal services sector and the Methodological norms on the calculation of tariffs applicable to public municipal products and services, approves and adjusts the price level and the tariffs of the municipal services, depending on the inflation, exchange rate, modification of production and distribution costs structure, as well as following the reorganisation of operators, supervises the observance by the public municipal services operators, as well as by the local administration authorities, of the legislation in this field and of the observance of prices and tariffs approved according to the normative acts in force, applies sanctions in case of non-observance of these rules, approves drafts of normative acts initiated by other central administration authorities, with effects on the activities in this field.

Ministry of Transport, Constructions and Tourism is the state authority in railway and naval transport area.

65. As a regulatory authority, it elaborates and promotes governmental decrees and specific provisions regarding the administration, utilisation and concession the railway and naval transport infrastructure and assures the state obligation fulfilment of international agreements to which Romania is a part.

66. The ministry is fulfilling its attributes directly, through special directions or by competence delegation, depending on the case, through public institutions, autonomous state owned company, national companies or firm placed under its authority or subordinated to it.

67. In the case of the railway and naval transport infrastructure, belonging to the public or private state domain, the ministry is awarding concession to the administrations organised as undertakings or national companies.

68. The local authorities (which awarded concessions) can establish non-profit autonomous non-governmental local public institutions, under its authorities, to monitor the fulfilment of the concession contract provisions during the operation of concessions (especially the accomplishment of the services levels to whom the concessionaire was obliged by him self), to perform the technical expertise to resolve the disputes between clients and concessionaire and decide in the matter of penalties.

11. Rules on pricing, coverage and quality standards

69. The basic principles regarding tariff, coverage and quality standards for the services are common to all economic activities sectors. Besides the authorities who award the concession, the law also empowers the sector regulatory authorities. Continuing the example from above, according to the regulations in this sector, the tariffs are established and adjusted only with the approval of NRAMS, based on the rules or formula established by the governmental decision at the initiative of the public authority that award the concession. The tariffs, including amounts designated to social protection granted by public authority who award the concession, must cover at list the expenses linked to the performed service, taxes, including a minimum agreed profit share, with the respect of financial autonomy of the operator. Tariffs adjustments are approved by the local council. In the case of the water and sewerage services, to maintain the concession contractual equilibrium, any subvention of the services will be approved by the local council, only if the operator reduces the tariffs and/or increase the quality of services.

70. The concession's contractual equilibrium is accomplished on the basis of the following principles:

a) periodic actualisation of the tariff correspondent to the public services performed according to inflation ratio;
b) the modification of the tariff in the situations of major contractual equilibrium changing.

71. Only the authorised/licensed operators can participate in the auction, in order to ensure a quality standard of the performed service. If the license or the authorisation expires or is lost, the concession contract will be repealed. If the quality standard of the performed service isn't achieved by the concessionaire, this can lead to penalties or to the redraw of the license/authorisation by the NRAMS, by the authority's request. Service levels are established progressive by the authority which award the concession, and refers to water quality delivered (it must reach the EU standards), improving the distribution, expand the coverage and assuring of a certain level of the water pressure, improving and expanding the sewerage system. The supervision of these service levels is assured continuous by the local council (directly or through an institution created by municipality with this purpose) and by the NRAMS, at the same time.

12. The access for non-integrated rivals to the concessioned infrastructures

72. According to the concession contract, the concessionaire has the right to directly exploit, on his own risk and responsibility, the goods, the activities and public services that are object of the concessions without being able to sub-concession to another person, in whole or in part, the concessioned object and he has the right to conclude contracts with third persons in order to ensure and valorise the exploitation of goods, activities and public services that are object of the concession according to the law, without being able to transfer them the rights acquired through the concession contract. Therefore, the law confers the concessionary an exclusive right to exploit on the whole duration of the contract.

73. Anyhow, in the field of rail infrastructure, the authority which grants the concession (The Romanian National Company CFR SA) offers the railway transport operators the public infrastructure, on non-discriminatory bases, according to the access contract, in exchange for the tariff of using the infrastructure. The establishing of the general framework for tariff and the use of the public railway infrastructure is based on the contract concluded by the national company that manages the infrastructure with the Ministry of Transportation, Constructions and Tourism (MTCT). In case of an un-interoperable railway infrastructure (low profitability railway sectors) the exploitation is also done by CFR by offering for lease, with the approval of the MTCT, of one or more circulation sections to one or more licensed juridical persons, in order to accomplish the services of managing the infrastructure, as well as the services

of public railway transportation of freight and/or passengers, according to the law. The non-price conditions refer to the combined or passenger railway transport development, in high safety conditions, to the maintenance and the repair of railway infrastructure and used rolling stocks as well as to the according of access of other railway operators to the mentioned sectors. Against the decisions of the CFR or if necessary against those of the railway transport operator, one can appeal at the Monitoring Council, within the MTCT.

13. Investigations regarding complaints of abuse of dominance by infrastructure concessionaires

74. We don't open investigations concerning the abuse of a dominant position by the infrastructure concessionaires.

DAF/COMP/GF/WD(2006)6

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2006

ROUNDTABLE ON CONCESSIONS

1. Regulating concession agreements by the Government.

1.1 Legislation on concession agreements

1. Until July 2005 legislation of the Russian Federation had not regulated the process of completing of concession agreements. In accordance with provisions of the Civil Code of the Russian Federation the parties of concession agreement have a full freedom in concession relations on any objects of concession.

2. In July 2005 new Federal Law of 21.07.2005 No 115-FL "On concession agreements" came into force. The aims of the Law are – attracting investments to the Russian economy, providing effective utilisation of the property being in public or municipal ownership on conditions of concession agreements and increase of the quality of goods, works, services granted to the consumers. Law on concessions have thoroughly regulated relations, arising in connection with preparation, completing, implementation and termination of agreements, stipulated guarantees of the rights and legal interests of the parties of a concession agreement.

3. Law on concessions regulates completing of concession agreements regarding determined objects of immovable property. In Russia there is no special law regulating concession agreements in a separate industry.

2. Definition of concession

4. According to concession agreement, one party (concessionaire) takes the commitment to establish or reconstruct at its own expense the immovable property determined by this agreement (object of the concession agreement), the right of property of which will be possessed by the other party (government), to perform the activity with the use (maintenance) of the object of concession agreement, and the government takes the commitment to grant to the concessionaire for the period stipulated by this agreement, the rights of possession and use of the object of concession agreement for performing the indicated activity. Reconstruction of the object of concession agreement includes activities on its rearrangement at the basis of introduction of new technologies, mechanisation and automatisation of the manufacture, modernisation and substitution of obsolete equipment, changing of technological and functional purpose of the object of concession agreement and its separate parts, other activities on enhancing characteristics and operational qualities of the object of concession agreement.

5. Concession agreement is a treaty, which contains elements of different agreements envisaged by federal laws. The rules of civil law on agreements, which elements are contained in concession agreement, are applicable to the relations of the parties of concession agreement in relative proportions if other rules are not applicable under the Federal law or the contents of concession agreement.

3. Parties to concession agreement

6. **Government** – Russian Federation, on behalf of which the Government of the Russian Federation is acting, or the authorised federal executive power body, or the subject of the Russian Federation, on behalf of which the federal executive body of the subject of the Russian Federation is acting, or municipal authority, on behalf of which local government is acting;

7. **Concessionaire** - individual entrepreneur, Russian or foreign legal person or two and more stipulated legal persons acting without establishing of legal person according to the agreement of a simple association.

8. Objects of concession agreement:

- Motorcar roads and engineer constructions of the transport infrastructure as well as bridges, overpasses, tunnels, vehicle parking places, vehicle check-points, points of charging fees from the owners of freight vehicles;
- Objects of railroad transport;
- Objects of pipeline transport;
- Sea and river ports, as well as hydrotechnic port installations, objects of their production and engineer infrastructures;
- Sea and river vessels, ships of mixed navigation (river-sea), as well as ships of ice-breaker building, hydrografic and science-research activity, ferry docks, floating and graving docks;
- Aerodromes or buildings and (or) constructions designed for take-off, landing, taxing operating and parking of aircrafts;
- Objects of production and engineer infrastructures of airports;
- Objects of unified system of organization of air traffic;
- Hydrotechnic constructions;
- Objects on production, transmission and dissemination of electric and heat energy;
- Systems of public utilities infrastructure and other objects of public utility, as well as objects of hydro-, heat-, gas- and electric supply, drainage system, water treatment, processing and utilization of domestic waste, objects designed for lighting of city and countryside territories, objects designed for the accomplishment of territories;
- Underground and other public transport;
- Objects used for executing preventive medical measures, recreation and tourism for citizens;
- Objects of health protection, education, culture and sport and other objects of social-culture and social-domestic purpose.

9. Mandatory conditions of concession agreement:

- Object of concession agreement subject to reconstruction, at the moment of signing the concession agreement should be in the ownership of the government and be free from the rights of third persons;

- Changing of the purpose of reconstructed object of the concession agreement is not allowed;

- Pawning or amortisation of the object of concession agreement from the party of concessionnaire is not allowed;

- Output and revenue, received by the concessionnaire as the result of the activity envisaged by the concession agreement, are the ownership of the concessionnaire, if the concession agreement does not stipulate otherwise;

- Concessionnaire carry the risk of the accident destruction or accident of the object of concession agreement if another is not stipulated by the concession agreement. Concession agreement charge the concessionnaire to insure the object of concession agreement at its own expense;

- The property created or obtained by the concessionnaire when performing the concession agreement and being not the object of concession agreement is the ownership of concessionnaire, if another is not stipulated by the concession agreement;

- Exclusive rights for the results of intellectual activity, obtained by the concessionnaire for its own expense when performing the concession agreement belong to the government, if another is not stipulated by the concession agreement;

- Concessionnaire carry out all expenses for the fulfilment of obligations under concession agreement, if another is not stipulated by the concession agreement;

- The government has a right to take a part of expenses for the establishment and (or) reconstruction of the object of concession agreement and present the guarantees to the concessionnaire;

- Others.

10. Sanctions applied to the infringers of concession agreements:

- The parties of concession agreement carry property responsibility for non-performance or undue performance of its obligations under concession agreement, envisaged under the Law on Concessions, other federal acts and the concession agreement itself.

- The Concessionnaire carry responsibility for the infringement of requirements, stipulated by the concession agreement, and (or) requirements of technical regalement, project documentation, other obligatory requirements to the quality of established and (or) reconstructed object of concession agreement. In case the named requirements are violated, the Government has a right to apply for free of charge elimination of the violation during the period stipulated by the Government.

- If the violation was not eliminated during reasonable period or the violation is substantial, the government has a right to demand the payment of damages (compensation paid).

- The concessionnaire carry responsibility for the quality of the object of concession agreement during 5 years from the date of transferring the object to the government, if any other term is not stipulated by the agreement.

11. Guarantees of the equality of rights of concessionnaires when setting conditions of placing the concessions:

- Equal rights, envisaged by the law of the Russian Federation, legal conditions of work, excluding applying of discriminative and other measures, preventing concessionnaires to freely dispose investments and products and revenues, obtained in the result of the activity under concession agreement are guaranteed to the concessionaires, as well as concessionaires – foreign legal persons.

12. The role of antimonopoly body when choosing conditions of placing the concessions:

- In case the government or tender commission stipulate discriminative conditions to the concessionaires or give advantageous conditions of participation in the tender for separate participants of the tender, antimonopoly body apply sanctions to violators and binds to eliminate infringements.

- In case the concessionaire stipulates discriminative conditions of access to infrastructure objects of the concession agreement for the consumers, antimonopoly body apply sanctions to the concessionaire, binds it to eliminate violations and provide non-discriminative access to the objects.

13. Tender for the right to conclude the concession agreement:

- Tender for the right to conclude concession agreement may be public or indoor (private). Indoor tender is held in case if the concession agreement is concluded relating to the object of the concession agreement, information about which is of state secret.

- When holding the public tender, information about holding the tender is placed at the web-page of the government as well as published in official printed mass media. The Government of the Russian Federation determines the web-page, where the information on holding the public tenders is placed.

- Preliminary selection of participants of the tender is held by tender commission, which considers:

  – conformity of the application for participation in the tender with requirements containing in the tender documentation;

  – conformity of the applicant with the requirements containing in the documentation.

- Tender documentation should not contain requirements to the participants of the tender, which baselessly restricts access of any of participants of the tender to participation in the tender and (or) creating advantageous conditions of participation in the tender to any of the participants of the tender.

- Criteria of the tender may be the following:

  – time constraints for establishing and (or) reconstruction of the object of a concession agreement;

- period from the day of signing of concession agreement till the day when created and (or) reconstructed object of concession agreement will conform the stipulated technical-economic indicators of the concession agreement;

- technical-economic figures of the object of concession agreement;

- volume of manufacturing the goods, doing works, rendering services when performing the activities, envisaged by a concession agreement;

- period from the day of signing of concession agreement to the day when manufacturing the goods, doing works, rendering services when performing the activities, envisaged by a concession agreement will be executed in the scope, stipulated by the concession agreement;

- amount of concession payment;

- marginal prices (tariffs) for manufactured goods, works done, services rendered, additions to such prices (tariffs) when performing the activities, envisaged by a concession agreement;

- Consideration and evaluation of tender offers are performed by the tender commission, which determines the conformity of a tender offer to the tender criteria and makes a comparison of conditions containing in tender offers with the view to define the winner of the tender.

- Participant of the tender, which have presented the best conditions of concession agreement performance in accordance with the criteria of the tender becomes the winner of the tender.

- Tender commission is obliged to publish a message on results of holding the tender indicating the name of the winner in an official edition and place this message at official web-page in Internet during 15 working days from the day of signing of the protocol on results of holding the tender.

- Concession agreement should be signed not later than in 90 working days since signing of the protocol on results of holding the tender. Concession agreement is concluded in writing form and comes into force since the day of its signing.

14. Requirements to the prices and quality of the services, rendered by infrastructure:

- Concession agreement stipulates:

  - Volume of goods manufacture, doing works, rendering services when performing the activities, envisaged by a concession agreement;

  - Period from the day of signing of concession agreement to the day when manufacturing of the goods, doing works, rendering services when performing the activities, envisaged by a concession agreement will be executed in the scope, stipulated by the concession agreement;

- Marginal prices (tariffs) for manufactured goods, works done, services rendered, additions to such prices (tariffs) when performing the activities, envisaged by a concession agreement;

- Marginal prices (tariffs) for electric and heat energy, gas supplied by the infrastructure, are fixed by authorised state executive power bodies.

- Marginal prices (tariffs) for water supplied by the infrastructure are fixed by authorised state executive power bodies.

- Requirements for the quality of electric and heat energy, gas, water is fixed by authorised state executive power bodies.

15. Infringement of pricing and non-pricing conditions of access to the concession infrastructure

- When infringing the rules of pricing for goods, works, and services for which marginal prices (tariffs) are fixed by authorised executive power bodies and authorised institutions of local governing, the named state power bodies and local governing, as well as antimonopoly body apply sanctions and obliges to remove infringements.

- Free access with non-discriminative conditions should be provided to the objects of infrastructure.

16. Cases of investigation of claims regarding abuse of dominant position by concessionaires

None.

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CONTRIBUTION FROM TUNISIA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON CONCESSIONS

1. Introduction

Concessions: a method of managing infrastructure and public services that has been used only recently in Tunisia

A concept introduced in connection with the reforms and liberalisation of the economy as a result of:

- The withdrawal of the State from certain sectors in order to promote competition.
- Problems with the management of State-owned enterprises.
- Pressure on public finances.
- Macro-economic imbalances (dating from the 1980s).

2. Objectives

- To improve the efficiency and competitiveness of the economy.
- To improve the quality of public services.
- To control production costs and operating costs (reduce subsidies and improve productivity).
- To attract foreign direct investment (FDI).
- To acquire modern technologies and management methods.
- To reduce the budget deficit and public debt.
- To develop less costly and easier methods of privatisation (avoid discontent).
- To create a dynamic reference model for competition.

3. The Regulatory framework for concessions

- Is being developed in the wake of privatisation.
- Is governed by the principles of ordinary law and public law.
- Does not include specific regulations for concessions, but comprises.

3.1 Sectoral regulations

- Telecommunications (code).
- Transport (laws, decrees);
- Electricity (laws, decrees).
- Postal services (code).
- Port services and solid waste management.
- A broad variety of regulatory texts, such as laws, decrees, orders, specifications, agreements.

3.2 Requirements that vary depending on the purpose, sector and nature of the concession

- Duration of concession.
- Amount of investment.
- Universal service.
- Fees, rates, prices.
- Job creation.
- Terms of financing.
- Partnership/outsourcing;
- Technical requirements.

3.3 Types of concessions

- Public domain concession: right to occupy and operate public property: motorways, ports, car parks, spas, etc..
- Public service concession: electricity production, mobile telephony, public transport.
- Delegation of public services to public agencies and enterprises:
  - Registration and regulation of motor vehicles.
  - Parking management.
  - Environmental protection.
  - Health care institutions.

- Outsourcing of public services: waste collection, cleaning, catering in hospitals and universities.

3.4 A comprehensive regulatory system is being prepared

- In the light of the experience gained in the field of concessions.
- In the interest of uniformity.
- In response to problems with awarding concessions (criteria).
- Because of confusion regarding public procurement rules.
- In order to ensure transparency and protect managers.

4. Methods of awarding concessions

4.1 Principle

Ensure that concession holders are selected competitively, while taking into account:

- Sectoral specificities.
- The fact that it must be possible, and is sometimes necessary, to renegotiate concessions.
- The need to make individual arrangements if there are no bidders or if competition is impossible.

4.2 Criteria for choosing concession holders

- Technical capacity to honour commitments (references).
- Amount of bid (licensing fee).
- Compliance with tender specifications.
- Possibility of outsourcing.
- Proposed pricing (adjustment formula, level):
  - Establishment of a technical selection commission (IPP) and an oversight commission.
  - Choice submitted to the government for decision.

5 Examples of concessions granted

5.1 Telecommunications

- Enactment of a telecommunications code.
- Granting of a concession to a second mobile telephone operator.

- Creation of a national regulatory authority for telecommunications (INT).
- Creation of a National Frequencies Agency (ANF).
- Granting of a mobile telephone concession through competitive tendering in 2000:
  - Pre-selection procedure.
  - Negotiation with bidders (3 bids).
  - Selection of Orascom (Egypt, 2002).
- Creation of Tunisian by Orascom, 11 May 2002, with share capital of TND 330 m.
- Increase in network capacity and satisfaction of demand (number of mobile telephone subscribers in 1998: 30 598; in 2005: 4 000 000):
  - Lower rates.
  - Diversification and improvement of services.
- Introduction of a dynamic of competition within the sector.
- Important role of the regulatory authority (interconnection, numbering, pricing).
- Foreseeable role of the competition authorities (revision of the Act on Competition and Prices in July 2005 to specify methods of co-ordination with the regulatory authorities in order to resolve problems of competition in the sectors concerned).

5.2 Electricity and gas sector

- Monopoly by a State-owned enterprise (STEG).
- In 1996, a law was passed authorising the granting of concessions for electricity production by private entities.
- Selection of concession holders made through consultation after a pre-qualification phase.
- Tender requirements are set by a Higher Commission for Electricity Production chaired by the Prime Minister. This same commission chooses the winning bidder on the proposal of the Inter-departmental Electricity Commission.
- The Ministry of Industry and Energy is responsible for concluding the contract after negotiations with the concession holder.
- Two private foreign companies have already been granted concessions and are now producing over 24% of the country's electricity needs.
- Investment of $290 m ($210 m for the Rades II power plant with a 470 MW capacity and $23 m for the Zarzis power plant with a 27 MW capacity).

- Transmission and distribution remain a monopoly of STEG.

- No regulatory authority; conflicts submitted to the Ministry and/or government.

5.3 Other successful concessions

- Construction and management of motorways.

- Public transport in major cities.

- Construction and management of a new airport in Enfidha (under construction).

6. The role of the competition authorities

6.1 When concessions are awarded

The competition authority gives its opinion on proposed sectoral legislation and regulations and advises operators regarding the rules and principles of competition, and it makes spot checks of compliance with these rules and principles.

The opinions and advice of the competition authority frequently concern the following:

- The need to ensure that transactions are transparent and fair.

- The promotion of competition and greater awareness of how it can benefit all concerned and protect their respective interests.

- Means of reducing barriers and requirements so that they do not cause prices to rise or deter bidders.

- Ways of preventing rent-seeking in the future.

6.2 Ensuring competition during the concession

- Concessions are subject to competition regulations (Section 5 of Act 64-91 on Competition and Prices).

- Abuse of dominant position, abuse of economic dependence and discriminatory practices are prohibited.

- Concession holders and users (consumers) can bring cases involving anticompetitive or restrictive practices before the Ministry of Commerce (DGCEE) or the Competition Council.

- The regulatory authority and the responsible ministry monitor the parties' compliance with rules and requirements so as to ensure a competitive and transparent environment, which is a prerequisite for granting a concession.

- The competition authority can intervene on its own initiative at any time (in response to information received, an investigation, etc.).

7. Conclusion

Limitations of the concession approach:

- Risk of rent-seeking after the concession has been obtained:
  - Increase in rates.
  - Ways of operating that are not always compatible with competition.
- Possible abuse by the government or historic operator when there is no independent regulator.
- Limited development because of a situation of economic dependence or the size of the market.
- Risk of influence-peddling and favouritism.
- Risk of deterioration in the quality of public service when there is no monitoring of compliance with commitments or there are no regulatory authorities.

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CONTRIBUTION DE LA TUNISIE

Organisation for Economic Co-operation and Development 2006
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TABLE RONDE SUR LES CONCESSIONS

1. Introduction

Les concessions, mode de gestion des infrastructures et des services publics sont d'utilisation récente en Tunisie.

Concept introduit dans le cadre des réformes et de la libéralisation de l'économie suite :

- Au désengagement de l'Etat de certains secteurs en vue de promouvoir la concurrence.
- Aux problèmes de gestion des entreprises publiques.
- A la pression sur les finances publiques.
- Aux déséquilibres macro-économiques (des années 80).

2. Objectifs recherchés

- Améliorer l'efficacité et la compétitivité de l'économie.
- Améliorer la qualité des services publics.
- Maîtriser les coûts de production et les frais de fonctionnement (réduire les subventions et améliorer la productivité).
- Attirer les investissements directs étrangers (IDE).
- Acquérir les technologies et les modes de gestion modernes.
- Alléger le déficit budgétaire et l'endettement public.
- Modalités de privatisation moins coûteuse et plus facile (éviter les mécontentements).

3. Cadre réglementaire de la concession

- S'inscrit dans le sillage de la privatisation.
- Régie par les principes de droit commun et de droit public.
- Absence d'une réglementation spécifique de la concession, mais :

3.1 Existence des réglementations sectorielles

- Télécommunication (code).

- Transport (lois, décret).
- Electricité (lois, décrets).
- Poste (code).
- Services portuaires et gestion des déchets solides.
- Textes très variés : Lois, décrets, arrêtés, cahiers de charges, conventions.

3.2 Obligations variables selon l'objet, les secteurs et la nature de la concession

- Durée de la concession.
- Montant de l'investissement.
- Service universel.
- Redevances, tarifs, prix.
- Création d'emploi.
- Modalités de financement.
- Partenariat / sous-traitance.
- Prescriptions techniques.

3.3 Les formes de concessions

- Concession de domaine public : droit d'occuper et d'exploiter le domaine public : autoroutes, ports, parkings, stations thermales…
- Concession de services publics : production d'électricité, téléphone mobile, transport public.
- Délégation de services publics à des agences ou entreprises publiques :
  - Immatriculation et gestion du parc automobile.
  - Gestion de stationnement des voitures.
  - Protection de l'environnement.
  - Etablissements de santé.
  - Sous traitance de services publics : collecte de déchets, nettoyage, restauration dans les hôpitaux et les universités.

3.4 Une réglementation d'ensemble est en cours de préparation

- A la lumière de l'expérience dans le domaine des concessions.

- Dans un souci d'uniformisation.
- Suite aux problèmes d'attribution (critères).
- Confusion avec les règles des marchés publics.
- Garantir la transparence et protéger les gestionnaires.

4. Modes d'attribution

4.1 Principe

Faire jouer la concurrence pour le choix du concessionnaire toutefois :

- Spécificités sectorielles.
- Renégociation possible parfois obligatoire.
- Gré à gré en cas d'absence de candidat, ou de concurrence.

4.2 Critères et choix de concessionnaire :

- Capacité technique d'honorer les engagements (références).
- Offre financière (redevance).
- Conformité aux cahiers des charges.
- Possibilité de sous-traitance.
- Offre de prix (formule de révision, niveau) :
  - Constitution d'une commission technique de sélection (IPP) et commission supérieure.
  - Attribution soumise au gouvernement pour décision.

5. Exemples des concessions accordées

5.1 Télécommunications

- Promulgation d'un code des télécommunications.
- Octroi d'une concession à un deuxième opérateur de téléphone mobile.
- Création de l'autorité nationale de régulation des télécommunications (INT).
- Création de l'agence nationale des fréquences (ANF).
- Octroi d'une concession de téléphone mobile par appel à la concurrence en 2000 :
  - Procédure de présélection

- Négociation avec les soumissionnaires (3 offres).
- Choix porté sur Orascom (Egypte en 2002)

- Création de Tunisian par Orascom, le 11 mai 2002 avec un capital de 330 MD.
- Augmentation de la capacité du réseau et satisfaction de la demande (nombre d'abonnées de la téléphonie mobile en 1998 : 30.598, en 2005 : 4.000.000) :
  - Baisse des tarifs.
  - Diversification et amélioration des services.
- Introduction d'une dynamique de concurrence dans le secteur.
- Rôle important de l'autorité de régulation (interconnexion, numérotation, tarification).
- Rôle prévisible des autorités de la concurrence (révision de la loi sur la concurrence et les prix en juillet 2005 pour prévoir les modalités de coordination avec les autorités de régulation pour résoudre les problèmes de concurrence dans les secteurs concernés).

5.2 Secteur d'électricité et du gaz

- Monopole d'une entreprise publique (STEG).
- En 1996, une loi a été promulguée autorisant l'octroi de concession pour la production de l'électricité par les personnes privées.
- Choix des concessionnaires effectué par consultation précédé d'une phase de pré-qualification.
- Conditions d'appel d'offres fixées par une commission supérieure de production d'électricité présidée par le Premier Ministre. Cette même commission choisit l'adjudicataire sur proposition d'une commission interdépartementale d'électricité.
- Le Ministère de l'Industrie et de l'Énergie est chargé de la conclusion du contrat après négociations avec le concessionnaire.
- Déjà deux sociétés privées étrangères ont bénéficié de concession, elles produisent plus que 24% des besoins du pays en électricité.
- Investissement réalisé de 290M$ (210 M$ pour la centrale de Radés II d'une capacité de 470 MW et 23 M$ pour la centrale de Zarzis d'une capacité de 27 MW)
- Transport et distribution demeurent monopole de la STEG.
- Pas d'autorité de régulation, conflit soumis au Ministère et/ou gouvernement.

5.3 Autres concessions réussies

- Constructions et gestion des autoroutes.

- Transport en commun dans les grandes villes.

- Construction et gestion d'un nouveau aéroport à Enfidha (en cours).

6. Rôle des autorités de concurrence

6.1 En cours d'attribution

L'autorité de la concurrence donne son avis sur les projets de législation ou des réglementations sectorielles et fait des observations pour rappeler les opérateurs concernés les règles et principes de la concurrence, elle procède à des contrôles pour vérifier le respect de ces règles et principes de la concurrence.

Les avis et observations de l'autorité de la concurrence concernent souvent :

- Le respect de la transparence et la loyauté des transactions.

- Incitation à la promotion de la concurrence et sensibilisation aux avantages qu'elle procure aux différents intervenants et à la sauvegarde de leurs intérêts respectifs.

- Allégement des obstacles et des obligations de manière à ne pas entraîner une augmentation des prix ou écarter des soumissionnaires.

- Eviter des situations de rente dans le futur.

6.2 Garantir la concurrence pendant la concession

- Les concessions sont soumises à la réglementation de la concurrence (article 5 de la loi 64-91 relative à la concurrence et aux prix) ;

- L'abus de position dominante, de dépendance économique et les pratiques discriminatoires sont interdites.

- Les concessionnaires et les usagers (les consommateurs) peuvent saisir le ministère du commerce (DGCEE) ou le conseil de la concurrence des cas de pratiques anticoncurrentielles ou de pratiques restrictives.

- L'autorité de régulation ainsi que le ministère de tutelle veillent au respect des règles et obligations des parties pour garantir un environnement concurrentiel et transparent, condition préalable de l'octroi de concession.

- L'autorité de concurrence a toujours la possibilité d'intervenir par sa propre initiative (suite information reçue , enquête…).

7. Conclusion

Limites de la formule de concession :

- Risque de situation de rente après l'obtention de la concession.

  - Augmentation des tarifs.

  - Formes d'exploitation non sanctionnées toujours par la concurrence.

- Abus possible de l'administration ou de l'opérateur historique en cas d'absence de régulateur indépendant.

- Limite de développement dû à la situation de dépendance économique ou à la dimension du marché.

- Risque de pouvoir d'influence et de favoritisme.

- Risque de détérioration de la qualité de service public en cas d'absence de contrôle du respect des engagements et de l'absence des autorités de régulation.

DAF/COMP/GF/WD(2006)32

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CONTRIBUTION FROM TURKEY

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON CONCESSIONS

1. İzmir, Mersin, İskenderun, Derince, Bandırma and Samsun ports[1] operated by TCDD (The State Railway Company, General Directorate of the State Railway Administration of Turkey) have been included in the privatisation programme by the Privatisation High Council (PHC)[2] in 2004. Their privileged geographical location, their connection to highways and railways unlike other ports, the size of investments they have concerning infrastructure and superstructure and largeness of their back spaces bring these ports to a position that has de facto concession. Moreover, Mersin, İskenderun and Bandırma ports have legal concessions to offer pilotage and towage to neighbouring ports. Privatisation in Turkey with respect to ports is a partial privatisation (landlord port model) in the sense that at the end of the bidding process a contract to transfer the right to operate the port is signed and this contract is a concession contract whereby the government transfers operating rights to private parties while keeping the ownership of the assets including the land.

2. The basic targets in privatisation of ports via contracts to transfer the right to operate the ports are that the projects including necessary investments could not be realised due to various reasons such as absence of bidders in tenders for projects regarding specific ports, delays in tenders, court decisions etc, that the ports became far from being functional in the face of increasing volume of trade due to deficiencies[3] in the management of TCDD. Therefore, privatisation has been seen as an opportunity to realise necessary investments. For instance, the contract to transfer the right to operate Mersin port requires the operator to realise compulsory investments within the first five years. As a result, the main objectives regarding privatisation of ports are to realise the investments, bring efficiency and provide rapid high quality service.

3. With respect to supervision, TCDD tries to carry out all operational activities and managerial transactions and it is known that they can not be done in an efficient manner.[4] It is not realistic to expect a single unit to assume performance of various and different duties. There is not a central body to provide supervision and regulation of ports or a port authority to oversee public benefits specifically for ports. General Directorate for Construction of Railways, Ports and Airports under Ministry of Transport (DLHİ), Ministry of Transport, State Planning Organisation and Ministry of Finance have powers regarding investments, Undersecretariat for Maritime Affairs regarding maritime services, Ministry of Public Works and Settlement and municipalities regarding development of ports. For instance, with respect to İzmir port, infrastructure is carried out by DLHİ, superstructure and tariff setting by TCDD, pilotage and towage services by Turkish Maritime Organisation Inc (TDİ), services for ship and freight by Directorate of Port within TCDD. Tariff settings, services for ships and freight that can be subject to competition are performed by TCDD and Directorate of Port within TCDD.

4. With respect to privatisations, the Competition Board, the decision taking body of the Turkish Competition Authority (TCA), has a dual function that can be summarised by citing Articles 3 and 6 Communiqué Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorization Made to the Competition Authority in order to Acquisitions via Privatization to Judicially be Valid Communiqué No: 1998/4 (the Communiqué).

5. Article 3 provides that “For procedures of acquisition via privatization under the scope of this Communiqué, in the case where the market share of the undertaking to be privatized or the unit aiming at producing goods and services at the relevant market exceed 20% or where the turnover of the same undertaking or unit exceed 20 trillion Turkish Liras or even though the aforesaid limits are not exceeded, but where the undertaking to be privatized does have judicial or de facto privileges, it is necessary to make

a pre-notification to the Competition Authority before tender conditions are announced to the public **in order to evaluate the results of such privatization in the relevant market, the condition of judicial or de facto privileges –if any- of the undertaking to be privatized after privatization** and it is necessary to take the view of the Competition Board which shall be taken as the basis in the preparation of tender conditions document."

6. Article 6 provides that "Application for Authorization to the Competition Authority shall be after the tender procedure is finalized and but before the decision of Privatization High Council, regarding the final acquisition procedures of the undertaking or the unit (aiming at the production of goods and services) to be privatized, in the form of independent files for each bidder taking part in draft resolution of the Privatization High Council submitted by Privatization Administration to Privatization High Council. To such an extend that, in case the number of bidders in draft resolution is more than three, authorization application for other bidders cannot be made before Competition Board Resolutions regarding the first three bidders' acquisition procedures are not notified to Privatization Administration."

7. For the sake of convenience, pre-notification stage can be called as Phase I, whereas second stage as regulated in Article 6 may be named Phase II.

1. Phase I

8. It is compulsory to mention following explanations to explain the position of the Competition Board in the privatisation of the ports.

9. While operated by TCDD, the ports are structured as state service port or tool port. They will become landlord ports after transfer of the right to operate. TCDD performs its transactions without the need for any regulations due to its monopoly right under current structure and in previous periods competition infringements are known issues due to the operation of private undertakings in handling in port quays and absence of supervision in TCDD contracts for the purchase of service the subject of which is only to carry out the service for the purpose of carrying freight inside the port (limbo). In the next step to liberalise the mentioned service, that is the landlord model, the state transfers all commercial activities to private undertakings with the exception of ownership. The need for necessity of regulation will be more obvious at this stage.

10. In the absence of a port authority responsible for supervision and regulation of port services after privatisation the responsibilities and powers of which are defined and officials of which are determined, establishing intra-port competition via dividing on the basis of terminal becomes a necessity because inter-port competition is absent due to absence of short and medium term alternatives for some ports in geographic regions that these ports are located, whereas there is no need for any structural regulations for some other ports after taking into account the geographical market conditions (inter-port competition, existence of alternative supply resources, regional investments towards ports that can be realised by private sector initiative).

11. Having taken into account these explanations regarding Phase I for privatisation of ports operated by TCDD as a monopoly, the Competition Board formed its opinion regarding İzmir, Mersin, İskenderun, Samsun, İzmit Derince and Bandırma ports and sent it to Privatisation Administration. The Opinion can be summarised as follows.

1.1 Concerning the privatisation of İzmir port

- With the aim to avoid creation of dominant position after privatisation in the field of provision of container handling service in the port, to assist in formation of prices of

services in market conditions with competition it will create and to provide efficiency of services; the area used for container handling and the back space should be privatised by splitting them into two in a form that the area consisting of three quays and 10 terminals (4-3-3) should not violate the totality of the other two quays and that two separate undertakings would be enabled to provide services through offering one quay to operation by a separate undertaking.

- There is no disadvantage in offering the operation of the quay reserved for handling conventional cargo and its back space with the quay for passenger ship and its facilities to the same undertaking and/or association of undertakings and therefore the quays, back space and facilities under consideration can be privatised together.

1.2 Concerning the privatisation of Mersin port

- To ensure that the quays reserved for container handling and their back spaces are not within the control of a single undertaking; quays numbered 7-8-9-10-11 with quays numbered 12-13 should be privatised as a package with their back spaces in a way that totality of the container quays are not violated; and quays numbered 20-21 and their back spaces with the quay adjacent to the area used by Coast Guard concreting and dredging of which have been completed should be privatised as a separate package to put them under operation of two different undertakings and/or association of undertakings.

- There is no disadvantage in offering the operation of the quays reserved for handling conventional cargo and their back spaces with the quay for passenger ships and its related facilities to the same undertaking and/or association of undertakings and therefore they can be privatised together.

1.3 Concerning the privatisation of İzmir and Mersin ports

- In the privatisation of container handling areas in İzmir and Mersin ports, because if the right to operate container quays is acquired by the same undertaking (or by the undertaking that is within the same economic group) and/or associations of undertakings, a dominant position would have been created in favour of the mentioned undertaking and/or association of undertakings in the market of Republic of Turkey, İzmir and Mersin ports should not be given under the operation of an undertaking in the same economic group and/or associations of undertakings.

- However, regarding the sections for container handling to be formed by dividing İzmir port into sections, there is no disadvantage in

  - acquisition of the rights to operate the quays terminal number of which is relatively little among container handling sections already set up in Mersin port by the undertaking and/or associations of undertakings who acquired the rights to operate the quays terminal number of which is relatively more among sections to be formed for container handling in İzmir port

  - acquisition of the rights to operate the quays terminal number of which is relatively more among container handling sections already set up in Mersin port by the undertaking and/or association of undertakings who acquired the rights to operate the quays terminal number of which is relatively little in sections to be formed for container handling İzmir port

- acquisition of the rights to operate quays in both ports terminal number of which is relatively little by the undertaking that is within the same economic group and/or association of undertakings

- In case there are shipping agencies and/or liners and those that are in the same economic group with them among each of undertaking and/or associations of undertakings that will acquire the right of operation of the quays terminal number of which is relatively more in container handling units set up in İzmir and Mersin ports, the undertakings of the mentioned nature should not either alone or together have the instruments that provide direct or indirect control of undertaking/associations of undertakings that will acquire the rights to operate.

1.4 Concerning the privatisation of İskenderun, Bandırma and Derince port

12. There was nothing to mention at the stage of pre-notification according to Article 3 of the Communiqué No: 1998/4.

1.5 Concerning the privatisation of İskenderun and Mersin ports

13. There is no disadvantage in acquisition of the right to operate İskenderun port by undertaking and/or associations of undertakings that will acquire the right to operate anyone of the container handling units divided into sections in Mersin port.

1.6 Concerning the privatisation of Samsun port

- To avoid a vertical integration that has the potential to prevent competition;

  - the right to operate Samsun port should not be transferred to

  - undertaking and/or associations of undertakings that deal in ro-ro liner any consortium in which undertaking and/or association of undertakings that deal in ro-ro liner have instruments that directly or indirectly provide the right to control.

2. Phase II

14. Phase II has been complete only for Mersin and İskenderun ports. Before granting the decision of the Board in Phase II regarding Mersin and İskenderun ports, following explanations should be given.

15. Regarding transfer of the right to operate Mersin and İskenderun ports, the contract for the transfer provides that price tariffs should be those currently applied by TCDD till the end of the next three years beginning from the date of signature of the contract. Other matters should be under the control of the prospective port operator. However, after three years, due to absence of port authorities in Turkey to supervise port services and pricing, there are concerns that conduct that may be subject of Article 4 regarding agreements, concerted practices and decisions limiting competition and Article 6 concerning abuse of dominant position of the Law on the Protection of Competition No 4054 (Competition Law/Law No 4054) may occur. Therefore, there are fears that the parameters which are main subjects to competition will not totally be determined under free market conditions after privatisation.

16. In the contract to transfer the right to operate Mersin port following privatisation, there is a provision aiming to prevent abuse of dominant position (prohibition of discrimination, excessive price and limitation of supply) that is very important both for undertakings operating in the relevant and neighbouring markets and for the security of the sectors benefiting from externality of port services. The

authority mainly responsible to supervise the provision is TCDD. However, the problem is that the boundaries of the powers assigned to TCDD via such contracts are not clear. For instance, it is emphasised that the level of TCDD official to conduct the examinations regarding subjects that TCDD are responsible for, their powers to intervene immediately against the prospective operator of the port and to stop the act or acts contrary to the Law (for instance violation of non-discrimination obligations by port operator through favouring some groups for approaching the quay without following the ship waiting order) should be clarified.[5] Moreover, that the section to be allocated to the officials and the administrative costs are being provided by the port operator does not seem to be measures to remove the concerns regarding the existence of the state in the ports for the purpose of supervision. Although Law No 4054 can be seen as a precaution against such conduct, the market is dynamic and requires immediate intervention against anti-competitive conduct that can not be satisfied by long periods for finalisation of administrative transactions in the Law No 4054. Therefore, unambiguous ex-ante determinations may be more meaningful than ex-post interventions.

17. With these explanations in mind, when successful bidders were sent to the Competition Board, it ruled that anyone of the successful bidders could acquire the right to operate Mersin port for 36 years and as a result the bidder, PSA-AKFEN Joint Venture, who offered the highest bid, would acquire that right after the transaction is realised. The Competition Board, in contrast to its Opinion requiring privatisation disallowing a single undertaking to obtain the right to operate Mersin port, allowed acquisition of the right by PSA-AKFEN Joint Venture. The permission was granted by the Competition Board because of the existence of provisions in the contract for transfer of the right to operate Mersin port including compulsory investments within the first 5 years that will increase container handling performance 2.25-3.2 times, performance criteria to be satisfied while compulsory investments are done in order to avoid failure in services given in the port, provisions prohibiting abusive practices such as discrimination, excessive prices and limitation of supply, reporting of port activities annually by separation of costs, responsibility given mainly to TCDD to oversee compliance with these obligations which gives the impression that a structure similar to a port authority is tried to be set up. Moreover, the contract includes provisions regarding quality of the service, its duration, criteria to assess the efficiency, and minimum amount of handling that will be controlled by TCDD and other governmental bodies.[6] The Competition Board was convinced that these provisions in the contract would substitute the expected benefits of establishing intra-port competition as foreseen in its Opinion in Phase I. Actually the Opinion of the Competition Board in Phase I favouring creation of intra-port competition was due to the initial strict attitude of the Privatisation Administration that no regulatory arrangements could be done in ports.

18. However, when PSA-AKFEN Joint Venture submitted the highest bid for the right to operate İskenderun port, the Competition Board has decided that transfer of the right to operate İskenderun port which is within the same geographic market and shared back spaces with Mersin port should not be permitted because it would strengthen PSA-AKFEN Joint Venture's dominant position if it would acquire Mersin port. The basic concern of the Competition Board which also constitutes the reasoning of its decision is to create inter-port competition after privatisation of Mersin port in favour of a single undertaking due to its medium-scale and other reasons. Tender procedure for İzmir, Derince, Bandırma and Samsun ports has not been finalised yet.

19. Generally, the Competition Board, to form its Opinion in Phase I, benefited from some works such as World Bank Port Reform Tool Kit of 2001 and UNCTAD's Anlayses of Port Privatisations published in various dates, 8th Five-Year Development Plan by State Planning Organisation. The Competition Board, in the absence of a Port Authority to ensure supervision and regulation after privatisation era, aimed to bring some structural measures such as operation of some ports by at least two separate undertakings (to ensure intra-port competition) where there is no prospect for inter-port competition and prevention of vertical integration that has the potential to prevent competition, to be taken into account before the tenders to ensure a certain level of competition. In Phase II, the Competition Board

takes into account the behavioural measures provided in the contract to transfer the right to operate Mersin port and the role of TCDD in overseeing that the behavioural measures are obeyed and deems them sufficient enough to avoid competition concerns that it raised in its Opinion in which it has proposed privatisation of quays separately to enable intra-port competition. Moreover, the Competition Board, regarding İskenderun port, aims to avoid acquisition of it by the same JV who will acquire the right to operate Mersin port in order to ensure inter-port competition between these two ports that are located in the same geographic region. Therefore, it can be said that the Competition Board takes into account both behavioural and structural measures in both phases and tries to ensure competition by taking into account the effects of both measures before forming its Opinion or final decision.

NOTES

1. Haydarpaşa is another port operated by TCDD and it will be closed and therefore it is excluded from the privatisation coverage.

2. The decisions of Privatisation High Council are executed by Privatisation Administration.

3. Due to deficiencies in TCDD management, congestion has been experienced in İzmir port which complicated the realisation of port operations. As a result of congestion, congestion premium began to be implemented for shipments to Northern Europe, Ireland, Scandinavia and England that was expanded to America with increase in freight. It was suggested by International Freight Forwarders Association of Turkey that the congestion premium would create an additional €38 million cost for Turkish import and export if the congestion would continue in İzmir port. Although these problems are partially caused by lack of investments, the functionality of the port decreases day by day due to inefficient management of TCDD and absence of necessary computer systems and computer programs.

4. Port activities can be examined under two headings that are public and commercial and subtitles cover ownership (administration of immovable properties within the port, development in the long term, maintenance etc.), planning (preparing master plan and improving the initial project, expansion, new projects/terminals etc.), marketing and promotion (commercial duties, attracting new customers to the port etc.), provision of freight handling service (storage, distribution etc.), provision of ancillary services (fuel supply, information system, insurance, banking etc.), regulatory activities (regulations and their implementation, monitoring compliance with regulations, security, environment, safety etc.), supply of maritime services (duties of harbour master, coordination of maritime services etc.).

5. It is expected that such ambiguities will be clarified for prospective privatisations in the short term.

6. Contract may be terminated in case the port operations are not carried out wholly or significantly, port services do not satisfy the service quality. To ensure efficiency of the port after compulsory investments are made, the average length of time of service to ships should not fall below the average length of time in 10 Mediterranean ports with highest traffic.

DAF/COMP/GF/WD(2006)14

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2006

ROUNDTABLE ON CONCESSIONS

1. Take-off and landing slots at congested airports are a scarce resource that can be allocated by government authorities as a type of concession. The U.S. antitrust agencies have consistently supported the goal of finding an effective and comprehensive method of handling the allocation of slots that both addresses the problem of airport congestion and encourages competition at congested airports. This paper is derived from comments filed in May 2005 by the Department of Justice (DOJ) in proceedings concerning slot allocation at Chicago's O'Hare Airport.

2. Slots, or rights to take-off or land at a particular time, were first used in the U.S. in 1969 and until recently were imposed to allocate capacity at four major airports: New York's LaGuardia, New York's Kennedy, Chicago's O'Hare, and Washington's Reagan National. Slots have always been apportioned administratively by the Federal Aviation Administration (FAA), largely to incumbent carriers based on existing service. The airlines with service at O'Hare in 1969 still have most of the slots at that airport. In 1985, the FAA created a buy/sell market for slots, which was expected to lead to a more efficient allocation of these scarce resources. Instead, the FAA found that it was rare for more than a few slots to be available in the secondary market at any given time. Only when an existing carrier exited the airport, as when Eastern and TWA went out of business, were large groups of slots available for sale. Due to the sporadic availability of slots, entrants (or incumbents seeking to expand service) often found it difficult to acquire sufficient slots to establish a viable service pattern in a city pair.

3. On two occasions, the FAA and Congress responded to this difficulty by relaxing the slot constraints at various airports. Both experiments failed, however, because they were unaccompanied by any mechanism, other than costly congestion, for limiting service to the airport. In 2000, Congress lifted slot controls at LaGuardia for smaller regional jets. The resulting rush of new flights led to major congestion problems at LaGuardia until the FAA restored administrative controls to limit arrivals and departures. At O'Hare, Congress mandated the lifting of all slot restrictions in July 2002. In response the two hub carriers American Airlines and United Airlines, promptly over-scheduled the airport.

4. Some of the congestion at O'Hare stems from the airlines' move to regional jets, which may inefficiently use O'Hare's limited capacity. An examination of data from a representative day in December 2004 shows that regional jets accounted for 44% of operations, but only 24% of seating capacity. This disparity between operations and seating capacity arises because regional jet operations at O'Hare average only 56 seats, compared to 140 seats on the average domestic jet flight. Regional jets do allow efficient service on feeder routes at hub airports, and to smaller communities that might not have enough traffic to justify larger jets. With the current system of airport pricing, however, congestion costs are not factored into the service decisions of airlines. There is no price signal to the airlines that would encourage them to balance the value of regional feeder service in small aircraft against the costs created by congestion. Instead, congestion at the airport creates a classic externality where the costs of delay are imposed on all users of the airport.

5. Faced with the problem of congestion at O'Hare, the FAA responded by convincing United and American to roll back some of their flights voluntarily in 2004. This scheduling reduction, however, was offset by the addition of flights by other carriers at the airport, leading to no net reduction in congestion. The FAA called a "delay reduction meeting" of all carriers serving O'Hare in the summer of 2004. The meeting resulted in an order, effective November 1, 2004, that limited arrivals to 88 per hour during peak hours, and that effectively prohibited entry at O'Hare without FAA permission.

6. The slot buy/sell market did not result in an efficient allocation of slots at O'Hare. No matter how slots are distributed (including a government giveaway to market incumbents), as long as a secondary market exists and transaction costs are low, slots should be bought and sold until each finds its highest valued use.[1] In practice, however, the slot market previously attempted at O'Hare and LaGuardia did not result in an efficient allocation among incumbents, nor did it facilitate competitive entry in the constrained airports.[2] The secondary market never became sufficiently liquid to achieve these results, for several reasons.

1. Transparency

7. Transparency in the market for slots is one reason the secondary market never became sufficiently liquid. Transparency means that the identity of buyers and sellers is widely known. Transparency in the secondary slot market permits strategic purchases by incumbents to prevent new entry. An incumbent carrier probably would never knowingly sell to an entrant that was likely to compete against it, given that such a sale would likely decrease the slot holder's profitability. More importantly, a potential entrant would have equal difficulty buying from other slot holders. Such slot holders, if approached by the potential entrant, would have every incentive at that point to seek out the threatened incumbent and solicit a better offer. Because the rents from limiting competition almost always exceed the more competitive rents an entrant would earn, the threatened incumbent should be willing to outbid the entrant, even if it would use the slots in an economically less efficient manner. Strategically purchasing available slots can be an effective entry deterrent, especially since multiple slot holdings required for significant entry rarely come up for sale.

8. Similarly, slot leases are transparent because the leasing process necessarily involves the identity of lessons and potential lessees being disclosed, and thus have the same problems associated with a transparent buy/sell rule. Although slot leasing is fairly common, the leases come with provisions that allow the lease holder to terminate the lease on relatively short notice. Leasing is therefore a substantially more risky and thus inferior means of entering a market. A new entrant understandably may be reluctant to incur the cost of beginning new service to Chicago if its lease could be pulled at any moment by an incumbent.

2. Market Power

9. Another reason the secondary slot market never became sufficiently liquid is that the FAA's initial allocation of slots at O'Hare gave the bulk of all slots to two carriers, American and United. This allocation gave those carriers much larger market shares in slots than any other carrier could obtain, and effectively limited the amount of competition other carriers could offer to O'Hare on at least some routes. Both of these carriers developed hubbing operations out of Chicago O'Hare, and any slot they sold would have almost certainly been used to compete with them on some route. Therefore, neither American nor United were willing to sell slots to potential competitors, making the bulk of O'Hare slots unavailable to others.

3. Uncertainty of Duration and Value

10. Another obstacle to creating a liquid market in slots is the repeated use of temporary administrative allocation mechanisms that do not create long-term property rights. Under each of the FAA's administrative allocation systems, the award of a slot has been a temporary right, exercisable only until the system changes again. That right has become quasi-permanent in practice, but anyone interested in buying a slot takes the risk that the system may change in a way that reduces the expected value of the property conveyed. The uncertainty about the time period over which the right can be exercised, therefore, makes it difficult for buyers and sellers with different views about the likely duration of that time period to

agree on price. In addition, by periodically giving away slots, Congress and the FAA have contributed to the uncertainty about slot value. The result is that fewer slot transactions occur, and the market is less liquid than it would be absent the uncertainty.[3]

11. The best solution to airport congestion problems is to implement market-based solutions. To a great extent, the problems described above are inherent in any administrative allocation of slots, and can be fixed only by a more comprehensive market-based approach. Any design for a market-based system should keep two objectives in mind. First, the system must establish a price-setting mechanism that reflects both supply of and demand for scarce airport resources. This price should replace existing regulatory fee structures which encourage carriers to use scarce airport capacity inefficiently by scheduling too many smaller planes. Second, the system should promote competition by enabling scarce capacity to be more easily transferred among carriers, and by preventing capacity from being locked up in ways that allow the exercise of market power. There must be a sufficiently liquid market in slots to permit new carriers to enter an airport rapidly and on a large enough scale to efficiently serve routes in competition with large incumbents.

12. There are two possible market-based approaches for allocating scarce airport capacity: congestion pricing and auctions. Both have the potential to be far superior to an administrative system. Each approach has strengths and weaknesses, as outlined below; the optimal choice will depend on particular market conditions.

3.1 Congestion Pricing

13. Under a congestion pricing system, the existing slot allocation system would be abolished in favour of congestion fees set for particular times.

14. Airlines currently pay weight-based fees for landing. The consequence of the weight-based fee structure is that a small regional jet, which causes just as much airspace congestion as the largest 737, pays a much lower landing fee than the much larger plane. Airlines thus do not face a price that reflects the fact that airspace is a scarce input.

15. If airlines were charged a flat landing fee based upon demand at particular times of day, regardless of the size or type of plane, smaller aircraft such as regional jets would appropriately have to bear a higher per-passenger cost for using an airport's scarce landing capacity than they do now. Regional jets would continue to be part of the airport's mix of aircraft, but at the margin where airlines are choosing between larger jets and regional jets, larger jets operating slightly less frequently will become a more attractive option than scheduling multiple trips on regional jets. The result would be an increase in passenger throughput at capacity-constrained airports.

16. The advantage of congestion pricing is that it is relatively easy to implement. The regulator would set prices for slots at different times and airlines would set their quantities accordingly. If the prices are initially too low, then the congestion prices can be raised over time to ration demand. A uniform fee for landing at a particular time would reduce the congestion bias caused by the current system of weight-based landing fees.

17. Congestion pricing has been used for several years to improve the flow of traffic on two highways in Southern California. Highway SR-91 in Orange County, California has four free lanes next to two toll lanes in each direction. There is a pre-determined toll schedule for every hour of the day. The rates vary from $1.05 for most overnight and pre-dawn hours to $7.00 for some afternoon rush hour time periods. On Interstate 15 in San Diego, there is a toll schedule for two reversible lanes. The toll varies with the level of congestion on the road and can change as often as every six minutes.

18. Although congestion pricing is likely superior to administrative allocation, a drawback to congestion pricing is the regulator's lack of knowledge about what price to set. A regulator may not have good enough information to allow it to set the right price without frequent experimentation. Even that mechanism may have problems because the necessary feedback for quantity adjustment may be slow. In particular, airlines often advertise service well in advance so as to schedule and make ground facility arrangements efficiently. This, in turn, implies that adjustments based on the changing price of arrival authorisations may be slow. For highly congested airports, the cost of setting the wrong price and getting too much (or too little) airline traffic may be high.

3.2 Slot Auction

19. A slot auction would allocate scarce arrival authorisations through a periodic open- bidding mechanism. For example, the FAA has good information about O'Hare's capacity for arrivals and departures, and can set a maximum quantity relatively precisely. An auction would determine the price for arrival authorisations at a particular time, regardless of the size or type of plane.

20. A well-designed slot auction would both assign prices to allocate efficiently scarce airport resources, and limit the maintenance or accumulation of market power by individual carriers. Such goals require careful attention to the details of auction design. For instance, the auction should limit informational feedback during the auction itself. Bidders might know the aggregate level of demand and supply of all arrival authorisations in each time period, but not be permitted to know the identity of the other bidders. This practice is fairly typical at auctions and is designed both to limit collusion among bidders and to prevent strategic bidding. Although more information allows more informed bidding on the part of bidders in ways that can be efficient, full knowledge of which airlines are bidding for which slots in an auction could encourage incumbent airlines to attempt to foreclose entry by particularly strong competitors. In this case, the government's interest in preserving competition among carriers should take priority over bidders' desires to have complete information about rival bids.

21. Any auction design must allow for sufficient liquidity so that potential entrants are not unnecessarily impeded. Annual auctions of a significant portion of airport arrival capacity (20%, for instance) would help allow for rapid entry when it is efficient.[4] Such a five-year rotation would provide a concrete duration for the property right, and therefore assist airlines in valuing the slots.

22. A switch to a market-based mechanism for allocating arrival authorisations will not by itself achieve the twin goals of reducing congestion and encouraging more competitive outcomes. Entry and expansion of new carriers, a key mechanism for encouraging competitive outcomes, is constrained not only by scarce landing rights, but by the limited availability at some airports of ground-based assets such as gates, baggage-handling, and check-in positions. To make any auction for arrival authorisations effective in this environment, aviation authorities must help ensure that ground-based assets will not be a constraint for new slot owners. A common-use pool of gates, for example, might be one solution to overcome some of the hurdles associated with limited ground-based assets. Another issue that authorities must take into account is that the transfer of ground facilities to slot holders can be disruptive of current operations. Auctioning off only 20% of the airport's capacity at a time, as discussed above, would allow for efficient transfer of needed ground facilities.

NOTES

1. See, *e.g.*, Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). "Highest valued use" for the carriers, however, might translate into market power on particular routes. Any distribution of slots must be subject to vigilant antitrust oversight.

2. Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets, Government Accounting Office, October 1996, GAO/RCED-97-4.

3. The interaction between the lack of liquidity in the marketplace and the uncertain nature of the property right being transferred may also make existing slot holders less willing to sell slots. For existing slot holders, the value of a slot includes not only the current value of operating a slot at the slot-constrained airport, but also the option to change their operational patterns in the future by adding flights ("option value"). To avoid paying a high price to get back into an airport later, slot holders may prefer to retain their slots if they are unconvinced that they can buy back into the airport later at a reasonable price. Although in theory someone could pay for acquiring this additional option value as well, the uncertainty surrounding the future of slots makes such a transaction more risky, and thus sales may simply not take place.

4. There is a trade off involved in limiting the duration of the property right – it induces some uncertainty in airlines' future plans, in return for keeping avenues of entry open.

DAF/COMP/GF/WD(2006)35

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CONTRIBUTION FROM Mr. ALBERTO HEIMLER

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON CONCESSIONS

PUBLIC OR PRIVATE PROVISION OF INFRASTRUCTURE SERVICES? IF PRIVATE, FIXED TERM CONCESSIONS OR FULL PRIVATISATION?*

*by Mr. Alberto Heimler***

1. Introduction

1. While in the past most infrastructure services were provided directly by governments in almost every country, in recent decades, especially because governments did not deliver the required quality and were not quick in adopting up-to-date technologies, there has been a progressive movement towards privatisation. At the same time technical progress and innovation changed the boundaries of natural monopolies, allowing competition in a number of activities.

2. In principle, privatisation[1] pursues productive efficiency, while allocative efficiency is achieved through competition. In practice, privatisation and competition reinforce each other: privatisation is very often necessary for introducing a level playing field among market participants, so that competition could more easily develop. This is the case for telecommunications and electricity where the privatisation of most former State monopolies, coupled with the introduction of independent regulators, contributed to the development of greater competition, leading to a strong improvement of both productive and allocative efficiency. In other industries, because of their natural monopoly characteristics, competition is impossible. The objective of privatisation in these industries is to improve corporate governance and increase incentives for cost minimisation.

3. Privatisation, however, does not eliminate the need to regulate market power. Economists are aware that in principle market power could be regulated directly through some form of price control. However, having developed the theory of regulatory capture[2], they started to suggest that competition be used also for choosing the single supplier of a natural monopoly market, granting the monopoly for a fixed term. The suggestion, originally made by Chadwick (1859)[3] and developed by Demsetz (1968)[4], was to organize bids by which firms, competing for the right to serve a monopoly market, would compete away all monopoly profits, thus eliminating the need for ex-post regulation.

4. In practice, competition for the market in infrastructure services has never been a substitute of regulation, but has always been introduced in order to choose the most efficient company which would still have to be regulated. Unfortunately the proposition that competition for the market requires nonetheless regulation is rarely made clear to the public, to politicians or to the bidding parties. As a consequence, the simple use of the term "competition" is widely (and unfortunately wrongly) perceived as an alternative to regulation.

5. Economists are now almost all in favour of bidding and auctions. Quite a change from the past! Sixty years ago economists were suspicious when they observed any form of externality or monopoly power, and they invariably thought it necessary for governments to intervene in a very substantial way. In both circumstances, they generally advocated nationalisation and public ownership.[5] Simons, a U.S. free market economist who nonetheless accepted and promoted public ownership of public utilities, believed that nationalisation would, by itself, eliminate the profit motive from managers' action, turning natural monopolies into companies that would maximize consumer welfare.

6. Economists in the U.S. began to convert to a free market ideology in the mid 1950s, believing that private firms would be more efficient also in circumstances where monopolistic conditions prevailed.

In such cases the solution would be price regulation. In contrast, in Europe, nationalisation continued to be considered the best form of control of market power by natural monopolies for many years. In many countries, this led to a production structure where the role of the State was quite substantial in the provision of both private and public goods. Only with the collapse of the communist economies of Eastern Europe did the case for nationalisation weaken also in Western European countries, and the number of advocates for privatisation of public enterprises has increased geometrically until very recently.

7. The problem with privatisation is that it cannot be a solution for every activity because regulation is not always adequate for disciplining market power. For example, certain public goods (such as roads) clearly facilitate the operation of markets. If roads were private and priced, the economy may suffer. More generally, there is a trade off between private and public ownership in terms of costs and benefits, which depends on the specific characteristics of the product being supplied.

8. For natural monopolies, like for example a highway, should there be State production or a regulated private monopoly? In the case of a private monopoly, how should this private monopolist is chosen? Should the license be fixed term or have an infinite duration? Is the situation different for industries that are not natural monopolies? Taking quite a broad perspective, this paper will try to offer some views on these issues, suggesting a lot of caution with respect to the not always easy competition-for-the-market solution.

9. The plan of the paper is the following. Section 2 will discuss the terms under which a choice between private and public provision should be made. Next, should a decision to grant a concession be made, whether the auction should have a fixed term or an infinite horizon. Section 4 will address the problem of renegotiations in fixed-term auctions, providing some examples taken from the vast Latin American experience. A discussion of the benefits of an auction vis à vis a beauty contest will then follow. In section 6 the problem of technical progress changing the boundaries of existing natural monopolies will be addressed together with the corresponding need that the issue is taken up by proper restructuring in the process of privatisation of infrastructure services. Section 7 concludes.

2. Concessions or public provision?

10. Concessions imply the transfer of a right from the government to a private entity. That right may originate from the fact that a certain activity (for example broadcasting or electricity production) is reserved to the State by the Constitution or that a certain resource (for example a forest or the spectrum) is owned by the State. In both cases the problem is how to choose those that would be entitled to enter that activity or to use that resource. Of course the problem exists only in so far as there is (real not artificially created) scarcity in supply or if there are some externalities associated with the reserved activity or with the use of the State owned resource. If there is no scarcity and there are no externalities then anybody could (and should) enter without any restriction. Otherwise the problem is how to choose the entrants.

11. As for concessions for the right to use a State owned resource, for example the spectrum, if there are no other public interest uses (for example defense), its use can be conceded to a private entrant. The problem is how many entrants should be let in, how to organize the bid, whether the transfer of property rights should only be temporary. The answer to these questions is easy, but only in principle: 1) entry should be allowed until entrants are willing to enter and a price for the State resource should be charged only if there is scarcity; 2) the resource allocated to each market participant should be in proportion to the use it is expected to be put at; 3) in any case firms should not be allowed to purchase multiple licenses so as to reduce competition[6]; 4) the bid should be organized carefully so as to avoid any strategic behaviour on the part of the bidding partners to pay less[7]; 5) the transfer of property right may be temporary only to the extent that there are no substantial sunk costs. In practice, organizing a problem free auction can be very demanding, even for allocating a scarce resource like the spectrum[8]. In many circumstances a similar

difficulty may arise even when the auction is organized for identifying the lowest cost provider in a public procurement setting[9]. There is a huge literature on these issues that shows that auction theory can be very effectively used for identifying the optimal auction-design mechanism[10].

12. With respect to the case of a reserved activity there is a further problem that logically anticipates how to choose a private entrant: it is that in some instances governments are better placed to keep that activity for themselves. For example, the privatisation of local bus transport services may disrupt service regularity[11], a negative externality from waste disposal or cemetery services could cause social harm, or universal service may not be guaranteed. In such cases government supply may well be the solution[12]. The problem of auctioning out an infrastructure-service activity will be pursued further in section 3.

2.1 Public vs private provision of public services

13. In a world of perfect information and no asymmetries, government provision of public services would lead to the same results as private provision. The government would either enter a contract that fully covers the provision of the service with an outside producer, or instruct the appropriate government branch/State owned company to provide the service. Accordingly, the question of who should provide these services would be irrelevant.

14. Public versus private ownership of assets becomes an important issue when the government is unable to write and enforce a complete contract. The government may know exactly what is needed in general, but it may be very difficult to write down exactly all possible contingencies that the provider might face. Furthermore it may be impossible to verify some dimensions of the quality of the service provisions *ex post*. If contracts are incomplete (which in fact is always the case), the ownership of assets becomes important because it determines who benefits from *ex post* bargaining over situations not covered by the contract.[13] For example, property rights are important for ensuring that innovation is carried out and that efficient strategies are pursued. As Shleifer[14] notes:

> [O]wnership strengthens the owner's incentives to make investments that improve or reduce the costs of using the assets, because the owner has the power to reap more of the rewards on these innovations.

15. The problem of how effectively residual profits are controlled is a key issue for establishing whether incentives for efficiency are sufficiently strong. In particular, in the absence of clear incentives to monitor managers by absent owners, the propensity to innovate and to minimize costs is strongly reduced. In the case of State ownership, citizens and taxpayers are indeed the ultimate owners, but are unable to effectively monitor the managers. As a consequence, the incentives for cost minimisation and innovation are severely weakened in State owned enterprises. This is why State owned enterprises often dissipate rents with other stakeholders, such as workers, managers and suppliers, so that rents do not accrue to the owners (the public) that by the way, contrary to the other possible owners, are much less inclined to compensate Contracts are often incomplete in that they do not specify an objective and verifiable minimum quality standard. If a contract cannot guarantee a required level of quality, a private firm would have the incentive to cut costs by reducing the quality of service provided. For example, with respect to nursing homes and prisons, private employers subject to price regulation could easily reduce the quality of services, serving food of lower quality or employing personnel that would mistreat the elderly or prisoners. Regulators, because of the difficulty of actually observing such behaviour, would face a lot of difficulties in identifying or punishing strategic behaviour of that sort.

16. One possible solution is to eliminate the private firm's incentive to cut costs through a contract that provides that the firm will be compensated for all its costs. Under such a contract, the firm would have low incentives for both cutting costs and enhancing quality. It would, however, always have the incentive

to increase costs, leading to monopolistic rents. In such circumstances, the government would have the incentive to monitor all expenditure decisions. Private ownership would then acquire most characteristics of public ownership (except for the very relevant fact that government would not directly control supply).

17. It is not always the case that when a contract does not effectively specify a minimum quality standard, a private supplier will provide low quality services. If it is possible to introduce competition in the market, then suppliers will have an incentive to improve quality in order to attract more customers. Thus, competition among private suppliers is one solution to the quality reduction problem. Competition, however, is not possible when natural monopoly conditions prevail[15].

18. Even without direct competitors however, a private firm may be sometimes motivated to maintain or improve quality because this might enhance their reputation as a high quality service provider. If the incentives are correctly established (for example by measuring quality by the number of complaints by unsatisfied customers), firms with a good reputation for high quality services may be in a better position to win additional contracts, or have their contract renewed when it expires.

19. Finally, private provision of services may be preferable because it will enhance the possibilities of innovation. If there is a potential for innovation, a private firm will have the incentive to do so. A government owned firm, in contrast, will be more reluctant, because it will be unable to fully enjoy the As Schleifer has suggested[16], these considerations imply that public provision is superior to private provision only when: a) the opportunity for cost reduction stemming from a decrease in non-contractible quality is high; b) the probability of product or process innovation is limited; c) gaining reputation as an efficient service provider is unimportant; and d) competition is weak and consumer choice is ineffective. Most public services that are sold at market price (in contrast to services that are given away for free or at below-cost prices) do not fulfil these prerequisites, which implies that, in order to increase the efficiency of supply, privatisation (accompanied by regulation) is quite effective. On the other hand, some public services, for example local transport, fulfil these prerequisites and are probably better served by public provision.

20. The problem is that the choice between public or private property is almost always resolved on political grounds and not enough consideration is given to the fact that the structure of managers' incentives is not the same in the two systems. While, at least in principle, public firms are less likely to pursue efficiency while providing quality, private firms are more likely to be efficient but less likely to provide quality. The realism of these trade offs can be judged on a case by case basis and around those a political/regulatory solution could be found.

3. Fixed-term auctions, privatisation and efficiency

21. Once private supply has been found preferable to public provision, auctions for entering into a reserved activity for a pre-determined period of time have been proposed as an alternative to privatisation.

22. One of the differences between the two is that with privatisation the license has an infinite time horizon. In this respect, the crucial issue with fixed term licensing is the extent to which inefficiencies might appear near the end of the license. In particular, such inefficiencies result from a company's failure to make efficiency-improving investments (in capital goods, training, restructuring, etc.) not at the beginning (when the length of the license allows for such investments to be paid back), but whenever necessary throughout its life. Except at the beginning of a license, the incentive to invest (even in maintenance) will be quite low, leading to distortions and disadvantages for consumers. The possibility of a payback by new entrants is generally not sufficient to eliminate the distortions. A new entrant would be unable to pay especially for non-capital investments, which are often even more important than capital investments[17], given the difficulties involved in determining their exact amount. However also for capital

investment their valuation at the time of the transfer may not be easy since the economic value of the assets to be transferred may be then different from its costs. This is why, especially when sunk investments are substantial, permanent licenses (and the possibilities they provide for internal growth, mergers and acquisitions) are more efficient than fixed-term licenses. In such circumstances, that is when sunk investments are substantial, privatisation, accompanied by regulation, is more efficient than a fixed term.

23. In contrast, if there are no substantial sunk investments, fixed term licenses are efficient because the danger of distortions in the propensity to invest around the end of the license term would be minimal. Competition for the market can thus be effectively introduced. For instance, an auction to provide waste removal services would lead to efficient results if the outside contractor required to provide services would take his know-how, equipment and work force to the next town if he does not win the next auction. The possibility of quality reductions due to lack of maintenance at the end of the franchise period would be minimal. The contract could be granted to the bidder that offers to supply the service for the minimum fee, and it should have short time duration. The shorter the license term, the greater the probability that circumstances will not change, which would necessitate a renegotiation of the level of subsidies or the price.

24. The argument that fixed-term concessions are particularly effective when there are no substantial sunk investments is however only a partial one because, especially for essential services, there might be the possibility of hold-ups that is for the provider to blackmail the government or the municipality that it would stop delivery unless tariffs are increased. This is why, for example, in waste collection services the municipality of Phoenix, Arizona, after having split the city in a number of zones each auctioned out to different contactors, assigned one zone to itself, ensuring that the government could resist any possible hold-up by one the private contractors[18]. Whether all this created real benefits to tax payers is not clear, however.

25. The possibility of hold-ups is much greater in the case of concessions for infrastructure services where sunk costs are widespread and renegotiations strongly decrease the benefits originated from competitive bidding. A further problem they create is that the existence of hold-ups may strongly undermine the confidence in competition by the population at large.

26. According to a 2001 survey by Latinobarometro[19] "63 percent of people in 17 countries in Latin America and the Caribbean believed that privatisations of state companies had not been beneficial, up from 57 percent in 2000 and 43 percent in 1998. ... To a large extent these negative sentiments are driven by the high incidence of renegotiations and the response to it. ... Renegotiation has occurred if a concession contract underwent a significant change or amendment ... in any of the following areas: tariffs, investment plans and levels, exclusivity rights, guarantees, lump-sum payments or annual fees, coverage targets, service standards, and concession periods".

27. The major reason for all these renegotiations is that there are widespread hold-up problems: the franchisee threatening the government that it cannot guarantee the quality of services as agreed unless subsidies or prices are increased. Given the essential nature of the services, it is unlikely that a government would decide to re-tender, given the problems that an interruption of such services would cause. The existing pressure to accommodate any request by an incumbent franchisee makes short-term license preferable, a solution however which is not very suitable for infrastructure services, given the high sunk-costs that characterize them.

28. For infrastructure services a well structured regulation reduces the problem of hold-ups. However, for regulation to be beneficial, the auction, as I will argue in the next sections, should be organized around an up-front fee and should not have the objective of minimizing the tariff under which the service will be supplied (with no subsidy).

29. In any case a further argument in favour of privatisation (infinite-horizon concessions) is that the competition for fixed term concessions is strongly reduced the second time the concession is auctioned out because of information asymmetry on the part of potential bidders. Once the first license is expired, the incumbent that bids on a new contract may use internal information on the relevant market's cost structure. Other potential bidders may be unwilling to under-price the incumbent, leading to a structural reduction in the number of participants in the tendering process at the end of a first license, especially for contracts of a special and unique nature. Unfortunately, since infrastructure concessions have all been granted quite recently and for a very long time, there is not much experience with second time auctions[20].

30. One solution to favour second time auctions is to create markets that are similar to each other, so that a company operating in one location would have enough information to participate in the tender offer of another location. If scale economies are not important, a solution would be to divide a larger market into smaller sections for which separate tenders could be made. This would increase the number of bidders, because even small companies could take part. Whether this is beneficial or not, will also depend on an evaluation of all costs involved, including transaction and coordination costs.

31. In any case irrespective of the time for which they are granted, where concessions are most efficient is when clear responsibilities, including full property rights, are handed to the concessionaire. For example, a local transport concession might require the concessionaire to come in the municipality with all the necessary buses and all the necessary employees. In this way, a market for concessions might develop nationwide with companies bidding for concessions, while municipalities would only (!) have the duty to write the contract and to regulate. On the other hand, one of the most important characteristic of a fixed-term concession is that very often a concession does not lead to the transfer of ownership of any fixed asset, which continues to remain in government hands, nor to any power with respect to existing employees, who maintain the job they already had when the company was State owned. In such circumstances, which are quite common when local services are tendered out for license, it is not clear what the auction is for, besides leading to a new CEO. Furthermore leaving to the State the property of all assets, the contract of the concession has to introduce some specific incentive for maintaining these assets and some provision in order to account for technical progress. Finally the separation between asset ownership and management of the services that these assets provide leads to a possible conflict of responsibility in the case of accidents. For example would the State as owner of the pipeline or the concessionaire be responsible for a gas leak? Again the concession contract would have to account for all these contingencies. Not an easy task.

4. Concessions, auctions and renegotiations: some practical experience

32. In the past twenty years privatisations and liberalisations have characterized the world economy. In Europe the transition economies of Eastern Europe have undergone significant economic reforms that have led to a strong reduction of the role of the State, opening up domestic markets and relying more and more on indirect government controls, rather than on direct State interventions. Before 1990 also in most EU countries the role of the State was quite significant, with State owned companies operating in most sectors of the economy, including heavy industry (steel and chemicals), car manufacturing, banks, and public utilities. Now companies operating in competitive sectors have almost all been privatized, while the State continues to be present in traditional natural monopolies, like rail, water supply, local services, airports and ports, where competition is almost impossible to introduce. Privatisation has been the solution for competitive sectors, while State owned companies (of course with many exceptions by country and by sector) continue to be present in natural monopoly industries. Again with a number of quite relevant exceptions, concessions have been important for granting access to State owned resources (the spectrum, forests, ports, airports etc.), but not so much for granting access to reserved activities characterized by natural monopoly conditions.

33. In the same period of time also Latin American and Caribbean countries have undergone significant economic reforms, mostly originating from the low quality of government run utility services. As a matter of fact, a significant part of these reforms had to do with allowing the private sectors into the management of public utilities. In the process, the choice between fixed term (concessions) and infinite horizon licenses (privatisations) was not based on the existence of substantial sunk costs as I have argued should be the criterion, but on whether competition in the market could exercise some discipline on the market power of the incumbent operator, privatisation being the preferred option should competition in the market exercise some disciplining effect. Indeed, as Guash (2004) reports, especially in telecommunications, and also in electricity generation and in natural gas, private sector participation was mostly achieved by outright privatisation. On the other hand, in natural monopolies, like rail, ports, airports, roads, water and electricity transmission, fixed-term concessions have been much more frequent.

34. Although concessions have significantly improved infrastructure service in many countries, they have also created quite a number of problems. The most important one has been the fact that renegotiations have been very frequent and most of the times, through these renegotiations, most advantages achieved by competitive bidding have been eliminated. Renegotiations however should not be completely ruled out in concession contracts. In fact one of the characteristic of a concession contract is that it is never complete so that some renegotiations should be expected, although probably not to the extent they have been experienced. The simple fact that renegotiations are the natural consequence of an incomplete contract, leads bidders to bid more aggressively in the hope that governments would bail them out. This is particularly the case when the bid is organized around the lowest possible tariff. In that situation the likelihood is strong that parties would bid low, so that the concession is awarded to them and then recoup profits through renegotiations?

35. Guash (2004) identifies a number of issues that eventually led to the failure of the competitive bidding process for granting concessions: aggressive bidding, faulty contract design, government failure to honour contract clauses, defective regulation. For each of these issues Guash (2004) provides some examples and a few of them will be summarized here[21].

4.1 Aggressive bidding

36. Aggressive biddings originate from the belief that governments are unable to commit to a policy of no renegotiation. Usually governments renegotiate and the benefits of competitive bidding are eliminated, as, for example, was the case with the Lima Airport.

> *In early 2001 the concession to operate Lima airport was awarded to a consortium, led by the Frankfurt Airport operator, Bechtel, and a local partner, that submitted the highest bid. The winning bid offered the state 47 percent of gross revenue in addition to a commitment to invest more than US$1 billion and construct a second landing strip by the 11th year of the 30-year concession. As should have been expected, the concession contract was renegotiated at the end of 2003 reaching much more sustainable conditions.*

37. Very rarely, like in the case of Buenos Aires water services, renegotiations were not allowed and, as a consequence the concession was abandoned.

> *In May 1999 the province of Buenos Aires used competitive bidding to award a concession for the provision of water services. Of the seven firms that pre-qualified for the operation, four submitted bids. The award criterion was the highest (lump-sum) transfer fee to the government of the province. The winning bidder, Azurix, offered 277 million dollars. The other firms bid 15 million dollars, 10 million dollars and 8 million dollars respectively. Azurix, as should have been expected, asked for a renegotiation that was denied and in 2002 the government reassumed responsibility for providing water services.*

4.2 Faulty contract design

38. The most difficult issue with concessions is that problems emerge ex-post, while solutions have to be identified ex-ante. As a consequence faulty contract designs are the most common problem that emerges in an auction. For example objectives to be pursued have to be clearly defined, especially taking into account the trade-off between the maximisation of economic efficiency and that of the proceeds to be obtained from the concession granting process. When the proceeds are maximized than economic efficiency suffers. For example, in Jamaica's sale of its telecommunications company, the winning bidder was given a 25-year monopoly and a guaranteed 18 percent annual return! Faulty designs can also involve the use of inadequate award criteria, for example minimum prices or tariffs, or direct adjudication. Faulty designs can also be caused by improper regulatory oversight. The impacts of faulty designs vary considerably: they can lead to renegotiation, abandonment of a concession, or other very negative outcomes.

> *In 1997 the Mexican government launched a 3.3 billion dollars plan to restructure 52 highways built under private concessions in the early 1990s. This renegotiation and bailout of private operators followed a very poorly designed program. First of all the bidding standard under which to award the concessions was the minimisation of the time needed to operate each concession, so that some concessions were awarded for as short a period as eighteen months. Furthermore the government provided extremely optimistic guarantees of traffic volumes and an implicit insurance for construction cost overruns. As a consequence, the system was characterized, as should have been anticipated, by significant cost overruns and by socially unacceptable high tolls to support the short concession periods.*

39. A very similar situation occurred in the Dominican Republic that granted road and railway concessions through direct adjudication. The contracts for these concessions provide a risk-free profit guarantee. In fact if costs exceed original estimates then Dominican taxpayers will cover the losses.

> *In the case of the Samana highway, which is the country's only toll road construction concession as of 2002, the contract stipulates that 6,050 vehicles will use it in its first year of the concession (2001) and that traffic will increase by 5 percent a year thereafter. If traffic does not reach those levels, the government will have to pay the winning bidder the shortfall in toll revenue. The government is also responsible for covering any deficits created by inflation, devaluation of the peso, and other cost-increasing components.*

40. Very favourable concession terms originating from faulty contract designs can lead to very strong unexpected increases in prices and violent responses from unhappy consumers.

> *The water concession in Cochabamba, Bolivia, granted in October 1999, were terminated in April 2000 by the government following violent protests because of high tariffs. Steep tariff increases were necessary to pay for an expensive bulk water scheme chosen by the government over a lower cost option.*

4.3 Government failure to honour contract clause

41. Very often governments fail to honour the provisions of concession contracts, especially in order to favour domestic groups. Such behaviour creates great uncertainty and enhances risks, discouraging auction participation especially by foreign bidders and sometimes leading the winners to abandon the awarded concessions.

> *In 1997 the Ukrainian government awarded two sets of frequencies in order to create two competing cellular phone networks. Two consortia were awarded the tender, one led by*

Motorola and one by Deutsche Telekom. As soon as the tender was over, the government unexpectedly requested the winning consortia to pay a 65 million dollars annual fee, a very significant amount considering the size of the market. Then, also without notice, the government awarded a third set of frequencies to a domestic company, stopping all frequency allocations for five months, presumably to allow the domestic company to catch up. As a result Motorola abandoned the granted concession.

42. A very similar result occurred with the 1999 concession for the management of Peruvian regional ports, even though in this case the auction was changed just before the opening of the bids, in any case providing an indication to bidders that Government was unreliable.

The contract of the concession of the small port of Matarani in Peru provided for a duration of 30 years. Four firms pre-qualified. Before the opening of the bids, however, the government decided to shorten the concession to 15 years. As a result three of the firms abandoned the auction and the concession was awarded to a local group at about the base price

4.4 Defective regulation

43. Quite often proper regulation has been missing, either because regulatory institutions were not in place at the time the concession was granted, existing regulators lacked enforcement power or were impeded to act by some domestic law. In this respect, the fact that a concession was awarded with a competitive procedure led many jurisdictions to exclude the concessionaire from any regulatory oversight, unless the regulator had already been mentioned in the concession contract. Such shortcomings have been particularly important at the local level, where independent regulators do not exist even in developed countries. It is necessary therefore that the proper regulatory institutions be in place already at the time of the auction.

44. Even if the right institutional structure is in place, regulation is not always effective in disciplining a natural monopolist, because regulators do not have access to all the relevant pieces of information so as to effectively regulate, especially with respect to the assessment of the monopolist production costs. As a consequence, regulators may need to allow regulated firms to reap at least a portion of the benefits expected from their information advantage, for example by introducing some sort of price-cap constraints. Furthermore, whenever significant externalities or information asymmetries exist, regulators should seek adequate public participation in policy formulation, consulting all those who can provide relevant information – particularly when their interests are adversarial to those held by the regulated firms. Finally, parliaments/governments should be capable to intervene upon the horizontal and vertical organisation of the industry, identifying non competitive components of the production process and, when beneficial, separating them out. Indeed when competition is possible, promoting it can significantly reduce the information imbalance faced by the regulator.

5. Auctions or beauty contests?

45. The extent of the problems encountered with auctions for concessions implies that before a concession is awarded tariffs (and the rules and regulations under which they would evolve) should be fully specified, so that the concession is given to the party willing to provide the highest initial payment. Indeed, as Guash (2004) suggests there are some beneficial effect with having the concession awarded to the party willing to pay up front the highest fee. The most important one is t it commits the awarded company to respect the contract and that it grants the government some leverage in the case of non-compliance.

46. Designing the proper auction does not eliminate all problems. As already mentioned, the main weaknesses of a fixed term license are the following: 1) incentives to invest or to improve operations near

the end of the license are reduced; 2) there are not many incentives on the part of new potential entrants to bid at the time of renewal and 3) in the case of separation between assets ownership and their management, there is no clear division of responsibility between the owner and the manager.

47. In this respect full privatisation (of a firm operating in a reserved activity) is preferable to fixed-term concessions. What privatisation does not eliminate is the problem of hold-ups of public administration by monopolies supplying essential services. In this respect infinite-horizon or long fixed-term licenses are not different. Hold-up problems are eliminated with public provision (but in that case government employees instead of the companies may have the power to exercise them instead) or when the license is short term.

48. Should the decision to grant a concession be taken, then auctions over an up-front fee are far more efficient than beauty contests, where the parameters over which the concession is granted are usually not as clearly defined and the scope for bilateral negotiations before the concession is granted greatly enhanced. By the way this lack of transparency strongly increases the possibility of corruption.

49. Guash (2004) reports that, contrary to what has happened with auctions, renegotiations were quite unlikely in the case of beauty contests because bilateral negotiations lead to much more favourable concession terms. Beauty contests are not really an instrument for achieving an effective competition for the market. Indeed the major benefit of an auction, as Klemperer (2003) puts it, is that "rather than relying on government bureaucrats to assess the merits of competing firms' business plans, an auction forces businesses men to put their *money where their mouths are* when they make their bids". So if the auction is well organized, there is no question that auctions are far more efficient than beauty contest.

50. In any case auctions are efficient only if the number of participants is sufficiently high. When the investment needed to participate in a bidding is too high, for example because technical details are very complex to disentangle, then participation may be low and the benefits of the bidding process are strongly reduced. There is therefore a trade off between the complexity of auctions and competition that would be very difficult to solve *ex-ante*.

6. Public services and competition

51. Not all public services are natural monopolies. Moreover, within a given public service some activities may be exercised under competitive conditions, while others are intrinsically monopolistic. All these elements have to be taken into consideration at the time of privatisation or when granting a concession.

52. Exclusive franchises are normally granted not only to assure protection to a natural monopolist, since it is extremely rare for a more efficient competitor to enter a market that is "naturally" monopolistic, once an incumbent is already present. They are also granted to ensure that a service provider remains profitable should prices be regulated and service obligations are imposed. If tariffs are not designed to cover the costs of the service being provided, but instead they guarantee the coverage of costs only on average, then it is likely that some services will be priced below and other services above their incremental costs. A new entrant, competing away the profits gained on the most profitable service, might prevent the incumbent from continuing to cover its costs at the given prices. In such circumstances, opening the service to competition without a thorough reform of the tariff structure may disrupt universal service. Such a tariff reform is at times politically and technically feasible. In such cases, while competition could be an efficient solution, should it be politically impossible to rebalance tariffs, the monopolist must be protected from outside entry.

53. Even if the service provider is protected from outside entry for its main mission, some of its activities could well be open to competition. For example, although the distribution of electricity, gas and water cannot be opened to competition (a single pipe enters each residence), supply can easily and efficiently be opened to competition. The identification of potentially competitive activities for each public service must be done on a case-by-case basis. For any identified competitive activity there should be a free entry regime.

54. It is questionable whether a company that has been granted a special and exclusive right should be allowed to continue supplying a complementary competitive activity and, if so, whether separation should be required. Competition law provisions that prohibit abuse of a dominant position are not always effective in eliminating any possible abuse by a vertically integrated firm. A natural monopolist subject to cost-plus regulation might have the incentive to artificially increase costs of the regulated service, in order to cover some of the costs of the competitive activity. The regulated company could thereby supply the potentially competitive activity at prices below average incremental costs, and equally efficient competitors would be kept out of the market. Predation could not always be used to prohibit such practices because the possibility for recoupment, in many jurisdictions a key element in a predation case, would not always be there. The reason is that government owned firms (or firms that are completely dependent on a government decision, such as renewal of a license) very seldom maximize profits. Lott argues that pricing below costs is more likely with government owned enterprises that are not profit maximizing, but output, employment or revenue maximizing[22].

55. A company controlling an essential facility may refuse access based on objective reasons (such as the absence of capacity), which would be justifiable from a competition policy perspective. However, such reasons may be the result of strategic decisions by the company controlling the essential facility. For example an electricity transmission company that is vertically integrated with a generation facility may have decided not to enlarge transmission capacity in order to impede entry of more efficient generators. In such cases, only separation can eliminate the anticompetitive exclusion[23].

56. On the other hand, if (vertical) economies of scope are important, then separating the two activities would lead to inefficiencies. Thus, an analysis of the importance of economies of scope is necessary for deciding whether to separate. If significant economies of scope are present, it would be inefficient to separate the competitive activity, and it would be unlikely that a "competitive" activity would indeed exist, since a firm would be unable successfully to compete without being able to exploit those economies. The recent OECD report to Council (REFERENZE) on member countries experience with vertical separation suggests that while there is substantial evidence that separation of transmission is beneficial in gas and electricity, the prospects for competition in rail passenger services are very limited and so the benefits of separating the rail infrastructure are at best unclear.

7. Conclusions

57. Governments supply public and private goods and services, for some of which they operate in competition with private firms, while for others governments are the only suppliers.

58. In the case of natural monopolies, the choice between public or private property is relevant because the structure of managers' incentives is not the same in the two systems. Public firms are less likely to pursue efficiency, instead favouring political patronage. If governments are interested in efficiency, they should encourage private firms to supply local public services. On the other hand public provision is more efficient when the effect on costs of a reduction of quality is high, quality is non-contractible and users value quality significantly.

59. In many infrastructure services technical progress may reduce the width and depth of natural monopoly. As competition increases, prices have to be structured so as to sustain it. For example, when competition becomes possible in long-distance telecommunications services, the subsidisation of the cost of local calls from long distance revenues may no longer be sustainable. Furthermore, as the scope for competition increases, it may be necessary especially at the time of privatisation to separate the natural monopoly part of the industry from the rest, so as to eliminate even the incentive for all sorts of exclusionary strategies. However the benefits of the separation have to be compared with its costs which in many industries are high.

60. The optimal solution is to:

- Continue with public provision when: a) the opportunity for cost reduction stemming from a decrease in non-contractible quality is high; b) the probability of product or process innovation is low; c) gaining reputation as an efficient service provider is not important; and d) competition is weak and consumer choice is non existent. Otherwise conditions are appropriate for private provision. In that case one important decision to be made is whether the license should be fixed term (long or short), or have no term. The longer the license, the greater the need for regulation because unexpected events can occur and the firm may need to renegotiate the terms of providing the service. The shorter the license, the more the results of a process of competition *for* the market resemble a competitive system (*in* the market).

- When there are large sunk costs, give the company a permanent license (full privatisation). Otherwise, the incentives to invest and to maintain the efficiency of the firm will be strongly distorted close to the end of the license term and remedies will be difficult to introduce. When sunk costs are not substantial (and contracts are easily written), competition for the market (and short-term licenses) can eliminate the need for regulation.

- Unless there are clear economies of scope to be gained, make sure that monopolists are not allowed to provide any liberalized activity. In fact, when the monopolist objective is not profit, but revenue or employment maximisation, anticompetitive cross-subsidisation becomes more likely. If that is the case more efficient producers may be kept out of the market by having captive consumers pay indefinitely for the difference between costs and revenues in the liberalized activity. Furthermore, a natural monopolist may refuse access to an essential facility based on objective reasons, such as the absence of capacity, that are justifiable from a competition policy perspective. However, such reasons may result from strategic decisions by the company controlling the essential facility. Separation is efficiency enhancing only if the complementary activities do not enjoy significant economies of scope. Otherwise consumers are better off if both activities are supplied by the same concern.

- Should the decision be made to grant fixed medium and long-term concessions, the auction should be organized around a single criterion and in particular around the up-front fee to be paid to the granting government. In this way the awarded company is committed to respect the contract and governments are granted some leverage in the case of non-compliance. Auctions designed to identify the minimum tariff for providing service are inefficient because they inevitably lead to renegotiations. For very similar reasons also beauty contests should be avoided. Furthermore beauty contest enhance the possibilities of corruption.

- If a concession does not lead to the transfer of ownership of the infrastructure but is only a management concession, provide the concessionaire with broad powers over the organisation of the company, including the power to fire existing redundant employees. Otherwise, the benefit of the auction may completely disappear. Furthermore when leaving to the State the ownership of all assets, the concession contract has to contain some specific incentive for maintaining these assets and some provision in order to account for technical progress. Finally the separation between asset ownership and service management leads to a possible conflict of responsibility in the case of accidents that is very difficult to solve *ex-ante* for all contingencies.

- Make sure that the proper regulatory institutional structure is in place at the time the concession is granted. Otherwise, if regulation is introduced after adjudication or after privatisation, the probability of legal disputes strongly increases. Furthermore, since long term contracts cannot contain provisions about future innovation possibilities, regulators need to allow regulated firms to reap at least a portion of the benefits expected from possible future innovations. In any case, whenever significant externalities or information asymmetries exist, regulators should seek adequate public participation in policy formulation so as to identify additional sources of information.

61. With respect to the role and powers of competition authorities all these suggestions relate to advocacy, since the greater concerns with privatisation, concessions and auctions for natural monopoly infrastructure services is that market power of natural monopolists is sufficiently disciplined by regulation and that there are incentives in place to pursue (productive) efficiency. Of course there can be collusion in tendering, but such collusion, as I have briefly argued in the paper, is also addressed by the optimal design of the auction and by making sure that the number of competitors is sufficiently high. Advocacy has an important role to play also into this respect.

62. There are two additional issues that I would like to briefly discuss here as a concluding remark. The first one is that natural monopolies are not stable in time and technical progress is continuously reducing their extent. This is of course very visible in telecommunications, but also in electricity generation, where the average size of a generating plant has strongly decreased in recent years, or in local services, where waste collection is now much more capital intensive than before and the service could easily be auctioned out. The problem with fixed or infinite-term concessions is that the future extent of technical progress is unknown and existing natural monopolies may disappear, opening up many markets to competition. If the concession is short term there is no problem, but long term concessions may introduce unnecessary restraints to competition. The solution is to make sure that the exclusivity period is no longer than necessary.

63. The second question relates to the possibilities that antitrust authorities have in intervening ex-post with respect to restrictions of competition in infrastructure services. We all know that there is a lot of room for intervening in infrastructure services in the case of impediment abuses, but I do not see anything special with concessions and privatisation because the antitrust law could be applied, in all jurisdictions I know, also in the case of public provision. Exploitative abuses are much more difficult to address. First of all because the exploitation does not always take the form of high prices (which most of the time are regulated), but much more frequently by reductions of quality. Furthermore the existence of exploitative abuses, in the absence of any yardstick competition as is the case in infrastructure services, are very difficult to identify and regulators are in this respect much better positioned than antitrust authorities.

NOTES

* This paper was first presented at the 32nd Annual Conference on International Antitrust Law & Policy, Fordham University, New York City, September 22 and 23, 2005.

** Director, Research and Institutional Relations, Italian Competition Authority, Rome. (Alberto.Heimler@agcm.it). I would like to thank Ginevra Bruzzone, Sean Ennis, Paolo Saba and especially Sally Van Siclen for very helpful discussions and for their comments to a first draft of this paper. The views expressed in the paper are my own and should not be taken as representing those of the Italian Competition Authority.

1. Throughout the paper by privatisation I mean transferring the control of a State owned firm in private hands. I will not consider partial privatisations of a company's capital (short of losing control) because they are mainly directed to solve budget deficits problems and are therefore outside the scope of the paper.

2 . See G. Stigler, The Process of Economic Regulation, Antitrust Bulletin, Spring (1972).

3. E. Chadwick, Results of different principles of legislation and administration in Europe; of competition for the field as compared to competition in the field, Royal Statistical Society Journal, 381-87 and 408-9 (1859).

4. See H. Demsetz, Why regulate utilities, Journal of Law and Economics, 55-65 (1968).

5. J. Meade, Planning and social Mechanism: The Liberal-Socialist Solution, George Allen & Unwin London (1948); H. Simons, "A Positive Program for Laissez Faire", IN ECONOMIC POLICY FOR A FREE SOCIETY, CHICAGO UNIVERSITY PRESS (1948); M. Allais, "Le Problème de la Planification Economique dans une Economie Collectiviste", 2 Kyklos 48 (1947).

6. In practice it is not always clear how can the Government assess scarcity *ex-ante*, nor is it always fair that first comers pay nothing and late comers, when the resource becomes scarce, pay

7. On this see P. Klemperer, Auctions: Theory and Practice, Princeton University Press: Princeton, N.J. (2003).

8. In the case of the spectrum allocations for the 3G mobile service, the aim of all governments was to assign the spectrum efficiently, to promote competition (given that the spectrum to be allocated allowed for multiple service providers) and to realize the full economic value. As a consequence, governments fixed the number of licenses to be issued according to engineering considerations (otherwise leaving the number of licenses being endogenously determined would have required a very complex auction design) and did not allow bidders to hold more than one license. The product to be sold, the spectrum, was clearly identified; the use to which the spectrum was going to be put to was also identified; prices of the 3G services were to be freely set; there were no universal service obligations, except that the service to the public had to be initiated at a given date, common to all license holders. The question was only what type of bidding design to choose in order to minimize the possibility that incumbents in 2G mobile service would threaten new entrants not to bid or that bidders would collude in order to share the market among them at the minimum cost. Nonetheless a number of mistakes were made in auction design and the proceedings of the auctions were manipulated in many countries by the strategic behavior of bidders, as Klemperer (2003) shows.

9. The problem with auctions is not only that bidders may collude or behave strategically in order to threaten other potential bidders. Sometimes markets are two sided, further complicating the auction design. For example in Italy in the auction for purchasing vouchers for restaurant services for government employees, the design of the bid did not sufficiently address the issue that in order for the vouchers to have any value at all for the users, enough restaurants had to be on board (for example by imposing a stricter required

number of associated restaurants). As a consequence competition among issuers reduced the price of the vouchers so much that the number of vouchers accepting restaurants was much lower than expected. Angry, and hungry, government employees strongly protested.

10. See P. Klemperer, Auctions: Theory and Practice, Princeton University Press (2003) and P. Milgrom Putting Auction Theory at work, Cambridge University Press (2004).

11. As a UK regulator once told me during an OECD meeting on competition and regulation on local transport, privatisation does not necessarily operate to the benefit of consumers: a profit oriented supplier tries to run buses as full as possible (maximising revenues given costs), while consumers like buses to be frequent and half empty (but cannot compensate suppliers for the lost revenue). In such circumstances how can privatisation with a proper regulation be the solution in local transport?

12. For a more detailed analysis of these issues with respect to local public services in Italy, see A. Heimler, Local Public Services in Italy: Make, Buy or Leave it to the Market?, in The anticompetitive impact of regulation, Edward Elgar; Cheltenham (G. Amato and L. Laudati (Eds) 2000).

13. O. Hart, Firms, Contracts and Financial Structure (1995); G. Grossman & O. Hart, The Cost and Benefits of Ownership: A Theory of Vertical and Lateral Integration, 94 Journal of Political Economy 691 (1986).

14. See Shleifer, A.

15.. See C. Henry, "Competition and the Regulation of Public Utilities in the European Union", Laboratoire d'économétrie, École Politechnique, Paris Working Paper No. 469 (1997), Henry cites the report by the Transport Committee of the House of Commons on "The consequences of bus deregulation" in support of his claim that the effects of competition between bus companies were not satisfactory.

16. A. Shleifer, "State versus Private Property", 12 Journal of Economic Perspectives 133 (1998).

17. See R. Nelson & H. Pack, "Asian Miracle and Modern Growth Theory", 109 Economic Journal 416.

18. See OECD ...

19. Reported in L. J. Guash Granting and Renegotiating Infrastructure Concessions. Doing it Right, The World Bank: Washington D.C. (2004).

20. Klemperer (2005) reports of an auction once the first licence expired: in the case of the UK lottery auctions there were six bidders the first time, only two the second, but in any case the incumbent won.

21. For greater detail see Guash (2004) from page 44 onwards.

22. J. Lott, Are Predatory Commitments credible? Who should the Courts Believe? (1999).

23. On this see OECD Recommendation of the Council concerning structural separation in regulated industries, Paris (2001).

SESSION II

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

DAF/COMP/GF/WD(2006)3

OCDE

OECD

BACKGROUND NOTE

by the Secretariat

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

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PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Background Note

By the Secretariat

> *Circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.*
>
> * * *
>
> *In order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreements. Very often in cases like this, such evidence is not available. You may find that the required agreement or conspiracy existed from the course of dealing between or among the individuals through the words they exchanged or from their acts alone.*

1. The above quotations, taken from the jury instructions in the recent successful criminal prosecution of the Chairman of the Sotheby's auction house,[1] illustrates that cartel conspirators can be prosecuted, even against the highest standards of proof, without direct evidence of the agreement or of their involvement in it. Indirect (circumstantial) evidence is used in most jurisdictions including those with the longest and most successful records of cartel prosecutions, where competition law enforcers now enjoy the virtuous circle of strong sanctions in past cases energizing leniency programs, which generate direct evidence in new cases, and more strong sanctions.[2] Indirect evidence is particularly important for competition law enforcers in jurisdictions without such enforcement records, given that cartel conspiracies are cloaked in secrecy and direct evidence is not forthcoming.

2. The focus of this paper is on the use of indirect evidence in cartel investigations, typically triggered by an episode of suspicious parallel pricing or other behaviour that is not readily explained by usual market forces. When the competition agency suspects that the conduct is the result of an agreement but cannot discover direct evidence to prove the existence of an agreement, what amount and quality of circumstantial evidence is sufficient for this purpose?

3. The key points for the reader to take from the paper are:

- The provisions of competition laws prohibiting anticompetitive agreements apply not only to explicit agreements but also to other types of joint arrangements, variously identified as "arrangements," "combinations" or "concerted practices." In all cases, however, liability for a competition law violation can be imposed only if it can be shown that the parties reached some "conscious commitment to a common scheme."

- Cartels pose a special problem for enforcers because they operate in secret, and their members usually do not co-operate with investigations of their conduct. In experienced jurisdictions, competition authorities in most cases use direct evidence to prove an unlawful

1. Available on the web site of the American Bar Association, at http://www.abanet.org/antitrust/committees/criminal/taubman.doc.

2. It should be noted that the United States, well along on the virtuous circle, would not normally bring a criminal cartel case on indirect evidence alone. Even in the Sotheby's case, there was direct evidence of the agreement, and there was some direct evidence linking Sotheby's Chairman to it. Much of the evidence against him, however, was circumstantial.

conspiracy. It can be difficult to obtain direct evidence of a cartel agreement, however. Enforcers may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence.

- Circumstantial evidence can come in several forms, including evidence of communications between rivals and economic evidence. Economic evidence consists of firm conduct, market structure, and evidence of facilitating practices. All types of evidence can be useful in a case and they should be employed together.

- Economic theories of oligopoly provide several valuable insights for competition law enforcers: They show that acts consistent with unilateral incentives can lead to a different outcome than when firms act collectively, and that oligopoly does not inevitably lead to cooperation and collective action to increase prices. As a result, enforcers and decision makers should carefully examine whether firm conduct can be described as actions in unilateral self-interest absent an agreement to act jointly, or as actions in the collective interest of all competitors. Conduct consistent with unilateral self interest does not constitute good evidence in a circumstantial cartel case.

- Consistent with economic theory, a long line of case law has recognised that evidence of parallel conduct, such as simultaneous price increases by rivals, alone it is not sufficient proof of a cartel agreement. There must be additional evidence, which tends to prove the existence of an unlawful agreement as required under the applicable standards of proof. Courts sometimes refer to this additional evidence as "plus factors."

- An important type of plus factor is evidence showing that there were communications among the suspected cartel operators in the course of which they could have reached agreement. Economic evidence is another important class of circumstantial evidence. It includes evidence both of conduct by market participants suggesting that they are acting jointly and of market structure that lends itself to collusive activity. One method of analysing economic conduct evidence is to consider whether the conduct would have been in the self interest of the actors if they had not been acting jointly.

- Circumstantial evidence should be considered in a holistic fashion. The decision maker should assess the cumulative effect of all evidence, rather than require that each item unequivocally support the hypothesis of agreement.

- Countries differ in the way that they develop evidence in cartel cases. Several factors contribute to these differences, including whether cartels are prosecuted administratively, civilly or criminally; and whether a country has been prosecuting cartels for a long time or has begun an anti-cartel programme only recently. There is a trend in OECD countries toward building cases based on direct evidence. But countries continue to bring cases employing mostly circumstantial evidence where it is appropriate.

- It is likely that countries just beginning an anti-cartel programme will have some difficulty generating direct evidence, and hence will have to rely more on circumstantial evidence in early cases. While these cases can be difficult, it is important that the new agency establish credibility for its competition law and for its anti-cartel effort.

1. Cartel agreements

4. All competition laws prohibit, among other things, anticompetitive conduct by two or more parties acting jointly. Competition laws are written broadly to apply to all forms of agreements, formal and informal, explicit and implicit. Thus, for example, the United States' Sherman act applies to any "contract, combination . . . or conspiracy;"[3] Article 81(1) of the EC Treaty applies to "agreements between undertakings, decisions by associations of undertakings, and concerted practices;" Mexico's competition law applies to "contracts, agreements, arrangements, or combinations;"[4] Chinese Taipei's competition law applies to "concerted actions," which is defined as including any "contract, agreement or any other form of mutual understanding;"[5] and Tanzania's law applies to "any agreement, arrangement or understanding between two or more persons, whether or not it is: (a) formal or in writing; or (b) intended to be enforceable by legal proceedings."[6]

5. As the broad statutory language suggests, unlawful agreements among competitors can take many forms. The most common in the business context is the explicit agreement, in which the parties communicate directly, either orally or in writing, specifying the relevant terms and conditions of their enterprise. But agreements do not have to be formal. They can be reached through informal means of communication, including conversations at an association meeting; public statements by senior officers; price announcements or advertisements; or communications through customers. One U.S. court famously noted: "A knowing wink can mean more than words."[7]

6. It is important, however, that in all cases competition laws will impose liability for entering into an unlawful agreement only if firms have consciously acted together, whether through formal or informal means of communication. To prove a competition law violation, it must be shown that there has been a "meeting of the minds" toward a common goal or result, or, in other words, some "conscious commitment to a common scheme."[8] Conversely, liability cannot be found where firms communicated purely in the form of market place action, or where firms communicated, but did not develop some "conscious commitment to a common scheme."[9]

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3. Sherman Act § 1.

4. Article 9.

5. Articles 7 and 14.

6. Articles 2 and 8.

7. Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965).

8.. The reader should be careful, though, and not put too much emphasis on these definitions. As other observers have noted, trying to come up with common definitions of "agreement" is not a useful exercise in cases where circumstantial evidence is used to identify a cartel. It is better to describe agreement in terms of what courts in circumstantial evidence cases actually require in terms of firm behavior that supports the inference of agreement. *See, e.g.*, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 Antitrust L. J. 41 (1996) (arguing that this approach emphasizes the (forbidden) process of reaching supracompetitive market outcomes, rather than the outcome itself, which in turn ensures that remedies focus on forbidden acts that can be enjoined.).

9. In a recent article Greg Werden notes the confusion in terminology that is employed in this field. The terms "express," "explicit," "tacit" and "co-ordinated" are often found, but users do not always ascribe the same meaning to them. For example, the term "tacit collusion" has been used to describe an alleged cartel agreement for which only indirect evidence is available, but also to describe cases of parallel, interdependent conduct that does not amount to an unlawful conspiracy. Werden uses the term "spoken agreement" to refer to an unlawful conspiracy. Gregory J. Werden, *Economic Evidence on the Existence of*

7. Proving the existence of a cartel agreement, whether formal or informal, poses special problems for the competition law enforcer. Cartels are usually formed and conducted in secret; their participants understand that their conduct is unlawful, and that their customers would object to the conduct if they knew about it, and so they take pains to conceal it. If an investigation into their conduct is undertaken, the participants usually do not co-operate with it, except through a leniency programme. Obtaining *direct* evidence of a cartel agreement -- evidence that identifies a meeting or communication between the subjects and describes the substance of their agreement -- requires special investigative tools and techniques, which the authority may lack.[10] Thus, the competition law enforcer may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence. The following section discusses which types of evidence a competition enforcer might be able to use to prove the existence of a cartel, focusing on various types of indirect evidence.

2. Available evidence for proving a cartel agreement

2.1 Categories of evidence

8. Evidence used to prove a cartel agreement can be classified into two types: direct and circumstantial. Circumstantial evidence, in turn, consists of "communication" evidence and economic evidence, which include firm conduct, market structure, and evidence of facilitating practices.

9. Common types of *direct evidence* include:

- A document or documents (including email messages) essentially embodying the agreement, or parts of it, and identifying the parties to it.
- Oral or written statements by co-operative cartel participants describing the operation of the cartel and their participation in it.

10. There are different types of *circumstantial* evidence. One is evidence that cartel operators met or otherwise communicated, but does not describe the substance of their communications. It might be called “communication” evidence for purposes of this discussion. It includes:

- records of telephone conversations between competitors (but not their substance), or of travel to a common destination or of participation in a meeting, for example during a trade conference.
- other evidence that the parties communicated about the subject – e.g., minutes or notes of a meeting showing that prices, demand or capacity utilisation were discussed; internal documents evidencing knowledge or understanding of a competitor’s pricing strategy, such as an awareness of a future price increase by a rival.

11. A broader category of circumstantial evidence is often called *“economic”* evidence. Economic evidence identifies primarily firm conduct that suggests that an agreement was reached, but also conduct of the industry as a whole, elements of market structure which suggest that secret price fixing was feasible, and certain practices that can be used to sustain a cartel agreement.

Collusion: Reconciling Antitrust Law with Oligopoly Theory, 71 Antitrust L. J. 719, 735-36 (2004). This paper will generally use the terms "agreement" or "cartel agreement" to refer to an unlawful conspiracy.

10. The secret video tapes generated in the *Lysine* investigation certainly qualify; they continue to represent the gold standard in cartel evidence. Unfortunately, obtaining such “real time” evidence of agreement is usually not possible.

12. *Conduct evidence* is the single most important type of economic evidence. As noted earlier, observation of certain, suspicious conduct frequently triggers an investigation of a possible cartel. And as the section on economics highlights,[11] careful analysis of the conduct of parties is important to identify behaviour that can be characterised as contrary to the parties' unilateral self-interest and therefore supports the inference of an agreement. Conduct evidence includes, first and foremost:

- parallel pricing – changes in prices by rivals that are identical, or nearly so, and simultaneous, or nearly so. It includes other forms of parallel conduct, such as capacity reductions, adoption of standardised terms of sale, and suspicious bidding patterns, e.g., a predictable rotation of winning bidders.

13. Industry performance could also be described as conduct evidence. It includes:

- abnormally high profits;
- stable market shares;[12]
- a history of competition law violations.

14. Evidence related to *market structure* can be used primarily to make the finding of a cartel agreement more plausible, even though market structure factors do not prove the existence of such an agreement. Relevant economic evidence relating to market structure includes:

- high concentration;
- low concentration on the opposite side of the market;
- high barriers to entry;
- high degree of vertical integration;
- standardised or homogeneous product.

15. The evidentiary value of structural evidence can be limited, however. There can be highly concentrated industries selling homogeneous products in which all parties compete. Conversely, the absence of such evidence cannot be used to show that a cartel did not exist. Cartels are known to have existed in industries with numerous competitors and differentiated products.[13]

16. A specific kind of economic conduct evidence is "*facilitating practices*" – practices that can make it easier for competitors to reach or sustain an agreement. It is important to note that conduct described as facilitating practices is not necessarily unlawful.[14] But where a competition authority has

11. *See infra*, at 11.

12. Market shares, of course, are also an element of market structure. Stable market shares are classified as conduct for purposes of this discussion because they could be the result of a conscious agreement among competitors not to compete.

13. Consider, for example, the French case against the mobile phone operators, discussed *infra* at 24. The market was concentrated, but mobile phone services would normally not be considered a homogenous product.

14. Sometimes, however, and depending on the circumstances, facilitating practices have been condemned in their own right as competition law violations, without the need for showing an underlying anticompetitive

found other circumstantial evidence pointing to the existence of a cartel agreement, the existence of facilitating practices can be an important complement. They can explain what kind of arrangements the parties set up to facilitate the formation of a cartel agreement, monitoring, detection of defection, and/or punishment, thus supporting the "collusion story" put together by the competition law enforcer. Facilitating practices include:

- information exchanges;[15]
- price signalling;[16]
- freight equalisation;[17]
- price protection and most favoured nation policies;[18] and
- unnecessarily restrictive product standards.[19]

2.2 A brief example

17. Consider the following brief description of a recent Italian cartel case. It illustrates nicely how a competition authority can combine a range of different types of evidence into a persuasive story of collusion.

2.2.1 Italy – Baby Milk[20]

18. In October, 2005 the Italian Competition Authority announced that it had fined seven sellers of baby milk, comprising three legal entities, a total of €9,743,000 for engaging in a cartel in violation of Article 81 of the EC Treaty. The Italian Government had noted during the period 2000-2004 that these firms had engaged in parallel pricing of their products, and that their prices in Italy were significantly higher – between 150% and 300% – than prices in other European countries. The Authority developed

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agreement. See, e.g., Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 Wisconsin Law Review 887.

15. Problematic *information exchanges* include those containing information about current prices, costs, business plans, capacity utilisation, or other nonpublic, business sensitive information. The use of this information in facilitating a cartel is obvious – it aids both in setting the terms of agreement and in monitoring compliance with it.

16. *Price signaling* is a form of information exchange, usually conducted by means of public announcements of future prices or pricing policy. This information obviously can assist rivals in reaching agreement.

17. *Freight equalisation* schemes, whereby products are sold on a delivered basis (freight is absorbed by the seller), or by using a "basing point" system in which freight is charged by all sellers as though their products were shipped from a single location, eliminate a variable component of prices, making it easier for rivals to define the cartel price and to monitor it.

18. *Price protection (meeting competition) and most favoured nation* clauses, whereby buyers are guaranteed the lowest price offered either by a seller's rivals (price protection) or by a seller to other buyers (MFN), are by no means always anticompetitive, but in the right circumstances they can serve as enforcement or punishment mechanisms in a cartel agreement.

19. Agreement on unnecessarily *restrictive product standards* operates to exclude new entry, which could destabilise a cartel.

20. *See* the press announcement of the case on the Competition Authority's website, at http://www.agcm.it/eng/index.htm.

evidence of contacts between the firms, both direct and indirect, that supported a finding of concerted action. Direct contacts included participation in special meetings at the headquarters of the manufacturers' Association, following a request by the Health Minister to reduce prices. The evidence showed that there was open discussion among the manufacturers regarding their response to the Minister's request, and that they agreed not to reduce prices by more than 10%.

19. Indirect contacts occurred as the respondents established recommended resale prices for pharmacies, which were the principal retail outlet for their product. Special characteristics of the market made it possible for sellers to compute their rivals' wholesale prices by reference to their recommended resale prices.

20. The Authority noted that since it began its case in 2004, prices of baby milk had declined by 25% and there had been other procompetitive developments in the market, including more advertising and consumer information, the introduction of new products and a greater presence of the respondents' products in supermarket chains.

21. Here is a list of the types of evidence apparently uncovered by the authority:

- direct evidence: the producers apparently agreed on a maximum price reduction;
- communication evidence: the producers had met at the trade association and discussed prices, although with the exception of the maximum price reduction there was no direct evidence that they had reached an agreement;
- conduct evidence: parallel pricing; steep price reductions and increased competition following the investigations which suggested that earlier high prices were not the result of competitive behaviour;
- conduct of the entire industry: across the board, the prices were significantly higher than in other European countries;
- market structure evidence: this was a highly concentrated industry with only three independent suppliers, and they sold a relatively homogenous product; and
- facilitating practices: recommended resale prices for pharmacies with significant price transparency, sales occurred predominantly through pharmacies which eliminated outlets such as grocery stores that likely would have used discount prices.

2.2.2 Some General Comments about Evidence

22. There are a few general points to be made about these categories of evidence. First, there is not necessarily a bright line between direct and circumstantial evidence, especially when considering various forms of communication evidence. Second, all types of evidence – direct and circumstantial – are helpful to the competition law enforcer. They can be, and often are, used together. And third, quality matters. Direct evidence in the form of testimony from a single, unconvincing witness is less credible than strong and cumulative circumstantial evidence.

23. There is a broad range of conduct and other factors that enforcers and courts have considered relevant in circumstantial cases against cartels. Decisions have typically identified how much evidence is

the critical mass of evidence for a successful case.[21] This makes the task of the competition enforcer more difficult and outcomes of cases less predictable, but appears to be the inevitable result of the fact specific nature of each case. However, a closer analysis of cases and economic theory suggest that two types of circumstantial evidence are most important, including whether the parties communicated or at least had the opportunity to communicate and an analysis of whether firm conduct was in the firm's best unilateral self interest, absent an agreement to act collectively.[22]

24. Circumstantial evidence typically is ambiguous; often it is subject to more than one interpretation. For example, certain parallel conduct may also be consistent with independent action; a meeting of parties and communications during the meeting may have had benign purposes. The principal task of the competition law enforcer when it has only circumstantial evidence is to carefully examine whether the conduct under investigation is simply the result of independent action by market participants, each acting according to its own judgment as to its best interests. When it has come to the conclusion that this was not the case, it must convince the decision maker that the evidence proves the existence of an unlawful agreement under the relevant evidentiary standards. Economics has an important role in informing the decision maker as to how to make that judgment.

3. Economic reasoning can help identify probative indirect evidence

25. Using economic evidence to indirectly prove the existence of a cartel agreement raises a fundamental problem: how to distinguish conduct which is likely due to an unlawful agreement from conduct which arises "innocently" as the product of independent decision-making in a concentrated industry. To make that distinction, some background in economics is necessary. This section briefly describes how economic theory may help to better understand the behaviour of firms that seem to be operating as if they had formed a cartel. The section first explains economic theories that can be used to describe firm behaviour. It then discusses how these theories can help to identify "good" economic evidence that tends to support the finding of an unlawful agreement. Last, it provides some suggestions for the use of economic evidence in cartel cases based on circumstantial evidence.

26. Generally speaking, one can distinguish three broad categories of economic models that describe firm behaviour. First, firms can independently pursue their "unilateral non-cooperative best response" given what rivals are doing. In these types of models the market equilibrium is determined when each firm pursues it best response given their [its?] rivals' best response. This type of equilibrium – best responses to best responses – is typically called a Nash equilibrium. Two elementary models that use this concept to determine the market equilibrium price and output were outlined long ago.[23] Indeed, much like these very

21. *See, e.g.,* Andrew I. Gavil et al., *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy* 283 (2002).

22. These two factors are discussed in greater detail below. *See infra*, at 16.

23. In 1838 Cournot proposed that firms choose their optimal output level given their rivals' outputs and 1883 Bertrand proposed instead that firms choose the optimal price given their rivals' prices. Both the Cournot and Bertrand models are examples of one shot games. In such games, participants expect that the game will last only for one period. In repeated games (for example, models associated with the Folk Theorem), the players play the one shot game repeated. Repeated games typically identify multiple equilibria and there appears to be a widely held view among economists that the actual outcomes in an oligopoly are determined by factors outside those models. Such factors can include, in particular, agreements among competitors. As a result, the usefulness of in particular infinitely repeated game models to explain firm conduct in circumstantial evidence cases has been questioned, and they are not discussed in greater detail in the text. For an analysis of this issue *see* Gregory J. Werden, *supra* note 9, at 759-765.

Whatever model the parties propose as lawful explanation of their conduct, competition authorities must check that the model's underlying assumptions are a good description of the industry in question.

old models, modern economics makes extensive use of the Nash equilibrium concept to model firm behaviour in many different types of markets.[24]

27. A second class of "models" argues that firms may at times recognize that mutual accommodation is in their best interests. Theories of this type indicate that certain actions by a firm are only profitable given an accommodating response by their rivals. And, when there is accommodation, firms' actions become "coordinated" in the sense that neither could have achieved that result without the help of the other.[25] Importantly, it should be understood that in models which feature accommodation, firms do not reach an explicit (unlawful) agreement through communication with each other, but rather come to understand what was in their mutual best interests through market place interactions.[26]

28. A third class of firm behaviour involves cartels. Here the key feature is that firms explicitly reach an agreement through direct communication with one another. The key difference between cartel behaviour and accommodation is that firms directly communicate with each other as they might in the proverbial smoke filled room or as in the US FCC spectrum auction case where firms communicated with each other through the prices they submitted.[27]

29. Notably, in cartel cases that primarily rely on circumstantial evidence there is no "silver bullet" showing that the parties reached an agreement. Thus, the authority must build a case that attempts to separate accommodating and unilateral behaviour from behaviour tending to show that rivals reached an explicit agreement. The key question is what types of circumstantial evidence tend to push aside the idea of legitimate competition and support the finding of an explicit agreement among competitors

30. In order to identify economic evidence that is of high quality and hence useful at discriminating among competing theories, the competition authority should have a good sense of the appropriate model that best describes the unilateral incentives of a firm to compete in the market that is being investigated. First, the authority must identify the set of actions that can be characterised as unilateral, non-cooperative best response behaviours in a given case. Then, and only then, can it identify actions that are inconsistent with that behaviour and thus support the hypothesis that an illegal cartel was formed. In other words, actions compatible with unilateral, non-cooperative best response behaviour serve as a benchmark to which a firm's behaviour can be compared during the period of suspicious activity.

31. The following two examples of dominant-firm price leadership and Cournot oligopoly illustrate this point. A model of dominant-firm price leadership indicates that when the dominant firm's marginal cost goes up, the optimal price charged by it and all of the firms in the market also goes up. Indeed, the price of all firms in the market changes simultaneously. In this model, there is no accommodation, let

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24. Following up on these developments, competition authorities have made extensive use of unilateral effects theories and today many legal complaints are brought primary based on a unilateral effects concern.

25. This reasoning has been the basis of numerous complaints by competition authorities in a variety of merger cases when they speak of a coordinated effects concern.

26. Certain economically minded students of antitrust policy have argued that coordinated or accommodating behaviour by firms should be treated as a violation of competition law. *See* Richard A. Posner, Antitrust Law 94 (2nd ed. 2001). The prevailing view is, however, that cases where competitors have not reached an agreement should not be held to violate competition laws as it would be difficult or next to impossible to design an appropriate remedy. *See, e.g.*, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 Antitrust L. J. 41, 48 (1996). *See also* Gregory J. Werden, *supra* note 9, at 773-77, for a discussion of Posner's view.

27. See United States v. Omnipoint Corporation, No. 1:98CV02751 (D.D.C. November 10, 1998); United States v. Mercury PCS II, L.L.C., No. 1:98CV02751 (D.D.C. November 10, 1998); United States v. 21st Century Bidding Corporation, No. 1"98CV02752 (D.D.C. November 10, 1998).

alone an explicit cartel. Instead, each firm is pursuing its unilateral, non-cooperative best response. This very elementary model, at the very least, serves as a warning that simultaneous or near simultaneous price movements can be consistent with alternative theories of behaviour and not just cartel conduct – let alone identifying the dominate firm as the cartel ringmaster. As mentioned earlier, the competition authority must check whether that model best describes the unilateral incentives of a firm to compete in the market that is being investigated. In the example discussed here, when parties submit that a dominant-firm price leadership model can explain firm behaviour under investigation as legitimate, unilateral conduct, a competition authority must examine whether the assumptions of that model appropriately describe the industry in question. The relevant questions could include, for example, whether in light of industry structure, price setting and other market conduct in the past (during non-collusive periods), the price leadership model is a good explanation for how prices are formed.

32. Similarly, the Cournot model highlights that evidence showing that prices are higher in markets where there are fewer players than in markets where there are many can be consistent with the independent, unilateral behaviour of a firm, and not only with the actions of a cartel. In fact, higher prices with fewer firms in a market is consistent with unilateral theories, accommodating behaviour and cartel actions. This type of economic evidence would not support the finding of an agreement, and therefore by itself would be of little value in a circumstantial evidence case.

33. Because it is necessary in each case to carefully identify which actions are in a firm's unilateral self-interest, the broad notion that "interdependent pricing may often produce economic consequences that are comparable to those of classic cartels" is not helpful in analyzing circumstantial evidence cases. This point is explained below.

34. The prisoner's dilemma provides a good example of how unilateral incentives lead to a different outcome than when firms act collectively.[28] For purposes of this paper, the fundamental point of the

28. The following table identifies two competitors: firm 1 and firm 2 and defines the profits that correspond to the sets of actions that are available to firm 1 and 2, respectively.

Table: Prisoner's Dilemma

		Firm 2	
		Price High	Price Low
Firm 1	Price High	10, 10	3, 15
	Price Low	15, 3	4, 4

For example, if firm 1 prices high and firm 2 prices low then firm 1 earns 3 and firm 2 earns 15. To find the Nash equilibrium and to highlight how unilateral incentives determine the Nash equilibrium let's begin in the box where both firm 1 and firm 2 are pricing high. This box indicates that both firm 1 and firm 2 each earn 10 in profits. Call these the profits that each would earn if they explicitly agreed to fix prices. In order to understand the incentives facing each firm ask what firm 1 should do if it thinks that firm 2 will price high. If firm 2 prices high then firm 1's profit can be 10 if it also prices high or 15 if instead it defects on the cartel and prices low. Because 15 is more than 10 it is in firm 1's unilateral interest to price low. Now, firm 2 knows that if firm 1 prices low that it could earn 4 if it also priced low or 3 if it continues to price high. Because 4 is more than 3, firm 2 will choose to price low as well. This is, as it turns out, is the Nash equilibrium because each firm's best response to the other firm's best response is for both to price low.

prisoner's dilemma is that unilateral incentives may lead each firm away from pricing high and earning high profits and towards lowering prices, even though each firm anticipates that the rival will cut prices as well. Conversely, matching the high price of a competitor may be in the collective interest of all competitors, but is not necessarily consistent with unilateral self interest. Thus, when analyzing circumstantial evidence, care must be taken not to conflate the two separate concepts of unilateral self-interest and collective interest of all competitors.

35. Using the insight of game theory that cooperation cannot be expected to happen spontaneously, Stigler's work on oligopoly emphasised the incentives of cartel members to defect if they believe that they can gain larger profits by cheating than by conforming to the cartel agreement.[29] Stigler identified three "problems" that cartels need to be overcome. First, they need to reach a consensus on the terms of their agreement. This task may be extremely difficult to accomplish without communication – as game theory puts it, there is an abundance of riches, too many possible decisions of market players. Second, cartels need a detection mechanism to ensure that every member follows the cartel rules. Third, a mechanism is needed to punish those who cheat, in order to deter members from defection.[30] Like the prisoner's dilemma, Stigler's model of oligopoly highlights that oligopoly does not inevitably lead to cooperation and collective action to increase prices.[31]

36. Courts have not always been careful to distinguish between actions in unilateral self-interest and those in the collective interest of all competitors and to realize that increased prices are not a necessary result of oligopoly absent collusion. A good example where a court seems to have made an error in this regard occurred in *Reserve Supply*.[32] In that case, a private action, the plaintiffs cited a series of parallel price increases during a period when demand was low. The defendant countered that it would have been "irrational to attempt to increase sales by maintaining lower prices, because lower prices would be met by their competitors, leaving no increase in market share and reduced profit levels." Finding that demand was inelastic, the court reasoned that by maintaining lower prices the defendant could have attracted only customers of the defendant's competitors. The court concluded that failing to keep prices low "does not suggest that [the defendants] 'acted in a way, that but for the hypothesis of joint action, would not have been in their interest.'" Significantly, this statement is exactly the wrong reasoning. In essence the court failed to appreciate that, depending on the circumstances, firms in the pursuit of their own interests may compete prices down from high levels in ways similar to that described by the prisoner's dilemma game.[33]

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29. George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44-61 (1964).

30. For a good hypothetical, using numerical examples, of the problems faced by firms considering a cartel *see* Andrew I. Gavil et al., *supra note* 21, at 228-35.

31. Stigler's description of the problems faced in the formation and operation of a cartel can provide useful guidance to a competition authority which attempts to build a cartel case using circumstantial evidence since attempts by cartel members to overcome these problems may have created an evidence trail. When seeking to establish that the companies' behaviour was not consistent with unilateral self interest, a competition authority can strengthen its "conspiracy story" if it has evidence that explains how the cartel solved the problems of formation, detection, and/or punishment. For example, the competition authority may be able to explain that certain facilitating practices were used by the cartel member to monitor their compliance with the agreement and provide for the possibility to punish defectors. The Italian baby milk case, discussed supra, at 9, provides a nice illustration of this point (facilitating practices included measures to create price transparency, and use of sales channels where price discounts were unlikely). On "facilitating practices," *see supra* at page 8 Note, however, that evidence concerning the solution of the three cartel problems will not always be available.

32. Reserve Supply Corporation v. Owens-Corning Fiberglas Corporation, 971 F. 2d 37 (7th Circuit 1992).

33. For further examples on the use of the concept of actions against unilateral self interest *see infra* at 18.

37. A classic example of an agency putting together circumstantial evidence showing that firms did not behave in accordance with their unilateral, noncooperative interest comes is *American Tobacco*.[34] In that case the court found a "record of price changes" was "circumstantial evidence of the existence of a conspiracy." On June 23, 1931 the big 3 tobacco firms in the United States all announced simultaneous price changes and no "economic justification for this raise was demonstrated." Other simultaneous price changes followed over the next several years. Precisely because of the simultaneity and because no economic justification (like higher costs) was demonstrated, the court found that this circumstantial evidence was enough to convict the defendants all on criminal charges. In contrast, if costs had increased around the times of the price increases then it would not be clear at all whether there was a conspiracy or not.

38. To summarise the discussion in this section, below are four points Werden has identified that focus attention on key issues regarding the use of economic evidence:[35]

- First, "something more than interdependence must be shown before agreement can be inferred." For example, when a competitor raises price in response to a rival raising price such activity may be fully consistent with the each firm's unilateral noncooperative best response given its rivals' responses. If we cannot condemn a firm for lowering its price in response to rivals' lowering their prices then we also cannot do so for price increases. Something more needs to be shown. (This 'extra' is further elaborated in the following text).

- Second, "the existence of an agreement cannot be inferred from actions consistent with Nash, non-cooperative equilibrium in a one shot game." Such behaviour, in fact, is fully consistent with vigorous competition and provides a useful benchmark against which suspicious activity can be gauged.

- Third, actions that are inconsistent with the one-shot Nash non-cooperative equilibrium can be used to infer the existence of an agreement, even if they may be consistent with actions taken in an infinitely repeated game model. Infinitely repeated game models do not provide a useful benchmark to identify action contrary to self interest.

- Fourth, for practical and policy considerations, the "existence of an agreement should not be inferred absent of evidence of communications of some kind among the defendants through which an agreement could have been negotiated." This kind of evidence is a useful indication that the conduct observed in the market place was the result of an unlawful agreement and thus can be an important factor to avoid enforcement action in cases of unilateral or accommodating behaviour.

4. Cases inferring an agreement from circumstantial evidence

39. Cartel cases in which there is no direct evidence of agreement often begin in a familiar way: there is an episode of suspicious parallel pricing or other behaviour that is not readily explained by usual market forces. By definition the competition agency cannot directly prove that the conduct is the result of an agreement. The question presented is, what amount and quality of circumstantial evidence is sufficient for this purpose?

34. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

35. Gregory J. Werden, *supra* note 9, at 779-80.

40. Over the years, courts, competition authorities and competition experts have come to accept that "conscious parallelism," which involves nothing more than identical pricing or other parallel behaviour deriving from independent observation and reaction by rivals in the marketplace, is not unlawful.[36] As explained above, this view is well grounded in economic theory. Economic theory and case law have made it clear that something more than conscious parallelism is required. Defining that "something more" has proved difficult; courts in a few jurisdictions have wrestled with the problem for decades. One formulation, developed in the United States in civil cases (criminal cases are discussed below), requires that there exist certain "plus factors," which prove that agreement is more likely the cause of the parallel conduct than independent action. One U.S. court described the standard in a recent decision as follows:

> . . . [W]e have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behaviour show that certain "plus factors" also exist. Existence of these plus factors tends to ensure that courts punish "concerted action"—an actual agreement—instead of the "unilateral, independent conduct of competitors." In other words, the factors serve as proxies for direct evidence of an agreement.[37]

41. Other jurisdictions do not use the same terminology as U.S. courts, but it seems that the analysis that they apply is similar.[38] This section will first more closely look at how decision makers have used the two factors commonly seen as the most important types of circumstantial evidence: communication or opportunity to communicate; and action against self-interest.

4.1 Communications

42. One important type of plus factor is that which indicates that the parties communicated about prices in a manner that permitted them to reach an agreement, or at least had the opportunity to communicate. The evidence falls short, however, of proving an explicit agreement. The following civil case from the United States highlights the importance of communication evidence.

4.1.1 Flat Glass[39]

43. This case, decided in 2004, is useful because the court considered allegations of price fixing in two separate markets, one for flat glass and one for automotive replacement glass. It concluded that in the former there was sufficient circumstantial evidence of price fixing to support a finding of unlawful agreement, while in the latter the evidence was insufficient.[40] In the flat glass market there had been

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36. See, e.g., 6 Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (3d ed. 2004), ¶1433a, at 236: "The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination or conspiracy required by Sherman Act §1;" Ivo Van Bael & Jean-François Bellis, *Competition Law of the European Community* (4th ed. 2005), at 55: "Parallel behaviour between two or more undertakings as such does not constitute sufficient evidence to establish the existence of a concerted practice. The EC Treaty "does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors." (quoting from Case 48/69, ICI v. Commission, [1972] ECR 619, para. 118).

37. In re Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004).

38. For discussions of the EU jurisprudence on the topic of circumstantial evidence in cartel cases, see, e.g., Mark Jephcott, *Horizontal Agreements and EU Competition Law* (2005); Sigrid Stroux, *US and EC Oligopoly Control* (2004); Lennart Ritter and David Braun, *European Competition Law: A Practitioner's Guide*, 100-110 (3d ed. 2004) ; Richard Whish, *Competition Law*, 514-16 (5th ed. 2003).

39. In re Flat Glass Litigation, *supra* note 37.

40. Most of the recent U.S. civil cases dealing with this topic have been presented to U.S. appellate courts upon appeal from a dismissal of the case by the trial court before a complete factual record had been made.

significant episodes of parallel pricing by the defendants. Several times in the relevant period they raised their list prices by identical amounts and within close time frames. The market structure was consistent with possible collusion. There was high concentration, featuring just a few sellers. The product was relatively homogeneous, where price was the most important distinguishing feature. There were high fixed costs; there was a substantial amount of excess capacity in the industry; and demand was static. The industry was, in the words of the court, "a text book example of an industry susceptible to efforts to maintain supracompetitive prices."[41]

44. There was also evidence that the price increases implemented by the defendants were not consistent with actions which would occur in a competitive market. The increases were not prompted by any change in costs or demand, and their result was to attract a new entrant. They were, concluded the court, actions "contrary to the self interest" of the defendants unless there existed a collusive agreement (that concept is discussed further below). But the court said that while this evidence was important, it was not sufficient in this case: "The most important evidence will generally be non-economic evidence 'that there was an actual, manifest agreement not to compete.' "[42] There was also ample evidence of this kind. There had been a series of meetings and communications in which prices were discussed. Internal records of the participants indicated that they typically had knowledge of one another's pricing policies that they could not have acquired by public means. The court held that in its totality the circumstantial evidence was sufficient to support the finding of an unlawful agreement.

45. In contrast, in the automotive replacement glass market the circumstantial evidence relating to communications between the defendants was much more sparse. The conduct that formed the principle basis for the allegation of price fixing was a practice by which the industry members provided certain pricing information to a third party trade association, which then published it in a form that permitted the participants to calculate one another's prices. The court found this evidence, standing alone, to be insufficient. Publication of pricing information, it noted "can have a procompetitive effect." It declined to "rest on [an] inference of collusion from this ambiguous, or even procompetitive, fact."

4.2 Economic evidence

46. Communication evidence is undeniably important – many would say critical in a circumstantial case. Certain economic evidence, however, also can play an important role in these cases. The following decision, written by the influential American jurist and scholar, Richard A. Posner, is a good example of how to analyze circumstantial economic evidence.

Under U.S. "summary judgment" procedures the court can grant judgment in advance of a full trial if the moving party can show that all necessary factual issues are settled or so one-sided they need not be tried. A different, more lenient (to the proponent) legal standard applies to summary judgment motions than to a final judgment. In these cases the appellate court is not deciding finally whether an agreement has been proved, but only whether there is sufficient evidence of agreement to permit that question to be submitted to the fact finder (judge or jury). Nevertheless, these cases are instructive on the issue of proof of agreement in horizontal cases.

41. *Id.*, at 361.

42. Ibid, quoting from an opinion by Judge Richard Posner in In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002).

4.2.1 High Fructose Corn Syrup[43]

47. The four principal manufacturers of high fructose corn syrup (HFCS), a sweetener made from corn, were alleged in a private civil damages case to have conspired to fix the price of their product during the period 1988-95. The trial court dismissed the case, but the appeals court reversed, sending the case back for trial.

48. Judge Posner succinctly classified the types of evidence relevant to proof of agreement under the Sherman Act:

> The evidence upon which a plaintiff will rely will usually be and in this case is of two types—economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types, and is in this case: evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelised if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a noncompetitive manner.[44]

49. The court noted various elements of economic evidence in the case that were consistent with an agreement: high concentration on the selling side, a "highly standardised" product; a lack of close substitutes for HFCS, a significant amount of excess capacity maintained by the defendants, market-wide price discrimination.[45] The court then turned to (economic) conduct evidence that suggested an agreement. It described a change to a pricing formula that was not based on cost. It also pointed to a change in the length of contracts imposed by the defendants and to a suspicious pattern among defendants of buying and selling from one another. It also noted an unusual stability of market shares in the industry, under circumstances in which one would expect more volatility. And the court gave some credibility to expert testimony showing that the prices for HFCS were higher during the period of the alleged conspiracy than they were before or after.

50. The court also found that there was communication evidence in the record that supported such a conclusion. It consisted of documents and other statements by officers of the defendants that referred obliquely to agreements and understandings, and gave indications that they had non-public information about their rivals' pricing decisions. The court held that the evidence in its entirety was sufficient for a trier of fact to conclude that there had been agreement.

4.2.2 "Action against self interest"

51. This is a concept employed in U.S. courts in recent years. As explained in greater detail in the economics section, it is a critical step in the evaluation of economic evidence.[46]

52. An action against self interest is one that would be against the self interest of the actor in the absence of agreement. The firm would not have acted as it did if it had been acting unilaterally. An action against self interest might take the form of a refusal to deal with a customer or supplier, when there appear

43. In re High Fructose Corn Syrup Antitrust Litig., *supra* note 42.

44. *Id.*, at 655.

45. Price discrimination is not always anticompetitive, and the existence of it does not always indicate collusion. Judge Posner discusses at some length in the decision why it is relevant in this case. *Id.* at 658.

46. *See supra*, at page 11.

to be no economic reasons why the party would refuse such a business opportunity.[47] It could involve a pattern of information exchanges – cost information, for example, or information about transaction prices – that businesses normally consider to be confidential, and which rivals in a competitive market could use to their advantage. It could involve a pricing structure that bears no relation to cost, or that otherwise seems to have no market-based justification.

53. A case in which this concept was important was *Blomkest Fertilizer*.[48] It involved allegations by fertilizer manufacturers that eight potash producers, six of them Canadian, had conspired to fix the price of potash between 1987 and 1994 (potash is an important input into fertilizer). The plaintiffs' case consisted mostly of economic evidence, which included evidence of a pattern of price verifications by the defendants, a form of economic "conduct" evidence described above in Part II.

54. The case was heard by all of the eleven judges on the appeals court, a rarity in U.S. practice.[49] The eleven judges split six to five in favour of the defendants, affirming the decision of the trial court to dismiss the case The majority found the price verification evidence unpersuasive, first because it occurred only as to past transactions, and as such would have minimal implications for future pricing, and second, because in the court's words:

> The price verifications relied upon were sporadic and testimony suggests that price verifications were not always given. The fact that there were several dozen communications is not so significant considering the communications occurred over at least a seven-year period in which there would have been tens of thousands of transactions. Furthermore, one would expect companies to verify prices considering that this is an oligopolistic industry and accounts are often very large. We find the evidence falls far short of excluding the possibility of independent action.[50]

55. The minority argued persuasively that such conduct would not have been in the defendants' interest if they had not been participating in a cartel:

> . . . if there were no reciprocal agreement to share prices (and the producers certainly do not argue that there was), an individual seller who revealed to his competitors the amount of his privately negotiated discounts would have been shooting himself in the foot. On the other hand, if there were a cartel, it would be crucial for the cartel members to cooperate in telling each other about actual prices charged in order to prevent the sort of widespread discounting that would eventually sink the cartel.[51]

56. As noted above, however, this view did not prevail in the case.

57. A good illustration of use of the "action against self interest" concept to determine whether parallel conduct should be regarded as indirect evidence of an agreement is the appeals court opinion in *Brand Name Prescription Drugs*.[52] There, a class of customers brought a case against drug manufacturers alleging that their uniform practice of price-discriminating among groups of customers, as a result of which the plaintiffs were forced to pay higher prices, should be viewed as (indirect) evidence that the defendants

47. See Petruzzi's IGA v. Darling-Deleware, 998 F.2d 1224, 1243-45 (3d Cir. 1993)

48. Blomkest Fertilzer v. Potash Corp. of Sask., 203 F. 3d 1028 (8th Cir. 2000) (en banc).

49. Most appeal cases in the U.S. Federal system are heard by a panel of only three judges, chosen at random.

50. *Id.*, at 1034-35.

51. *Id.,* at 1047.

52. *In re* Brand name Prescription Drugs Antitrust Litig., 186 F3rd 781 (7th Cir. 1999).

had entered into a cartel agreement. The court rejected the plaintiffs' argument, however. It reasoned that as each defendant drug manufacturer had market power as a result of the patent protection of its drugs, it was consistent with each manufacturer's self interest to exercise that market power and price discriminate among groups of customers, depending on their willingness to pay. The fact that all defendants had adopted similar price discrimination strategies therefore was consistent with action in each defendant's self interest and could note be viewed as evidence of an agreement among them.

4.3 Holistic v. item-by-item approaches to circumstantial evidence

58. One important issue that affects how courts evaluate circumstantial evidence is whether the court is willing to consider all evidence that is proffered as a whole, giving it cumulative effect, or whether it requires that each item unequivocally support the hypothesis of agreement. In *High Fructose Corn Syrup* Judge Posner strongly adopted the holistic approach. The trial judge in the case had refused to consider the communication evidence that was offered

> … because he thought its character was such as to "require that a substantial inference be drawn in order to have evidentiary significance." This is correct in the sense that no single piece of the [communication] evidence . . . is sufficient in itself to prove a price-fixing conspiracy. But that is not the question. The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment.[53]

59. Judge Posner noted that a "trap" that confronts the court in these cases is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial? The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.[54]

60. It should be noted, however, that there are different views even within the United States. Other federal appeals courts have examined each item of circumstantial evidence independently as to whether it tended to exclude independent, unilateral action of competitors.[55]

61. It appears that in *Wood Pulp*, an important European Union case dealing with circumstantial evidence in a price fixing case, the European Court of Justice court took a similarly strict approach on this issue of evaluating individual items of evidence.

4.3.1 Wood Pulp[56]

62. The European Commission had declared that more than 40 producers of wood pulp and three associations of producers had engaged in concertation during two periods between 1975 and 1981, in which their announced prices were nearly identical. It was the practice in the industry for buyers and sellers to enter into long term contracts, which gave buyers the right to purchase a minimum quantity of wood pulp at prices no higher than announced prices. The producers announced their prices each quarter,

53. *Id*., at 661.

54. *Id*., at 655-56.

55. *See* Williamson Oil Co. v. Philip Morris USA, 346 F.3rd 1287 11th Cir. 2003).

56. Cases C-89/85 etc., Ahlstrom Oy v. Commission, [1992] ECR I-1307.

at virtually the same time. The Commission produced a substantial quantity of economic evidence, in addition to the parallel pricing conduct, in support of its decision: a large number of sellers, who differed significantly from one another in terms of national origin (they were from Finland, Sweden, Spain, Portugal, the U.S. and Canada); varying cost structures; differing freight costs; variation in national markets across the Community; announced prices significantly above spot market prices; apparent breakdowns in price discipline twice during the period; prices published in the trade press; prices announced in advance of their application; all prices quoted in U.S. dollars.

63. The Commission also adduced communication evidence supporting concertation, consisting of documents and telexes from the files of the parties showing that they had attended meetings at which prices were discussed. However, the ECJ required the Commission to link each document to concertation between specific producers and for specific periods. The Commission took the position that it need not do so, that the evidence was relevant generally to the alleged concertation. The ECJ did not accept the Commission's view, however, and excluded the documents from consideration.

64. The court then turned to whether the economic evidence alone was sufficient to establish concertation. The standard that it applied to this inquiry was whether "concertation constitutes the only plausible explanation for such conduct." It concluded that there were valid business reasons for the long term relationships and the pricing practices that had evolved in the industry. The court had employed two experts, who did not rule out concertation but who also found legitimate reasons for the conduct under consideration. The simultaneity and parallelism of announced prices could be explained by the "very high degree of transparency that existed in the market."[57]

65. The strict standard adopted by the court for evaluating the economic evidence in the case – that concertation constitutes the only plausible explanation for such conduct – may have been the principal reason for reversing the Commission decision, but it is likely that the ECJ's unwillingness to consider in a holistic fashion the communication evidence that was proffered also contributed substantially to the result. In subsequent cases decided by the Commission and EU courts, however, it does not appear that the authorities have adopted such a strict approach.[58]

66. It is inevitable under such an "itemised" approach that each item of circumstantial evidence will almost always be ambiguous if analysed in isolation. If the evidence is cumulative, on the other hand, the overall ambiguity may be ameliorated. It would seem that the better approach, as articulated by the court in *High Fructose Corn Syrup,* would be to be consider the available evidence as a whole and evaluate whether all evidence in its entirety can be sufficient under the applicable standards of proof.

5. Cartels and circumstantial evidence – the national experience

67. Circumstantial evidence is treated differently in different countries.[59] The law regarding the use of circumstantial evidence in cartel cases will undoubtedly develop according to these national norms. Other factors will also dictate how these cases evolve across countries, notably whether cartels are administrative or civil violations, or whether they are prosecuted as crimes. Further, countries are at different places in the development of their anti-cartel programmes. Some countries have been prosecuting

57. Id. at para. 81. See also, Suiker Unie v. Commission (*Sugar Cartel)*, OJ [1973] L 140/17.

58. *See, e.g.*, *PVC II*: OJ [1994] 239/14, substantially upheld on appeal, Cases T-305/94 etc., Limburgse Vinyl Maatschappij v. Commission [1999] ECR II-931 (CFI confirming that "…items of evidence should be regarded not in isolation but in their entirety […] and individual items of evidence cannot be divorced from their context"); *Plasterboard*, OJ [2005] L. 166/8.

59. Although, as suggested above, there might be differences even within one and the same country.

cartels for decades, others for only a short time. Some have highly effective leniency programs; others have only recently introduced one. The impact of these factors on prosecuting cartels with circumstantial evidence is explored further below.

5.1 Prosecuting cartels as administrative or civil violations

68. In the majority of countries cartels are prosecuted administratively or civilly (in most of these the process is administrative; that term will be employed exclusively from here on out in this section). The trend in OECD countries that treat cartels as administrative violations is toward developing direct evidence. Thus, virtually all cartel cases prosecuted by the European Commission since 2001 or so have generated direct evidence.[60] Further, the Third Report by the OECD Competition Committee on hard core cartels[61] describes several recent cartel cases originating in OECD countries and a few non-Member observer countries. Almost all of these, it seems, employed direct evidence.[62] There may be at least two reasons for this trend, and they are related: Leniency programmes, which bring a greater number of cartels to the authorities' attention and generate at least some direct evidence, are becoming ever more effective. And countries are increasingly imposing very large fines for cartel conduct. Severe sanctions make leniency programmes more effective. Independently, it is easier to justify the imposition of large fines if one has direct evidence of the violation, including, if possible, evidence of knowing, intentional wrongdoing.[63] Finally, countries have strengthened their investigatory techniques, including dawn raids.

69. There is another, important benefit from cases built on strong direct evidence: they can lead to more plea bargains and fewer appeals. In some jurisdictions, the parties in these cases usually consent to a finding of a violation and to the imposition of strong sanctions. This has significant resource implications; litigation can take a great deal of time and consume enforcement resources that could otherwise be employed in generating more cases.

70. Still, when only circumstantial evidence is available and it is strong, countries with a longer enforcement record continue to be willing to bring cases based on it. One example is the Italian *Baby Milk* case, discussed earlier. Another recent case is the French decision concerning a mobile phone operators cartel.

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60. Based upon a review of Commission press releases during the period, available on the Commission's website.

61. OECD, *Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels: Third Report by the Competition* Committee (2005), available on the OECD web site at www.oecd.org/competition.

62. Of course, in many of these cases there was circumstantial evidence as well. As noted above, the different types of evidence may be used together in a case.

63. For example, between 2001 and 2005 the European Commission imposed fines totaling almost €4 billion for cartel conduct in violation of Article 81. See, speech by European Commissioner Neelie Kroes before the International Forum on Competition Law, April 7, 2005, available on the European Commission website, at http://europa.eu.int/comm/competition. As noted above, all of these cases apparently were based, at least in part, on direct evidence.

5.1.1 France – Mobile Telephones[64]

71. On 1 December 2005 the Conseil de la concurrence announced that it had fined three mobile telephone providers a total of €534 million for collusive activity. There are two parts to the case. The first is a course of dealing between 1997 and 2003 by which the respondents exchanged detailed and confidential information on the numbers of new customers signed up the previous month, and the numbers of people who opted to cancel their subscriptions. This conduct was deemed to have anticompetitive effects apart from any direct effect on prices.

72. More relevant to this discussion, the Conseil also found that between 2000 and 2002 the three operators had entered into a market sharing agreement centered on stabilizing their market shares. The Conseil stated that it had

> . . . uncovered a number of pieces of serious, specific and corroborating evidence pointing to the existence of such an agreement. These included handwritten documents with explicit references to an "*agreement*" between the three operators, the "*pacification of the market*" and the "*Yalta of market share*".

73. The Conseil pointed to certain market practices that the respondents had simultaneously adopted in 2000, including "a hike in prices and the adoption of measures such as giving priority to contracts with commitments over pay-as-you-go cards, or the introduction of billing per 30-second increments after a minimum first minute." The Conseil appeared to evaluate these actions in the context of the "against self interest" standard discussed above:

> These measures . . . could clearly have led to a drop in sales (and therefore market share) for any operator who took the step of introducing them unilaterally. The collusion was therefore intended to make it easier for the operators to introduce this strategy, by enabling them to ensure that they all adopted the same policy simultaneously, and that their market shares would consequently remain stable.

5.1.2 Brazil – Steel

74. In 1999, CADE, the Brazilian competition tribunal, concluded what many considered to be the first cartel case under its current competition law, which was enacted in 1988. The case involved an alleged agreement in 1996 to increase the prices of certain flat rolled steel products. There were only three domestic producers of those products, two of which were linked by a 50% cross-ownership. In July of 1996 representatives of the Brazilian Steel Institute met with officials of Brazil's Secretariat for Economic Monitoring (SEAE) and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day. The background to this meeting is that until 1992 these products were subject to price controls, which were administered in part by SEAE. Producers were required to submit proposed price increases to SEAE. There were no such controls in 1996, however.

75. On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of the competition law and illegal. Nevertheless, the three producers each implemented price increases on these products in early August of that year. The increases were approximately the same as those given to SEAE by the Steel Institute. They were not identical across the three companies, but in

64. The press release by the Conseil de la concurrence is available on the Conseil's website at http://www.conseil-concurrence.fr/user/standard.php?id_rub=149&id_article=501. The complete decision is available at http://www.conseil-concurrence.fr/user/avis.php?avis=05-D-65. The defendants have announced their intention to appeal the decision.

most cases they did not vary by more than .5%. About one year later the companies implemented another, similar increase, though there was no preliminary notice given to SEAE.

76. The defendants denied that they had formed an agreement. They admitted that prior to the meeting with SEAE the top executives of the firms had met, but they denied that an agreement had been reached. The Brazilian competition agencies were not able to develop direct evidence of an agreement. They were unable to question executives of the three firms directly about the matter. The agencies concluded, however, that there was sufficient circumstantial evidence of agreement. That evidence included the executives' meeting prior to the SEAE meeting, the statement of intent to increase prices at the SEAE meeting, the nearly identical, nearly simultaneous increases in August of 1996, and the lack of evidence otherwise supporting independent decisions by the steel companies to increase prices at that time. CADE concluded that the 1996 conduct was unlawful. It did not include the 1997 increase as a part of the violation, however, as there was no evidence of a meeting or communications among the firms prior to that increase.

77. The tribunal imposed the minimum fine under the law of 1% of the previous year's gross turnover of each firm, which amounted to about R$51 million (then the equivalent of about USD48 million).[65] The defendants appealed the decision and the fines, and some aspects of the case, unfortunately, are still not resolved. More recently, the Brazilian competition agencies have become more aggressive in their anti-cartel effort and have perfected their use of dawn raids and other specialised investigative techniques. They have created a leniency programme, which has generated some cases.[66]

5.1.3 Latvia – Hens' Eggs

78. This case is a good example of the use of different types of circumstantial evidence:

- communication evidence, including evidence of meetings of competitors through an industry trade association, and documents evidencing that prices were discussed at these gatherings;

- economic evidence showing an increase in prices after the relevant meetings, and evidence rebutting the claim by the respondents that their pricing was the result of market forces.

79. The case is also relevant because it occurred in the agricultural products sector, where it seems that many cartels exist in countries beginning anti-cartel enforcement.

80. In 2003 The Latvian Competition Council initiated an inquiry into possible price fixing by producers of hens' eggs upon reading in the local press an announcement by the leading producer that it intended to raise its prices. The article also stated that the Latvian Association of Egg Producers had recommended that its members raise their prices. The Competition Council then lacked mandatory inspection powers, but its investigators appeared simultaneously at the offices of three producers to conduct voluntary interviews. Later the investigators interviewed other producers.

81. The investigation developed the following evidence: There were 12 members of the Producers' Association. The Latvian market was dominated by one producer, which had a market share of 50%. Three others each had shares of 8-11%. In the interviews, the investigators were told that there had been

65. For further discussion of this case, see, Paulo Corrêa and Frederico G. de Aguier, *Circumstantial Evidence and Plus Factors in Cartel Cases*, available on the SEAE website, at http://www.fazenda.gov.br/seae/english/index_english.html.

66. See, OECD, *Competition Law and Policy in Brazil: A Peer Review*, at 50-54 (2005), available at the OECD website, at http://www.oecd.org/dataoecd/12/45/35445196.pdf.

discussions about raising prices at association meetings in two periods, July – August 2002 and March – April 2003. The investigators obtained a copy of a fax sent to association members by the dominant firm prior to a meeting in March 2003. The fax stated that the agenda of the meeting would include the topic of "price policy (the increase of prices is planned starting from April 1, 2003)." The fax also stated that the dominant firm would not respond to proposals from retailers for special low price promotions for the upcoming Easter season, and it concluded: "Therefore, in order to ensure successful trade in Easter we invite you not to support the actions of retailers of above-mentioned nature."

82. The Council also developed economic evidence in support of its case. It analysed egg prices during the relevant periods and found that prices did indeed raise after the association meetings. Moreover, it seemed that the increases could not be justified either by higher costs or by supply and demand considerations. Indeed, the producers produced a surplus of eggs during the relevant periods.

83. The Competition Council concluded that the producers had engaged in price fixing activity in violation of the Latvian competition law, and fined the respondents. The case is currently on appeal.

5.1.4 Chinese Taipei – petrol and diesel fuel

84. This case is useful because it occurred in a sector in which many countries initiate cartel investigations – retail sales of petrol. It is also notable because it contains no communication evidence – only economic evidence. The competition authority apparently employed a form of economic analysis like that discussed above in Part III, but it is not clear why the agency rejected the hypothesis of unilateral noncooperative best response – in particular the dominant-firm price leadership model.

85. At the time the investigation began in 2003, the refined petroleum sector in the Chinese Taipei market for petrol and diesel fuel was a duopoly. The leader, with a market share of 70%, had been a monopolist until the entry of another firm in 2000. A third firm, a large American company, had entered in 2002 but subsequently withdrew.

86. For two years the prices charged by these two suppliers to retail petrol stations had moved in parallel fashion. There were at least 20 instances of simultaneous and nearly identical price adjustments. In each instance, one of the parties announced new prices publicly, to take effect in the future. The other party would then react, also announcing its new prices publicly. If on occasion the second party did not follow the prices announced by the first, the initiating party would either withdraw its changes or amend them to conform to those announced by the other.

87. There was no direct evidence of agreement. The Chinese Taipei Fair Trade Commission concluded that the duopolists had reached a "meeting of the minds," however. It considered the following factors in making that judgment:

- the parallel conduct of the two parties, covering many price adjustments over a period of years;
- the fact that the price changes were announced publicly, and in advance;
- the fact that retail petrol station operators reacted quickly to the price changes by posting new prices; these announcements served as a monitoring mechanism for the two suppliers;
- an in-depth analysis of the cost structures of the two firms, showing significant differences between them in terms of sources of imports, refinery costs, transportation costs, capacity utilisation, and others.

88. The FTC also apparently employed game theory in its analysis of the conduct, concluding that the results were consistent with a form of agreement.[67]

89. The Commission concluded that the conduct constituted a violation of Chinese Taipei's Fair Trade Law, and it fined each of the two respondents NT$6,500,000 (about USD200,000).

5.2 Cartels as crimes

90. A minority – but a growing one – of countries prosecute cartels as crimes. The standard of proof in criminal cases is the highest, and this would translate into stricter standards for the use of circumstantial evidence. Still, such evidence can be used in these cases. The experience in two countries where cartel conduct is a crime is described below.

5.2.1 United States

91. The U.S. has a relatively long history in prosecuting cartels as crimes.[68] There were some early criminal cases under the Sherman Act that were built on circumstantial evidence.[69] In the past several years, however, all criminal convictions under the Sherman Act have been based on direct evidence. Since the mid-1990s, the U.S.' leniency programme has become its most important tool in its anti-cartel arsenal, and most cases result from an application under the programme. Most are also resolved without trial, on the basis of guilty pleas.

92. Of course, circumstantial evidence can also be useful and important. The *Art Auctions* case noted in the introduction above was one case in which it was. The case involved an agreement between the two leading art auction houses, Sotheby's and Christie's, fixing their commission rates. The trial involved Sotheby's Chairman, A. Alfred Taubman; the other parties had either pled guilty or were not prosecuted because they had entered the U.S.' leniency programme. There was direct evidence resulting from the leniency application proving the existence of the cartel agreement. The evidence linking Taubman to the agreement was more tenuous, however. It consisted of communication evidence, much of it written, showing that Taubman had met with his counterpart at Christie's and discussed prices, and that he had

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67. A more complete description of this case is available on the APEC website, at http://www.apeccp.org.tw/doc/Taipei/Case/D094q108.htm.

68. The Sherman Act provides for both criminal and civil sanctions, but for many years after its enactment in 1890 most of the cases brought under it were civil. Also, for many years, a Sherman Act violation was classified as a misdemeanor – a lesser crime. In the 1970s, however, the act was amended to make a violation of it a felony, and the maximum penalties were increased. There were further increases in the maximum penalties, so that today a corporation can be sentenced to pay a fine of up to $100 million (and even more, pursuant to an alternative sentencing provision in U.S. law), and a natural person can be sentenced to a jail term of up to 10 years and a fine of up to $1 million. Sentences actually imposed have kept pace with the increasing authorisations; corporations have paid fines of hundreds of millions of dollars, and individuals are regularly sentenced to jail terms of three years or more. *See*, Scott D. Hammond, "An Overview Of Recent Developments In The Antitrust Division's Criminal Enforcement Program," speech before the America Bar Ass'n, January 10, 2005, available at http://www.usdoj.gov/atr/public/speeches/207226.htm.

69. One of these was *American Tobacco*, *supra* note 34, decided in 1946. It was an appeal from a criminal conviction of three leading tobacco companies and some of their executives. Each defendant was convicted on three counts of violating the act and each was fined a total of $15,000, which was then the maximum fine. There was apparently no direct evidence of an agreement between the defendants, but as outlined in Part III above, the Supreme Court upheld the convictions on the basis of patterns of price changes, which it found to be "circumstantial evidence of the existence of a conspiracy."

supervised discussions between his subordinate and a Christie's executive on the subject.[70] The jury convicted Taubman on the basis of this evidence, and he was sentenced to one year and a day in jail and a fine of $7.5 million.

5.2.2 Canada

93. Canada has also long classified cartels as crimes. Like the U.S., there were some early cases in which convictions were based only on circumstantial evidence, and in which the sanctions – fines – were minimal.[71] In 1980 an important case in the evolution of the use of circumstantial evidence in criminal cases was decided by the Supreme Court of Canada.

5.2.3 Atlantic Sugar[72]

94. The defendants, three sugar refiners, were accused of, among other things, entering into an agreement to maintain traditional market shares over a period of several years. There was no evidence of communication between the defendants on this subject, however. The evidence, as characterised by the court, was entirely "circumstantial." It included the rigid stability of the defendants' shares over a long period and at least one facilitating practice – basing point pricing. In addition, there was documentary evidence showing that the defendants deliberately – but apparently independently – chose not to initiate price cuts that would destabilise this environment.

95. The trial judge concluded that the circumstances were "the result of a tacit agreement between the accused," brought about by the desire of each defendant to avoid a destructive price war.[73] The judge held, however, that such conduct did not constitute a violation of the applicable criminal law. The Supreme Court upheld the trial court (an intermediate appellate court had overturned it). It emphasised the apparent lack of communication between the defendants on this point. Then:

> In those circumstances did the "tacit agreement" resulting from the expected adoption by the competitors amount to a conspiracy? I have great difficulty agreeing that it did because the author of Redpath's [the pricing leader] policy was conscious that its competitors would inevitably after some time become aware of it in a general way and also expected them to adopt a similar policy which would also become apparent.[74]

96. The *Atlantic Sugar* decision engendered concern that "tacit agreements" were no longer subject to the criminal conspiracy provisions of the Competition Act. The Act was amended in 1986, adding (among other things) the following provision:

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70. There was also oral testimony offered by Taubman's subordinate, however, which the U.S. government considered to be direct evidence. A good description of the evidence introduced by the government can be found in a government filing in the appeal from the conviction (which was upheld), available at http://www.usdoj.gov/atr/cases/f11300/11329.htm.

71. One of these was *McGavin Bakeries*, a case decided in 1951 by the Supreme Court of Alberta. Rex v. McGavin Bakeries, Ltd., 3 W.W.R. (N.S.) 289, at p. 10 (1951). The court noted that ". . . the crown's case here is based almost entirely on circumstantial evidence," but it concluded that the "massive amount of factual material" relating to conduct over a 17 year period by bakers in three western provinces resulted in the "inescapable inference . . . that there was the conspiracy charged." The maximum fine that could be applied to the conduct, however, was CAD10,000. Six defendants were fined a total of CAD30,000.

72. Atl. Sugar Refineries Co. v. A.G.Can.., [1980], 2 S.C.R.644.

73. *Id.*, at p. 7.

74. *Id.*, at p. 15.

> **Evidence of conspiracy** – In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.[75]

97. The following interpretation of the amendment is provided in a comment to the law:

> The new subsection makes clear that tacit agreements, in the sense of agreements proved by circumstantial evidence alone, fall within the scope of s. 45(2.1). However, the section does nothing to clarify the more difficult questions of what in law constitutes an agreement, what sort of communication among the alleged conspirators is necessary and how to distinguish agreements from mere "conscious parallelism."[76]

98. In any case, it seems that the trend in Canada, like that in the U.S., is toward an increasing number of cartel cases generated by its immunity programme. These cases, which by their nature generate

6. Conclusion

99. In prosecuting cartel cases, competition officials prefer to have direct evidence of the cartel agreement, and they are getting better at acquiring it. Circumstantial evidence continues to play an important role in cartel cases, however, either alone or, more commonly, together with direct evidence. Circumstantial evidence may be relatively more important in early cartel cases in countries just beginning an anti-cartel effort, as those new agencies may not have perfected their ability to develop direct evidence.

100. There are various types of circumstantial evidence, and it is difficult to generalise about them, because each case is highly fact specific. However, communication evidence and conduct evidence that tend to show that the parties' actions were not consistent with each party's unilateral self-interest are widely considered most important. Other economic evidence typically will be relevant as well to establish a persuasive case.

101. The great challenge in establishing a circumstantial evidence case is that such evidence typically is ambiguous and subject to more than one interpretation. There is a risk that enforcers will too readily condemn parallel conduct even though it is simply the result of independent action by market participants, each acting according to its own judgment as to its best interests. As demonstrated above, application of sound economic principles plays an important role in interpreting the conduct of firms to distinguish lawful, unilateral acts from joint action that results from an unlawful agreement.

75. Competition Act, §45(2.1).

76. Robert S. Nozick, *The 2004 Annotated Competition Act* (Toronto: Thomson Carswell, 2004), at 87.

DAF/COMP/GF/WD(2006)3

OCDE

OECD

NOTE DE REFERENCE

du Secrétariat

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

TABLE RONDE SUR LES POURSUITES CONTRE LES ENTENTES SANS PREUVE DIRECTE D'UN ACCORD

Note de Référence

préparée par le Secrétariat

> Les preuves indirectes n'ont pas moins de valeur que les preuves directes car la loi ne fait par principe aucune différence entre elles, mais exige simplement qu'avant de condamner un prévenu le jury ait acquis l'intime conviction de sa culpabilité à la lueur de toutes les preuves qui ont été présentées au cours du procès.
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> * * *
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> Pour démontrer la réalité d'une entente, il n'est pas nécessaire que le ministère public apporte la preuve d'un accord oral ou écrit. Très souvent, dans ce genre d'affaires, cette preuve n'existe pas. En fait, c'est à partir des relations qui ont existé entre les personnes, des paroles qu'elles ont échangées ou de leurs actes eux-mêmes que l'on pourra déduire l'existence de l'entente ou de l'accord supposé.

1. Ces citations, extraites des instructions données au jury à l'occasion de l'action pénale qui a récemment abouti à la condamnation du président de la maison de ventes aux enchères Sotheby's[1], montrent que l'on peut intenter des poursuites contre les membres d'une entente, même au regard des exigences les plus strictes en matière de preuves, sans disposer de preuve directe de l'entente en question ou d'une participation supposée à celle-ci. La plupart des juridictions admettent en effet les preuves indirectes (circonstancielles), y compris celles qui ont l'expérience la plus longue et la plus fructueuse de la répression des ententes, et où les autorités chargées de faire respecter le droit de la concurrence ont réussi à enclencher le cercle vertueux selon lequel la conjonction de lourdes sanctions et de programmes de clémence ont permis d'obtenir des preuves directes de nouvelles infractions, passibles à leur tour de lourdes sanctions[2]. Étant donné le secret qui entoure les ententes, la possibilité d'utiliser des preuves indirectes à leur encontre, à défaut d'éléments plus probants, revêt donc un intérêt particulier dans les juridictions qui n'ont pas autant d'expérience.

2. La présente note traite de l'utilisation des preuves indirectes dans le cadre d'enquêtes sur des ententes généralement déclenchées après un épisode douteux de parallélisme des prix ou autre phénomène qui ne semble pas résulter directement du jeu des forces du marché. Lorsque l'organisme chargé de la concurrence soupçonne l'existence d'une entente sans pouvoir en apporter la preuve directe, en effet, la question qui se pose est alors celle de l'ampleur et de la qualité des preuves indirectes qu'il va devoir réunir pour constituer son dossier.

3. Les principaux points à retenir sont résumés ci-dessous :

- Les dispositions de la législation de la concurrence qui prohibent les ententes anticoncurrentielles visent non seulement les ententes explicites mais aussi d'autres types

1. A consulter sur le site web de l'American Bar Association, à l'adresse : http://www.abanet.org/antitrust/committees/criminal/taubman.doc.

2. On notera qu'aux États-Unis, où le cercle vertueux décrit ici est déjà bien engagé, les autorités renonceraient normalement à porter une affaire d'entente devant la justice si elles disposaient uniquement de preuves indirectes. Même dans le cas de Sotheby's, il y avait une preuve directe de l'entente ainsi que certains témoignages de première main impliquant le président. En ce qui concerne ce dernier, cependant, la mise en cause reposait pour l'essentiel sur des preuves indirectes.

d'accords parfois qualifiés d'"arrangements", d'"association d'intérêts" ou encore de "pratiques concertées". Dans tous les cas, cependant, il doit être démontré que les parties sont parvenues d'une manière ou d'une autre à un "accord de volonté délibérée en vue d'un projet commun" pour qu'il y ait violation du droit de la concurrence.

- Les ententes créent un problème particulier pour les autorités car il s'agit d'accords secrets dont les parties prenantes refusent généralement de coopérer lorsque des enquêtes sont menées à leur sujet. Dans les juridictions expérimentées, les autorités de la concurrence ont le plus souvent recours à des preuves directes pour démontrer l'existence d'une entente illicite, mais il n'est pas toujours facile d'obtenir ce type de preuves, et il peut donc s'avérer nécessaire de faire appel à d'autres éléments.

- Il y a plusieurs formes de preuve indirecte, parmi lesquelles notamment les indices attestant l'existence de communications entre des concurrents et les preuves économiques. Les preuves économiques sont liées au comportement de l'entreprise, à la structure du marché et aux pratiques de nature à faciliter certains agissements. Tous les moyens de preuve peuvent être utiles et il convient de n'en laisser aucun de côté.

- Les théories économiques de l'oligopole apportent plusieurs éclaircissements intéressants pour les autorités chargées de faire respecter le droit de la concurrence : elles montrent que des actes motivés par des incitations unilatérales peuvent aboutir à des résultats différents de ceux qu'obtiennent des entreprises agissant collectivement, et qu'un oligopole n'entraîne pas inévitablement une coopération et une action concertée pour augmenter les prix. Par conséquent, lorsqu'ils examinent la conduite d'une entreprise, les responsables doivent veiller à bien faire la distinction entre ce qui relève d'une action accomplie unilatéralement pour satisfaire un intérêt individuel, en l'absence d'accord pour agir de concert, et ce qui relève d'une action accomplie dans l'intérêt collectif de tous les concurrents. Dans le cas où l'intérêt individuel explique l'action, celle-ci ne peut pas constituer une bonne preuve indirecte d'entente.

- Conformément à la théorie économique, une jurisprudence bien établie reconnaît que les indices de comportement parallèle, comme des augmentations de prix concomitantes chez des concurrents, ne constituent pas à eux seuls une preuve suffisante de la réalité d'une entente. Il faut des éléments supplémentaires pour démontrer l'existence d'un accord illicite conformément aux exigences en vigueur en matière de preuves. C'est ce que certains tribunaux nomment les "facteurs complémentaires".

- Tout élément permettant de démontrer que les membres présumés d'une entente ont communiqué entre eux et que cette communication a pu déboucher sur une concertation est considéré comme un facteur complémentaire de poids. Les preuves économiques sont une autre catégorie importante de preuves indirectes. Il s'agit à la fois d'indices de comportement suggérant une action menée en commun et d'éléments révélateurs de structures propices à des actes de collusion. L'analyse d'un comportement dans cette optique consiste par exemple à se demander si le comportement en question répondrait au critère de l'intérêt individuel sauf à supposer que ses auteurs ont agi d'un commun accord.

- Les preuves indirectes doivent être envisagées dans leur ensemble. C'est en fonction de l'effet cumulatif de l'ensemble des moyens de preuve que le juge doit statuer, et non pas en considérant que chacun des éléments présentés doit être de nature à corroborer sans équivoque la thèse de l'entente.

- Dans les affaires d'entente, les modes de preuve diffèrent selon les pays. Plusieurs facteurs expliquent ces différences, notamment le choix de la procédure, civile, pénale ou administrative, applicable aux ententes et l'expérience plus ou moins longue du pays en matière de répression des ententes. Dans les pays de l'OCDE, les tribunaux ont plutôt tendance à privilégier les preuves directes. Certains pays continuent néanmoins d'employer essentiellement des moyens de preuve indirecte lorsqu'il y a lieu.

- Dans les pays qui viennent de se doter d'un programme de lutte contre les ententes, il est probable qu'à l'occasion des premières affaires les autorités auront du mal à obtenir des preuves directes et devront donc faire davantage appel à des preuves circonstancielles. Il importe cependant de ne pas s'arrêter à ces difficultés afin d'asseoir la crédibilité des règles de la concurrence et des moyens adoptés pour les faire respecter.

1 Les ententes

4. Tous les textes de loi sur la concurrence interdisent, entre autres, les comportements anticoncurrentiels entre deux ou plusieurs parties agissant d'un commun accord. Il sont rédigés en des termes assez généraux pour pouvoir s'appliquer à toutes les formes d'accords, formels et informels, explicites et implicites. Ainsi, aux États-Unis, la loi Sherman vise tout "contrat, association … ou entente"[3] ; dans le traité CE, l'article 81 s'applique à "tous les accords entre entreprises, toutes les décisions d'associations d'entreprises et toutes les pratiques concertées" ; au Mexique, la législation de la concurrence s'applique aux "contrats, accords, arrangements ou associations"[4] ; celle du Taipei chinois, aux "actions concertées", définies comme incluant tout "contrat, accord ou toute autre forme de consentement mutuel"[5] ; et la législation tanzanienne s'applique à "tout accord, arrangement ou entente entre deux ou plusieurs personnes, qu'ils aient ou non a) un caractère formel ou écrit ; et qu'ils soient ou non b) destinés à être rendus applicables par voie d'action en justice "[6].

5. Comme le suggèrent les formulations générales des textes de loi, les accords illicites entre concurrents peuvent revêtir de nombreuses formes. La plus courante, dans le contexte des entreprises, est celle de l'accord explicite dans le cadre duquel les parties communiquent directement, oralement ou par écrit, en précisant les modalités et conditions de leur arrangement. Mais les accords n'ont pas toujours un caractère aussi formel. Ils peuvent être conclus par d'autres moyens de communication, tels que conversations à l'occasion d'une réunion, déclarations publiques de dirigeants, annonces de prix ou publicités, ou encore par l'intermédiaire de clients. Comme l'a si justement faire remarquer un tribunal des États-Unis, "un clin d'œil entendu vaut parfois mieux que tous les discours"[7].

6. Dans toutes les législations, cependant, il est important de le noter, la participation à une entente illicite ne constitue une infraction que si les entreprises concernées ont agi ensemble sciemment, par des moyens de communication formels ou informels. Pour que l'atteinte au droit de la concurrence soit constatée, il faut pouvoir démontrer qu'il y a eu un "consentement" sur un objectif ou un résultat défini en commun, ou, en d'autres termes, une forme ou une autre d'"accord de volonté en vue d'un projet commun"[8].

3. Loi Sherman, article 1.

4. Article 9.

5. Articles 7 et 14.

6. Articles 2 et 8.

7. Esco Corp. v. United States, 340F.2d 1000, 1007 (9th Cir. 1965).

8. Il convient cependant d'adresser une mise en garde au lecteur en lui demandant de ne pas attacher trop d'importance à ces définitions. Comme d'autres observateurs l'ont déjà noté, essayer de parvenir à une définition commune de la notion d'"accord" ne présente guère d'intérêt dans les cas où l'on a recours à des

A l'inverse, il ne peut y avoir d'infraction si les entreprises ont communiqué entre elles uniquement par le canal du marché, ou si elles ont communiqué, mais sans avoir eu d'une façon ou d'une autre "l'intention délibérée de prendre part à une initiative commune"[9].

7. Pour les autorités chargées de faire respecter le droit de la concurrence, prouver l'existence d'une entente, formelle ou informelle, pose un problème particulier. La conclusion d'une entente se fait généralement dans le secret ; ceux qui y participent savent que leur conduite est illégale et que leurs clients s'y opposeraient s'ils étaient au courant, aussi font-ils tout ce qu'ils peuvent pour la dissimuler. Lorsqu'ils font l'objet d'une enquête, ils sont donc rarement disposés à coopérer, sauf dans le cadre d'un programme de clémence. Pour obtenir des preuves *directes* d'une entente – éléments révélant l'existence d'une réunion ou d'une communication entre les intéressés, ainsi que le contenu de l'accord passé entre eux –, il faut des outils et des techniques d'investigation particuliers dont ne disposent pas toujours les autorités de la concurrence[10]. Il est donc des cas où celles-ci sont confrontées à la difficulté d'avoir à démontrer l'existence d'une entente sans en posséder de preuves directes. Les différents moyens de preuve qui peuvent être invoqués pour établir l'existence d'une entente, en particulier les moyens indirects, sont récapitulés ci-après.

2 Moyens de preuve permettant d'établir l'existence d'une entente

2.1 Types de preuves

8. Il existe deux grands types de preuves utilisables dans les affaires d'ententes : les preuves directes et les preuves circonstancielles ou indirectes, ces dernières comprenant à leur tour les preuves ayant trait aux "communications" entre participants et les preuves économiques, c'est-à-dire celles qui se rapportent au comportement de l'entreprise, à la structure du marché et aux pratiques ayant pour effet de faciliter les ententes.

9. Les *preuves directes* les plus courantes sont les suivantes :

- Les documents (y compris les messages électroniques) comportant tout ou partie de l'accord et identifiant ceux qui y participent.

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preuves indirectes pour démontrer l'existence d'une entente. Mieux vaut décrire les comportements dénoncés dans les termes effectivement considérés par la justice comme nécessaires pour étayer une présomption d'entente. Voir, par exemple, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 Antitrust L. J. 41 (1996) (pour lequel cette approche met l'accent sur le processus (interdit) conduisant à l'obtention de résultats supraconcurrentiels, plutôt que sur les résultats eux-mêmes, permettant ainsi d'axer les recours sur les actes frappés d'interdiction).

9. Dans un article récent, Greg Werden note la confusion qui règne entre les termes utilisés dans ce domaine. Ainsi en est-il de termes courants comme "formel", "explicite", "tacite" et "coordonné", qui n'ont pas toujours le même sens selon la personne qui les utilise. L'expression "collusion tacite", par exemple, a été employée pour décrire une entente présumée sur laquelle on ne possède que des preuves indirectes, mais aussi pour décrire des comportements parallèles et interdépendants qui ne constituent pas des ententes illicites. Werden utilise le terme "accord oral" (*oral agreement*) pour désigner une entente illicite (*unlawful conspiracy*). Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 Antitrust L. J. 719, p. 735-36 (2004).

10. Les enregistrements vidéo secrets qui ont été utilisés dans l'affaire de la lysine restent à ce jour ce que l'on peut faire de mieux en matière de preuves contre une entente. Mais il est hélas très rare d'arriver à obtenir des indices comme ceux-ci, montrant "en temps réel" l'accord en train de se conclure.

- Les déclarations orales ou écrites de membres d'une entente ayant décidé de coopérer avec les autorités, qui décrivent le fonctionnement de ladite entente et les modalités selon lesquelles ils y participaient.

10. Les preuves *indirectes* sont également de plusieurs types. L'une d'elles consiste à montrer que les membres d'une entente se sont rencontrés ou ont communiqué entre eux par d'autres moyens, sans toutefois décrire le contenu de leurs échanges. C'est ce qu'on appellera ici les preuves de "communication", lesquelles comprennent notamment :

- les relevés de communications téléphoniques entre concurrents (sans indication de contenu) ou les éléments attestant de voyages vers une destination commune ou de participation à une réunion, par exemple à l'occasion d'une manifestation commerciale.

- d'autres éléments indiquant que les parties ont communiqué au sujet des faits suspectés – comptes rendus de réunions ou notes établissant qu'il a été débattu des prix, de la demande ou de l'utilisation des capacités ; documents internes mettant en évidence la connaissance de la stratégie d'un concurrent en matière de prix, par exemple la connaissance anticipée d'une majoration que celui-ci va pratiquer.

11. Il existe aussi une catégorie plus large de preuves indirectes, englobant ce que l'on appelle souvent les preuves *économiques*, c'est-à-dire essentiellement les comportements d'entreprises individuelles tendant à prouver l'existence d'une entente, mais aussi les comportements de l'ensemble d'un secteur, les éléments de la structure du marché évoquant la possibilité d'une entente secrète sur les prix et certaines pratiques de nature à soutenir une entente.

12. La preuve de *comportement* est la plus importante de toutes les preuves économiques. Comme on l'a noté précédemment, les agissements suspects sont souvent l'élément qui déclenche l'ouverture d'une enquête. Et comme l'explique la section consacrée au raisonnement économique[11], il est très important d'étudier de près le comportement des parties pour détecter les actes pouvant être considérés comme contraires à l'intérêt individuel et unilatéral de chacune d'elles et par conséquent comme autant d'indices de l'existence d'une entente. Le premier de ces comportements indiciaires est :

- le parallélisme des prix – c'est-à-dire l'observation de variations de prix identiques, ou quasiment identiques, et simultanées, ou quasiment simultanées, entre des entreprises concurrentes. Des comportements parallèles peuvent aussi se manifester d'autres manières, par exemple au travers de la réduction des capacités, de l'adoption de conditions de vente uniformes et de pratiques suspectes en matière de soumission à des appels d'offres (telles qu'une rotation prévisible des adjudicataires).

13. Les performances commerciales peuvent aussi fournir des indices de comportements suspects, notamment :

- des profits anormalement élevés ;

- des parts de marché stables[12];

11. Voir plus loin la section 3, page 10.

12. Les parts de marché font aussi partie, bien entendu, de la structure du marché. Mais nous les avons classées ici sous la rubrique des comportements parce que leur éventuelle stabilité peut très bien résulter d'un accord délibéré entre des entreprises qui s'abstiennent de se faire concurrence.

- des antécédents d'infractions à la législation de la concurrence.

14. Les preuves liées à la *structure du marché*, bien qu'insuffisantes pour établir l'existence d'une entente, sont surtout utilisées pour rendre plus plausibles les autres éléments dont on peut disposer à ce sujet. Il s'agit notamment des facteurs suivants :

- forte concentration ;
- faible concentration à l'extrémité opposée du marché ;
- niveau élevé des barrières à l'entrée ;
- forte intégration verticale ;
- produits uniformes ou homogènes.

15. La valeur probante des facteurs d'ordre structurel est cependant limitée. Il y a des secteurs très concentrés qui vendent des produits homogènes et où la concurrence s'exerce néanmoins entre toutes les parties. A l'inverse, ce n'est pas parce que ces caractéristiques ne sont pas observables que l'on peut conclure à la non-existence d'une entente. On sait qu'il y a eu des ententes sur des marchés caractérisés par la présence de nombreux concurrents et des produits différenciés[13].

16. Les "*pratiques de nature à faciliter*" la mise en place ou le maintien d'une entente constituent un type particulier de preuve économique. Il importe de noter que les comportements assimilables à ces pratiques ne sont pas nécessairement illicites[14]. Mais lorsque d'autres preuves indirectes ont été découvertes qui laissent présumer l'existence d'une entente, ils peuvent compléter utilement l'argumentation. Les pratiques en question sont révélatrices des moyens mis en œuvre par les parties pour faciliter l'établissement d'une entente, la surveillance dont elle fait l'objet, la détection des défections et, éventuellement, l'application de mesures de rétorsion, toutes ces informations venant ainsi étayer la thèse de la collusion. En voici une liste :

- échanges d'informations[15] ;
- envoi de signaux sur les prix[16] ;

13. Le cas de la téléphonie mobile, en France, en est une illustration (voir plus loin au paragraphe 24). Le marché était certes concentré, mais il est difficile de considérer les services de téléphonie mobile comme un produit homogène.

14. Il est déjà arrivé, toutefois, dans certaines circonstances, que des pratiques de ce genre aient été condamnées en tant que telles pour violation du droit de la concurrence, sans qu'il ait été nécessaire de démontrer l'existence d'une entente anticoncurrentielle sous-jacente. Voir, par exemple, Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp*., 1983, Wisconsin Law Review 887.

15. Les *échanges d'informations* suspects sont ceux qui portent sur les prix courants, les coûts, les plans d'exploitation, l'utilisation des capacités ou d'autres sujets commerciaux sensibles et confidentiels.

16. Il s'agit d'une forme d'échange d'informations, généralement par le canal d'annonces publiques relatives aux prix ou à la politique de prix envisagée pour l'avenir, qui peuvent à l'évidence déboucher sur des accords entre concurrents.

- péréquation du fret[17] ;
- clauses de protection des prix et de la nation la plus favorisée[18] ;
- normes de produits inutilement restrictives[19].

2.2 Une brève illustration

17. L'affaire brièvement décrite ci-après, concernant une entente récemment découverte en Italie, illustre bien l'usage qui peut être fait de différents types de preuves pour bâtir une argumentation convaincante dans un cas de collusion présumée.

2.2.1 Italie – Lait infantile[20]

18. En octobre 2005, l'autorité italienne chargée de la concurrence a annoncé qu'elle avait infligé des amendes à sept fabricants de lait infantile, dont trois personnes morales, pour un montant total de 9 743 000 euros, à l'issue d'une enquête ayant démontré l'existence entre eux d'une entente contraire aux dispositions de l'article 81 du traité CE. Au cours de la période 2000-2004, en effet, les autorités ont pu mettre en évidence une évolution parallèle manifeste des prix pratiqués par ces entreprises, avec en outre des écarts considérables – entre 150 % et 300 % – par rapport aux prix des mêmes produits dans d'autres pays européens. D'autre part, il est apparu que des contacts directs et indirects avaient eu lieu entre les concurrents, étayant la thèse d'une action concertée. Les contacts directs avaient pris la forme de réunions spéciales organisées au siège de l'association des fabricants, suite à une demande adressée par le ministère de la santé pour qu'ils réduisent leurs prix. D'après les conclusions de l'enquête, les fabricants avaient alors débattu ouvertement de la réponse à donner au ministère et décidé d'un commun accord de ne pas consentir de baisse supérieure à 10 %.

19. Les contacts indirects avaient eu lieu à l'occasion de la fixation des prix de vente recommandés aux pharmacies, principale filière de distribution des produits, le marché étant organisé de telle sorte que les vendeurs étaient alors en mesure de calculer les prix de gros de leurs concurrents à partir des prix de détail recommandés.

20. L'autorité italienne de la concurrence fait remarquer que depuis le début de l'affaire en 2004, le prix du lait pour bébé a diminué de 25 % et le marché a connu d'autres évolutions propices à la concurrence, notamment le développement de la publicité et de l'information destinée aux consommateurs,

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17. Les systèmes de *péréquation du fret*, dans lesquels les produits sont vendus à un prix qui comprend la livraison chez le client (le fret étant à la charge du vendeur), ou selon une tarification avec point de parité, c'est-à-dire en évaluant le coût du transport à partir d'un point choisi comme si tous les vendeurs expédiaient leur produits depuis un seul et même lieu, éliminent une composante variable des prix et font ainsi qu'il est plus facile pour les concurrents de s'entendre sur un prix et de surveiller son application.

18. Les clauses de *protection des prix (alignement sur la concurrence) et de la nation la plus favorisée*, qui garantissent aux acheteurs le prix le plus bas proposé soit par les concurrents d'un vendeur (protection des prix), soit par un vendeur à d'autres acheteurs (clause NPF), n'ont pas toujours un caractère anticoncurrentiel, loin de là, mais dans certaines circonstances elles peuvent servir de moyen pour faire appliquer et respecter une entente.

19. Un accord sur des *normes de produits inutilement restrictives* permet de barrer l'entrée du marché aux nouveaux concurrents qui risqueraient de déstabiliser une entente.

20. Voir le communiqué de presse publié à ce sujet sur le site de l'autorité chargée de la concurrence, à l'adresse http://www.agcm.it/eng/index.htm .

l'arrivée de nouveaux produits et une présence accrue des fabricants sanctionnés dans les chaînes de supermarchés.

21. Voici une liste des divers éléments de preuve apparemment mis au jour par les autorités :

- preuve directe : les fabricants s'étaient mis d'accord sur une baisse maximale des prix ;
- preuve de communication : les fabricants s'étaient rencontrés au siège de leur association et avaient débattu de la question des prix, mais à l'exception de la marge de réduction maximale, rien ne permettait de démontrer directement qu'ils avaient conclu un accord entre eux ;
- preuve de comportement : parallélisme des prix ; la forte baisse des prix et le renforcement de la concurrence qui ont suivi l'enquête donnent à penser que le niveau élevé des prix observé auparavant n'était pas le résultat d'un comportement concurrentiel ;
- comportement de l'ensemble du secteur : de façon générale, les prix étaient sensiblement plus élevés que dans les autres pays d'Europe ;
- preuve liée à la structure du marché : c'était un secteur très concentré qui comptait uniquement trois fournisseurs indépendants, et le produit vendu était relativement homogène ;
- pratiques de nature à faciliter une entente : les prix de vente recommandés aux pharmacies étaient assez transparents pour les concurrents ; les ventes ayant lieu essentiellement par le biais des officines pharmaceutiques, cela permettait d'éliminer les autres distributeurs comme les commerces d'alimentation qui auraient sans doute pratiqué des rabais.

2.2.2 Quelques commentaires d'ordre général sur les preuves

22. Quelques commentaires s'imposent à propos des différents modes de preuve. Tout d'abord, la frontière n'est pas toujours très nette entre preuves directes et preuves indirectes, surtout en ce qui concerne les communications. Ensuite, toutes les preuves – qu'elles soient directes ou indirectes – présentent un intérêt pour les autorités chargées de faire respecter le droit de la concurrence. Elles peuvent être utilisées ensemble, et elles le sont du reste souvent. Enfin, la qualité est une dimension importante. Une preuve directe constituée par un seul témoignage peu convaincant est moins crédible qu'une accumulation de preuves indirectes.

23. En l'absence de preuves directes, les autorités de la concurrence et les tribunaux ont reconnu la pertinence de toute une série de comportements et d'autres éléments invoqués dans le cadre d'affaires portant sur des ententes. En règle générale, les décisions rendues ont ainsi établi la masse critique des preuves à rassembler pour obtenir gain de cause[21]. Cela rend la tâche plus difficile pour ceux qui sont chargés de faire respecter le droit de la concurrence, et l'issue des procédures n'en est que plus incertaine, mais il semble que ce soit là le résultat inévitable de la spécificité des faits observés dans chaque cas. Cependant, un examen plus attentif des différentes affaires et de la théorie économique montre que parmi les preuves indirectes, il en est deux sortes qui revêtent la plus grande importance, à savoir le fait que les parties aient ou non communiqué entre elles, ou tout au moins qu'elles aient eu la possibilité de le faire, et,

21. Voir, par exemple, Andrew I. Gavil *et al* , *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy*, p. 283 (2002).

en l'absence d'accord attestant une volonté d'agir collectivement, le fait que les actes considérés répondent ou non à l'intérêt individuel et unilatéral de l'entreprise concernée[22].

24. Les preuves indirectes sont généralement ambiguës et se prêtent souvent à des interprétations diverses. A titre d'exemple, certains comportements parallèles peuvent aussi être compatibles avec une action indépendante : une réunion des parties et les communications qui ont eu lieu à cette occasion peuvent s'avérer parfaitement anodines. La première chose à faire quand on ne dispose que de preuves indirectes est de s'appliquer à déterminer si les faits considérés sont le simple fruit d'une action indépendante de la part d'entreprises qui ont agi chacune selon ce qu'elle estime être le plus avantageux pour elle. Si l'enquête montre que tel n'est pas le cas, il faut alors convaincre le décideur que les éléments dont on dispose démontrent bien l'existence d'une entente illicite compte tenu des normes requises en matière de preuve. C'est là que la théorie économique peut s'avérer extrêmement utile.

3 Le raisonnement économique peut aider à cerner les preuves indirectes

25. Le recours à des preuves économiques pour démontrer indirectement l'existence d'une entente pose un problème de fond : comment distinguer un comportement probablement imputable à une entente illicite d'un comportement "innocent" qui résulte d'une décision prise de façon indépendante dans un secteur industriel concentré. Pour y parvenir, quelques notions générales d'économie sont nécessaires. Nous verrons donc brièvement dans cette section en quoi la théorie économique peut aider à mieux comprendre le comportement d'entreprises qui semblent fonctionner comme si elles participaient à une entente. Nous nous intéresserons pour commencer aux différentes théories qui décrivent le comportement des entreprises, avant de voir plus précisément comment ces théories peuvent aider à identifier les "bonnes" preuves économiques dans les affaires d'ententes illicites, et nous terminerons par quelques suggestions concernant leur utilisation.

26. De manière générale, on distingue trois grandes catégories de modèles économiques qui décrivent le comportement des entreprises. En premier lieu, il y a ceux qui partent du principe que les entreprises recherchent de façon indépendante "la meilleure solution unilatérale non coopérative" en tenant compte de ce que font les concurrents. Dans les modèles de ce type, le marché parvient à l'équilibre lorsque chaque entreprise cherche à faire le meilleur choix compte tenu de celui que son concurrent [ou ses concurrents ?] fera [ou feront]. Cet équilibre – entre solution optimale des uns et solution optimale des autres – est couramment désigné sous le nom d'équilibre de Nash. Deux modèles élémentaires faisant appel à ce concept pour déterminer le prix et la production d'équilibre sur le marché ont été établis il y déjà très longtemps[23]. Mais tout comme ces modèles anciens, l'économie moderne se sert beaucoup de l'équilibre de Nash pour modéliser le comportement des entreprises sur un grand nombre de marchés différents[24].

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22. Ces deux éléments sont examinés plus en détail dans la suite du document. Voir ci-après, p. 16.

23. En 1838, Cournot avait fait l'hypothèse que chaque entreprise déterminait la quantité optimale qu'elle allait produire en prenant pour référence la production des autres, et en 1883, Bertrand avait repris ce raisonnement pour l'appliquer aux prix. Les modèles de Cournot et de Bertrand sont tous deux des exemples de jeux simples dans lesquels les joueurs s'attendent à une seule partie ou période. Les jeux répétés (illustrés notamment par les modèles associés au "folk" théorème) sont des jeux simples réitérés plusieurs fois de suite. Ils se caractérisent généralement par des équilibres multiples et il semble largement admis chez les économistes que, dans le cas d'un oligopole, les résultats effectifs sont en fait déterminés par des facteurs extérieurs à ces modèles, facteurs qui peuvent comprendre, en particulier, les ententes conclues entre des entreprises concurrentes. C'est pourquoi on peut douter de la pertinence des modèles de jeux répétés, surtout ceux où la répétition est infinie, pour expliquer le comportement des entreprises dans les affaires d'ententes reposant sur des preuves indirectes, raison pour laquelle ces modèles ne sont pas présentés plus longuement dans le corps du texte. Pour une étude de la question, voir Gregory J. Werden, note 9 ci-dessus, p. 759-765.

27. Une deuxième catégorie de "modèles" considère que les entreprises ont parfois tout intérêt à un accommodement mutuel. Ces théories supposent que certaines actions ne sont profitables que si les concurrents y réagissent de façon accommodante. Et si tel est le cas, ces actions deviennent alors "coordonnées" en ce sens qu'aucune entreprise n'aurait pu obtenir le résultat constaté sans l'aide des autres[25]. Il importe de faire remarquer que les modèles fondés sur la notion d'accommodement mutuel ne postulent pas l'existence d'une entente (illicite) explicite obtenue par voie de communication entre les entreprises, mais plutôt que celles-ci parviennent à comprendre en quoi consiste leur intérêt mutuel par déduction des interactions observées sur le marché[26].

28. La troisième catégorie de modèles est celle des ententes, c'est-à-dire des situations caractérisées par le fait que les entreprises ont explicitement passé un accord par voie de communication directe les unes avec les autres. La principale différence avec le comportement accommodant tient à ce que les entreprises communiquent directement "en coulisse" ou, comme aux États-Unis dans l'affaire de la mise aux enchères de bandes de fréquences par la FCC, par l'intermédiaire des prix proposés[27].

29. Dans les affaires d'ententes où la procédure repose essentiellement sur des preuves indirectes, en particulier, rien ne permet jamais de démontrer de façon irréfutable que les parties ont passé un accord. Les autorités sont donc obligées de construire leur argumentation sur la distinction entre comportement accommodant et unilatéral, et comportement tendant à montrer que les concurrents ont conclu un accord explicite. La question essentielle est alors celle de savoir quels éléments utiliser pour écarter l'idée de concurrence légitime et au contraire appuyer celle d'une entente explicite entre les concurrents.

30. Pour pouvoir choisir des preuves économiques de qualité, c'est-à-dire utiles pour faire le tri entre des théories concurrentes, l'autorité de la concurrence doit avoir une bonne idée du modèle qui décrira le mieux les incitations unilatérales qui peuvent pousser une entreprise à affronter la concurrence sur tel ou tel marché. Pour cela, elle doit en premier lieu identifier les actes dont on peut dire qu'ils constituent un comportement optimal, unilatéral et non coopératif dans les circonstances considérées. Après cela, et seulement après cela, elle pourra essayer de déterminer ce qui est incompatible avec les actes ainsi définis et peut donc étayer l'hypothèse d'une entente illicite. Autrement dit, ce sont les actes compatibles avec un comportement jugé optimal, unilatéral et non coopératif qui doivent servir de référence pour apprécier la conduite d'une entreprise pendant la période où ses activités sont apparues suspectes.

Quel que soit le modèle proposé par les parties pour justifier leur comportement, les autorités de la concurrence doivent impérativement vérifier que les hypothèses sur lesquelles il repose rendent bien compte du secteur considéré.

24. Dans le prolongement de ces évolutions, les autorités de la concurrence se sont largement appuyées sur les théories des effets unilatéraux, au point qu'un grand nombre d'affaires aujourd'hui soumises à la justice le sont principalement sur la base du critère de l'effet unilatéral.

25. C'est sur ce raisonnement que se fondent un grand nombre de plaintes déposées par les autorités de la concurrence dans diverses affaires de fusions où il est question d'effets coordonnés.

26. Certains observateurs de la politique antitrust sensibles aux arguments économiques estiment que les comportements coordonnés ou accommodants observés parmi les entreprises devraient être considérés comme incompatibles avec la législation de la concurrence. Voir Richard A. Posner, Antitrust Law 94 (2nd ed. 2001). L'opinion qui prévaut, cependant, est qu'en l'absence d'entente conclue entre les concurrents, il ne paraît pas justifié de constater un manquement au droit de la concurrence puisqu'il serait difficile, sinon impossible, d'y apporter un recours. Voir, par exemple, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 antitrust L. J. 41, 48 (1996). Voir également Gregory J. Werden, note 9 ci-dessus, p. 773-77, pour un commentaire sur le point de vue de Posner.

27. Voir United States v. Omnipoint Corporation, No. 1:98CV02751 (D.D.C. 10 novembre 1998); United States v. Mercury PCS II, L.L.C., No. 1:98CV02751 (D.D.C. 10 novembre 1998); United States v. 21st Century Bidding Corporation, No. 1”98CV02752 (D.D.C. 10 novembre 1998).

31. Les deux exemples qui suivent – pilotage des prix par une entreprise dominante et oligopole de Cournot – illustrent ce principe. Dans le premier cas, lorsque le coût marginal de l'entreprise dominante augmente, le prix optimal qu'elle pratique et que pratiquent également toutes les autres entreprises du marché augmente lui aussi. Les prix fixés par toutes les entreprises varient ainsi simultanément sur le marché. Il n'y a pas de comportement accommodant et encore moins d'entente explicite : chaque entreprise recherche la meilleure solution possible pour elle-même, de façon unilatérale et non coopérative. Ce modèle très élémentaire doit au moins attirer l'attention sur le fait que des mouvements de prix simultanés ou quasi simultanés peuvent être compatibles avec différentes théories concernant le comportement des entreprises et pas seulement avec l'hypothèse de l'entente – ni a fortiori avec celle qui prétendrait faire de l'entreprise dominante la principale instigatrice de l'entente. Comme on l'a vu précédemment, l'autorité de la concurrence doit impérativement vérifier si le modèle d'explication choisi est celui qui décrit le mieux les incitations unilatérales que peut avoir une entreprise pour affronter la concurrence sur le marché considéré. Dans l'exemple donné ici, lorsque les parties affirment que le modèle de l'entreprise dominante qui pilote les prix suffit à expliquer le comportement des entreprises en cause, l'autorité de la concurrence doit absolument se demander si les hypothèses de ce modèle décrivent correctement le fonctionnement du marché considéré. Entre autres questions pertinentes, elle doit chercher à savoir, par exemple, si, compte tenu de la structure du secteur, de l'évolution des prix et d'autres caractéristiques du marché qui ont pu être observées dans le passé (pendant les périodes antérieures à l'épisode de collusion présumée), le modèle de l'entreprise dominante offre une bonne explication de la manière dont se forment les prix.

32. De la même façon, si l'on peut démontrer que les prix sont plus élevés sur les marchés où les acteurs sont rares que sur les marchés où ils sont nombreux, le modèle de Cournot permet de comprendre que cette situation peut très bien refléter le comportement unilatéral et indépendant d'une entreprise, et pas seulement l'action d'un cartel. En fait, l'existence de prix élevés sur un marché qui comprend peu d'entreprises est compatible à la fois avec les théories du comportement unilatéral, du comportement accommodant et de l'entente. Ce type de preuve économique ne pourrait donc pas conforter la thèse de l'accord, et ne serait guère utile, en soi, dans une procédure reposant uniquement sur les preuves indirectes.

33. Puisqu'il est nécessaire, dans chaque cas, de bien cerner les actes qui répondent au critère de l'intérêt individuel et unilatéral de l'entreprise, l'idée générale selon laquelle "l'interdépendance des prix peut souvent avoir des conséquences économiques comparables à celles des ententes au sens classique du terme" n'est pas d'un grand secours pour l'analyse des preuves circonstancielles. C'est ce que nous expliquons ci-dessous.

34. Le dilemme du prisonnier est un bon exemple de la façon dont des incitations unilatérales peuvent aboutir à des résultats différents de ceux qu'obtiendraient des entreprises qui agiraient de façon concertée[28]. Dans le cadre de notre analyse, l'intérêt fondamental du dilemme du prisonnier est que des

28. Le tableau ci-dessous met en présence deux concurrents, l'entreprise 1 et l'entreprise 2, et définit le profit correspondant aux différentes options qui s'offrent respectivement à l'un et à l'autre.

Tableau : Dilemme du prisonnier

		Entreprise 2	
		Prix élevé	Prix bas
Entreprise 1	Prix élevé	10, 10	3, 15
	Prix bas	15, 3	4, 4

incitations unilatérales peuvent conduire chacune des entreprises à décider de baisser son prix au lieu d'opter pour un prix et un profit élevés, même si chacune pense que l'autre va également baisser son prix. A l'inverse, s'aligner sur le prix élevé d'un concurrent peut être dans l'intérêt de tous les concurrents, mais n'est pas nécessairement compatible avec l'intérêt de chacun d'eux. C'est pourquoi il faut bien prendre garde de ne pas confondre les deux notions distinctes d'intérêt individuel et d'intérêt collectif lorsqu'on analyse un cas d'entente présumée sur la base de preuves indirectes.

35. En empruntant à la théorie des jeux l'idée que la coopération ne peut pas avoir lieu spontanément, Stigler, dans ses travaux sur l'oligopole, montre l'incitation qu'ont les membres d'une entente à dévier de l'accord conclu lorsqu'ils estiment qu'ils ont plus à gagner en trichant qu'en s'y conformant[29]. D'après lui, pour qu'une entente puisse s'organiser entre des entreprises, il y a trois "problèmes" à surmonter. Premièrement, il faut que les concurrents se mettent d'accord sur les modalités de leur arrangement, ce qui peut s'avérer extrêmement difficile à faire sans communication – comme le souligne la théorie des jeux, tout peut arriver, il y a un trop grand nombre de décisions possibles entre les acteurs du marché. Deuxièmement, la collusion suppose un mécanisme de détection pour s'assurer que tous les participants respectent les règles convenues. Troisièmement, il faut aussi un mécanisme de punition pour sanctionner ceux qui trichent et dissuader les autres d'en faire autant[30]. Tout comme le dilemme du prisonnier, le modèle de Stigler montre qu'un oligopole ne conduit pas inévitablement à une situation de coopération et d'action concertée pour accroître les prix[31].

Si, par exemple, l'entreprise 1 fixe son prix à un niveau élevé et l'entreprise 2, à un niveau bas, l'entreprise 1 gagne 3 et l'entreprise 2 gagne 15. Pour trouver l'équilibre de Nash et montrer comment les incitations unilatérales déterminent cet équilibre, commençons par la case où les entreprises 1 et 2 fixent toutes deux leur prix à un niveau élevé. On y voit que chacune réalise alors un bénéfice de 10. Considérons ce bénéfice comme celui qui reviendrait à chaque entreprise si elles passaient un accord explicite de fixation des prix. Pour comprendre les incitations qui s'offrent à chaque entreprise, il faut se demander ce que l'entreprise 1 devrait faire si elle pensait que l'entreprise 2 allait fixer son prix à un niveau élevé. On voit que si l'entreprise 2 fixe son prix à un niveau élevé, l'entreprise 1 peut gagner soit 10 si son prix est également élevé, soit 15 si elle ne respecte pas l'accord et baisse son prix. Un profit de 15 étant supérieur à un profit de 10, l'intérêt unilatéral de l'entreprise 1 est de baisser son prix. De son côté, l'entreprise 2 sait que si l'entreprise 1 fixe son prix à un faible niveau, elle pourra gagner 4 si elle en fait autant ou 3 si elle maintient son prix à un niveau élevé. Un profit de 4 étant supérieur à un profit de 3, l'entreprise 2 optera elle aussi pour un prix bas. C'est cette situation, dans laquelle la meilleure offre de chaque entreprise compte tenu de la meilleure offre de l'autre consiste à pratiquer un prix bas, qui correspond à l'équilibre de Nash.

29. George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ., p. 44-61 (1964).

30. Pour une bonne description, exemples chiffrés à l'appui, de tous les problèmes auxquels sont confrontées les entreprises qui envisagent de conclure une entente, voir Andrew I. Gavil *et al.* , note 21 ci-dessus, p. 228-35.

31. La description faite par Stigler des problèmes que posent la mise en place et le fonctionnement d'une entente peut apporter des indication utiles pour une autorité de la concurrence qui chercherait à démontrer l'existence d'une entente au moyen de preuves indirectes, car dans l'hypothèse où les entreprises concernées ont eu à surmonter ces problèmes, il devrait en principe en rester des traces. En d'autres termes, pour établir que le comportement des entreprises n'était pas compatible avec le critère d'intérêt individuel et unilatéral, l'autorité de la concurrence aura de bons arguments si elle est en mesure d'expliquer comment les membres de l'entente ont résolu les problèmes de coordination, de détection et/ou de punition. Elle pourra, par exemple, mettre en avant certaines pratiques destinées à faciliter la détection des comportements déviants et éventuellement leur punition. L'affaire italienne du lait infantile évoquée à la page 8 ci-dessus, illustre bien ce point (les pratiques en question comprenaient des mesures favorisant la transparence des prix et le choix de canaux de distribution qui rendaient les rabais peu probables). A propos des pratiques visant à faciliter les ententes, voir plus haut à la page 7. En ce qui concerne les solutions apportées aux trois

36. Dans leur analyse des comportement des concurrents, les tribunaux n'ont pas toujours pris la peine de faire la distinction entre intérêt individuel unilatéral et intérêt collectif, et donc de reconnaître que des hausses de prix ne sont pas toujours la marque d'une concurrence oligopolistique sans collusion. L'affaire *Reserve Supply* est un cas exemplaire de l'erreur qu'un tribunal semble avoir commise à cet égard[32]. Dans cette affaire privée, les requérants dénonçaient une série d'augmentations parallèles des prix qui avaient eu lieu à un moment où la demande était faible. Le défendeur leur rétorqua qu'il aurait été "irrationnel d'essayer d'augmenter les ventes en maintenant les prix à un faible niveau, étant donné que dans ce cas les concurrents se seraient alignés sur lui, avec pour conséquence l'impossibilité de gagner des parts de marché et une réduction des profits". Constatant que la demande était inélastique, le tribunal estima alors qu'en maintenant des prix bas le défendeur n'aurait pu attirer que des clients de ses concurrents, et il en conclut que le fait de ne pas avoir opté pour cette solution "ne veut pas dire que [le défendeur] a agi d'une façon qui, sauf à supposer une action collective, n'aurait pas été avantageuse pour lui". C'est là un raisonnement tout à fait erroné. En fait, ce que le tribunal n'a pas compris, c'est que dans certaines circonstances, des entreprises qui cherchent à satisfaire leurs propres intérêts peuvent faire baisser les prix par le jeu de la concurrence en se comportant d'une façon analogue à ce que décrit le dilemme du prisonnier[33].

37. Une autre affaire, celle d'*American Tobacco*, est un exemple classique de l'utilisation de preuves indirectes pour démontrer que des entreprises ne se sont pas comportées de façon unilatérale, non coopérative et conformément à leur intérêt individuel[34]. Dans ce cas, la Cour a estimé qu'"une série de changements de prix" constituait "une preuve indirecte de l'existence d'une entente". Le 23 juin 1931, les trois grandes compagnies de tabac des États-Unis avaient annoncé simultanément des majorations de prix sans qu'"aucune justification économique de cette hausse puisse être démontrée". D'autres changements de prix simultanés avaient également été observés au cours des années suivantes. C'est précisément à cause de la simultanéité et parce qu'aucune justification économique (comme une hausse des coûts) n'a pu être démontrée que le tribunal a jugé suffisante cette preuve indirecte pour déclarer les défendeurs coupables de tous les chefs d'accusation portés contre eux.

38. Pour résumer les arguments développés dans cette section, voici quatre points sur lesquels Werden attire l'attention en ce qui concerne l'utilisation de preuves indirectes[35]:

- Premièrement, "il faut montrer quelque chose de plus qu'une simple interdépendance avant de suggérer la possibilité d'une entente". Ainsi, lorsqu'une entreprise relève ses prix parce qu'un concurrent en a fait autant avant elle, ce comportement peut être tout à fait compatible avec le modèle selon lequel il s'agit de la réaction optimale, unilatérale et non coopérative de l'entreprise en question compte tenu du comportement de ses concurrents. S'il est impossible de condamner une entreprise qui baisse ses prix pour riposter au fait que ses concurrents ont également baissé les leurs, alors il n'est pas non plus possible de le faire en cas de hausse des prix. Il faut apporter des éléments supplémentaires. (Nous reviendrons plus en détail sur cette notion de "supplément" de preuve dans la suite du document.)

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problèmes posés par les ententes, on notera cependant qu'il ne sera pas toujours possible d'en obtenir des preuves.

32. Reserve Supply Corporation v. Owens-Corning Fiberglas Corporation, 971 F. 2d 37 (7th Circuit 1992).

33. On trouvera d'autres exemples sur la notion d'action contre son propre intérêt dans la suite du document, à la page 19.

34. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

35. Gregory J. Werden, voir ci-dessus la note 9, p.779-80.

- Deuxièmement, "on ne peut pas présumer l'existence d'un accord à partir d'actes compatibles avec l'équilibre non coopératif de Nash dans un jeu à une seule partie". Ces actes sont en fait entièrement compatibles avec l'exercice d'une concurrence vigoureuse et ils constituent un point de référence utile pour détecter les comportements suspects.

- Troisièmement, les actes qui ne sont pas compatibles avec l'équilibre de Nash non coopératif dans un jeu à une seule partie peuvent servir d'argument pour étayer l'hypothèse d'un accord, même s'ils peuvent être compatibles avec les comportements observés dans les modèles de jeu à horizon infini. Les jeux indéfiniment répétés n'offrent pas un bon cadre de référence pour détecter les comportements qui ne répondent pas au critère de l'intérêt individuel.

- Quatrièmement, pour des raisons d'ordre pratique, "il ne faut pas présumer l'existence d'un accord en l'absence d'éléments tendant à prouver que les défendeurs ont communiqué entre eux, d'une façon ou d'une autre, et qu'un accord aurait pu être négocié à cette occasion". Ce type de preuve est très utile pour démontrer que le comportement observé sur le marché résulte d'un accord illicite et peut donc s'avérer un facteur important pour éviter le déclenchement d'une procédure en cas de comportement unilatéral ou accommodant.

4. Présomption d'existence d'un accord sur la base de preuves indirectes

39. Les affaires d'ententes dans lesquelles on ne dispose pas de preuve directe de l'existence d'un accord commencent souvent de la même façon, à savoir par un épisode suspect de parallélisme des prix ou autre phénomène difficile à expliquer par le jeu habituel des forces du marché. Par définition, l'autorité de la concurrence ne peut pas prouver directement que cette situation résulte d'un accord et elle doit donc alors se poser la question de savoir à quelles exigences elle doit satisfaire, du point de vue quantitatif et qualitatif, pour pouvoir exploiter des preuves indirectes.

40. Au fil du temps, les tribunaux, les organismes chargés de la concurrence et les experts en sont venus à accepter l'idée que le "parallélisme conscient", c'est-à-dire ni plus ni moins que la fixation de prix identiques ou autre comportement parallèle découlant de l'observation indépendante du marché et des réactions des concurrents, n'était pas contraire à la loi[36]. Comme il a été expliqué plus haut, cette conception trouve de bons arguments dans la théorie économique. La théorie économique et la jurisprudence montrent en effet clairement que le parallélisme conscient n'est pas une preuve suffisante pour conclure à l'existence d'une entente ; il faut quelque chose de plus. Or c'est ce "quelque chose de plus" qui est difficile à définir : cela fait des décennies que les tribunaux d'un petit nombre de pays se débattent avec ce problème. L'une des formules adoptées dans le cadre de procédures civiles aux États-Unis (les procédures pénales sont examinées plus loin) requiert l'existence de "facteurs complémentaires" démontrant que l'accord suspecté est plus vraisemblablement la cause d'un parallélisme de comportement que d'une action autonome. Une décision rendue récemment par un tribunal des États-Unis expose la norme applicable en ces termes :

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36. Voir, par exemple, Phillip E. Areeda et Herbert Hovenkamp, *Fundamentals of Antitrust Law* (3d ed. 2004), para. 1433a, p. 236: "Les tribunaux sont quasiment unanimes à reconnaître que le simple parallélisme interdépendant ne suffit pas à établir l'existence du contrat, de l'association ou de l'entente exigés par l'article 1 de la loi Sherman" ; Ivo Van Bael et Jean-François Bellis, *Competition Law of the European Community* (4th ed. 2005), p. 55: "Le parallélisme de comportement entre deux ou plusieurs entreprises ne constitue pas en tant que tel une preuve suffisante pour établir l'existence d'une pratique concertée". Le traité CE "n'exclut pas le droit des opérateurs économiques de s'adapter intelligemment au comportement constaté ou à escompter de leurs concurrents" (citation tirée de l'affaire 48/69, ICI contre Commission des Communautés européennes, [1972] ECR 619, para. 118).

> … [Nous] avons demandé aux parties requérantes qui fondaient leur grief de collusion sur l'hypothèse d'un comportement parallèle conscient de démontrer également l'existence de certains "facteurs complémentaires". Ces facteurs complémentaires permettent généralement aux tribunaux d'avoir la certitude qu'ils punissent une "action concertée" – c'est-à-dire un accord effectif – et non pas le "comportement de concurrents agissant de façon indépendante et unilatérale". En d'autres termes, les facteurs complémentaires suppléent l'absence de preuves directes d'un accord[37].

41. D'autres juridictions utilisent un vocabulaire différent de celui des tribunaux des États-Unis, mais l'analyse qu'elles font semble être la même[38]. Nous verrons maintenant de plus près l'usage qui a été fait jusqu'ici des deux facteurs le plus souvent considérés comme les moyens de preuve indirecte les plus déterminants, à savoir la communication ou la possibilité de communiquer, et l'action contre son propre intérêt.

4.1 Communications

42. Un type de facteur complémentaire important consiste à pouvoir montrer qu'il y a eu entre les parties une forme de communication sur les prix qui leur a permis de conclure un accord, ou au moins que les parties ont eu l'occasion de communiquer entre elles. Il n'est certes pas possible avec ce type d'éléments de démontrer l'existence d'un accord explicite, mais nous verrons ci-après, avec l'exemple d'une action civile engagée aux États-Unis, l'importance que peuvent avoir les preuves relatives à la communication.

4.1.1 Affaire du verre plat[39]

43. L'intérêt de cette affaire, qui a été jugée en 2004, tient au fait que le tribunal y était saisi d'un grief de fixation des prix concernant deux marchés distincts, celui du verre plat et celui du verre pour pièces de rechange automobiles, et qu'il a conclu à l'existence d'éléments indirects suffisants pour valider la thèse de l'accord illicite dans le premier cas, mais pas dans le second[40]. S'agissant du verre plat, un schéma récurrent de fixation parallèle des prix avait été observé sur le marché, les parties défenderesses ayant à plusieurs reprises au cours de la période en cause relevé leurs prix de catalogue dans des proportions identiques et à des dates rapprochées. La structure du marché favorisait le risque de collusion : forte concentration et petit nombre de vendeurs, produit relativement homogène dont le prix était le principal

37. Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004).

38. Pour une analyse de la jurisprudence de l'UE sur la question de l'utilisations de preuves indirectes dans les affaires d'ententes, voir, par exemple, Mark Jephcott, *Horizontal Agreements and EU Competition Law* (2005); Sigrid Stroux, *US and EC Oligopoly Control* (2004); Lennart Ritter et David Braun, *European Competition Law: A Practitioner's Guide*, 100-110 (3d ed. 2004) ; Richard Whish, *Competition Law*, 514-16 (5th ed. 2003).

39. Flat Glass Litigation, voir ci-dessus la note 37**Error! Bookmark not defined.**

40. La plupart des procédures civiles portant sur cette question qui se sont déroulées récemment aux États-Unis ont été rejetées en première instance et portées devant les juridictions d'appel avant que tous les faits aient été réunis. Conformément aux procédures de "jugement sommaire" prévues par le système américain, une affaire peut être conclue avant l'ouverture d'un procès en bonne et due forme si la partie qui en fait la demande est à même de montrer que toutes les questions de faits matériels sont réglées ou si manifestement déséquilibrées qu'elles ne peuvent faire l'objet d'un procès. La norme juridique applicable est plus indulgente (pour le requérant) en cas de requête de jugement sommaire qu'elle ne l'est pour un jugement définitif. Dans ce cas, en effet, la juridiction d'appel ne statue pas définitivement sur l'existence ou non d'un accord, mais seulement sur le point de savoir si les preuves apportées concernant cet accord sont suffisantes pour que la question soit soumise à un juge ou à un jury. Quoi qu'il en soit, tous ces exemples sont instructifs pour ce qui est des preuves utilisées dans les affaires d'ententes horizontales.

trait distinctif, coûts fixes élevés, fort excédent de capacité dans le secteur et demande statique. Pour reprendre les termes du tribunal, c'était "l'exemple parfait du secteur industriel qui se prête au maintien de prix supraconcurrentiels"[41].

44. D'autre part, les faits montraient que les hausses de prix pratiquées par les défendeurs n'étaient pas conformes à ce qui se passerait normalement sur un marché concurrentiel. Elles n'étaient pas motivées par une augmentation des coûts ou de la demande, et elles ont eu pour conséquence d'attirer un nouveau concurrent. Pour le juge, ces comportements étaient donc "contraires à l'intérêt individuel" des parties défenderesses, sauf à supposer l'existence d'une entente (ce point est examiné ci-après). Toutefois, malgré l'importance de ces éléments, ils n'étaient pas jugés suffisants : "En règle générale, l'élément le plus important est une preuve non économique permettant d'établir 'l'existence d'un accord effectif et manifeste de non-concurrence'"[42]. Or, les preuves de ce type ne manquaient pas. Il y avait eu une série de réunions et de communications qui avaient permis de discuter de la question des prix. Les documents internes des participants indiquaient que chacun était en général au courant de la politique de prix menée par les autres, ce qui n'aurait pas pu être le cas s'ils avaient eu accès uniquement aux données publiques. Finalement, le tribunal a décidé que toutes ces preuves indirectes étaient suffisantes pour étayer la thèse de l'accord illicite.

45. Dans le cas du verre pour pièces de rechange automobiles, en revanche, les preuves indirectes relatives aux communications entre les parties défenderesses étaient beaucoup plus minces. Le comportement sur lequel était fondé le grief de fixation des prix était une pratique qui consistait à fournir certaines informations tarifaires à une association commerciale tierce, laquelle les publiait ensuite sous une forme permettant aux participants de calculer les prix des concurrents. Le tribunal a estimé que cette preuve, à elle seule, était insuffisante. La publication d'informations concernant les prix, a-t-il observé, "peut avoir un effet favorable à la concurrence". D'où l'impossibilité de "retenir la thèse de la collusion à partir de ce fait ambigu, sinon favorable à la concurrence".

4.2 Preuves économiques

46. Si les éléments de preuve relatifs aux communications sont indéniablement importants – beaucoup diraient même essentiels – dans les procédures qui s'appuient uniquement sur des preuves indirectes, certaines preuves économiques peuvent elles aussi jouer un rôle. La décision exposée ci-après, rédigée par le grand juriste et théoricien Richard A. Posner, est un bon exemple de la façon d'analyser des preuves économiques circonstancielles.

4.2.1 Affaire de l'isoglucose[43]

47. Dans une action privée en dommages-intérêts intentée au civil, les quatre principaux producteurs d'isoglucose, un édulcorant à base de maïs, étaient poursuivis pour entente présumée sur le prix de leur produit. La partie plaignante ayant été déboutée en première instance, la juridiction d'appel avait alors infirmé cette décision et renvoyé l'affaire pour jugement.

48. Voici comment le juge Posner décrivait à cette occasion les différents types d'éléments de preuve applicables aux ententes en vertu de la loi Sherman :

41. *Idem*, p. 361.

42. *Ibid.,* citation extraite d'un avis formulé par le juge Richard Posner dans l'affaire High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002).

43. High Fructose Corn Syrup Antitrust Litig., voir ci-dessus la note 42.

> Les éléments de preuve sur lesquels s'appuie le plaignant sont en général, et dans le cas d'espèce, de deux types – les preuves économiques indiquant que les défendeurs n'étaient effectivement pas en situation de concurrence, et les preuves non économiques indiquant qu'ils ne se faisaient pas concurrence parce qu'ils avaient passé entre eux un accord pour ne pas se faire concurrence. Les preuves économiques sont à leur tour en général, et dans le cas présent, de deux types : les preuves indiquant que la structure du marché était telle qu'elle rendait possible une entente secrète sur les prix (pratiquement tous les marchés peuvent être cartellisés dès lors que la législation permet aux vendeurs d'établir des mécanismes formels et explicites de collusion, tels que des concessions de vente exclusive), et les preuves indiquant que le marché s'est comporté de façon non concurrentielle[44].

49. D'après le juge, plusieurs éléments de nature économique pouvaient laisser penser à l'existence d'un accord : forte concentration du côté des vendeurs, "grande homogénéité" du produit, absence de produits de substitution proches de l'isoglucose, large excédent de capacité entretenu par les défendeurs, différenciation des prix dans l'ensemble du secteur[45]. S'agissant du comportement des entreprises en cause, les preuves (économiques) avancées étaient un système de prix non fondé sur les coûts, ainsi qu'une modification de la durée des contrats imposée par les défendeurs et un phénomène suspect d'achats et de ventes entre eux. Le tribunal mettait également en évidence une stabilité inhabituelle des parts de marché dans des circonstances qui auraient plutôt laissé attendre l'inverse, et accordait une certaine crédibilité au témoignage d'expert selon lequel les prix de l'isoglucose étaient plus élevés pendant la période de l'entente présumée qu'avant ou après.

50. Au chapitre des communications, le dossier comportait par ailleurs des éléments à l'appui de la présomption d'entente. Il s'agissait de documents et de déclarations émanant d'employés des défendeurs qui faisaient allusion indirectement à des accords et à des arrangements, et indiquaient qu'ils étaient en possession d'informations non publiées sur les décisions des concurrents en matière de prix. Le juge décida que ces preuves étaient dans leur ensemble suffisantes pour conclure sur les faits à l'existence d'un accord.

4.2.2 "Action contre son propre intérêt"

51. C'est aux États-Unis qu'est apparu le concept d'action contre son propre intérêt, et il y est maintenant employé depuis quelques années. Comme il est expliqué plus en détail dans la section consacrée à la théorie économique, il s'agit d'un point capital pour l'appréciation des preuves[46].

52. L'action contre son propre intérêt s'entend de toute action qui serait contraire à l'intérêt de son auteur en l'absence d'accord. C'est ce que l'entreprise n'aurait pas fait si elle avait agi de façon unilatérale. Il peut s'agir, par exemple, du refus de traiter avec un client ou un fournisseur, alors qu'il n'y a apparemment aucune raison économique pour l'entreprise de se priver de cette opportunité[47]. Il peut s'agir d'échanges d'informations – sur les coûts ou sur les prix de transaction – généralement considérées comme confidentielles et que des concurrents pourraient utiliser à leur avantage si le marché fonctionnait librement. Ou encore d'une structure de prix qui n'a aucun rapport avec les coûts, ou bien qui ne semble avoir aucune justification économique.

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44. *Id.*, p. 655.

45. La différenciation des prix n'est pas toujours contraire à la concurrence, et l'existence de prix différenciés n'est pas nécessairement un signe de collusion. Le juge Posner explique avec précision dans sa décision les raisons pour lesquelles il considère néanmoins ce phénomène comme pertinent dans le cas examiné. *Id.*, p. 568.

46. *Id.*, p. 655.

47. Voir IGA v. Darling-Delaware, 998F2.D 1224, p. 1243-45 (3d Cir. 1993).

53. L'affaire *Blomkest Fertilizer* a permis de mettre en évidence l'importance d'un tel argument[48]. Plusieurs fabricants d'engrais avaient intenté une action contre huit producteurs de potasse, dont six canadiens, auxquels ils reprochaient d'avoir passé une entente pour fixer le prix de la potasse au cours de la période comprise entre 1987 et 1994 (la potasse est un composant majeur des engrais). Les plaignants s'appuyaient essentiellement sur des preuves économiques, notamment une série de vérifications de prix qu'auraient effectuées les défendeurs, soit une forme de "comportement" révélateur parmi ceux décrits ci-dessus à la section 2.

54. Fait très rare dans la pratique judiciaire aux États-Unis, les onze juges de la cour d'appel étaient réunis pour statuer sur l'affaire[49]. Six se prononcèrent en faveur des défendeurs, confirmant la décision rendue en première instance de débouter les plaignants. La majorité de la Cour estima que les preuves avancées concernant les vérifications de prix n'emportaient pas la conviction, d'une part parce qu'elles portaient uniquement sur des transactions passées, et ne pouvaient de ce fait avoir que peu de conséquences pour les prix futurs, et d'autre part parce que, selon les termes de l'arrêt :

> Les vérifications de prix invoquées étaient sporadiques et, d'après les témoignages, n'avaient pas toujours été consenties. Le fait qu'il y ait eu plusieurs dizaines de communications n'est pas significatif compte tenu de la durée de la période au cours de laquelle elles ont eu lieu, c'est-à-dire au moins sept ans, période durant laquelle les transactions ont dû se compter par dizaines de milliers. En outre, dans un secteur oligopolistique caractérisé par des marchés souvent très importants, il semble logique que les entreprises aient procédé à des vérifications de prix. Nous concluons donc que les preuves avancées sont loin d'exclure la possibilité d'une action menée de façon indépendante[50].

55. La minorité soutenait au contraire avec force que le comportement incriminé n'aurait pas été dans l'intérêt des parties défenderesses si celles-ci n'avaient pas passé entre elles une entente :

> … s'il n'y avait pas eu d'accord réciproque de mise en commun des prix (et les producteurs nient en effet cette éventualité), un vendeur individuel qui aurait révélé à ses concurrents le montant de ses rabais secrètement négociés se serait littéralement tiré une balle dans le pied. D'un autre côté, s'il y avait bel et bien une entente, il était essentiel pour ceux qui en faisaient partie de coopérer en se communiquant leurs prix respectifs afin d'éviter un phénomène de rabais généralisés qui auraient fini par couler le cartel[51].

56. Comme il a été indiqué plus haut, cependant, ce point de vue ne l'a pas emporté.

57. L'opinion de la cour d'appel dans une autre affaire, en l'occurrence *Brand Name Prescription Drugs*, offre une bonne illustration de l'utilisation du concept d'"action contre son propre intérêt" pour déterminer le point de savoir si le parallélisme de comportement doit être considéré comme une preuve indirecte d'entente[52]. Dans ce cas, un groupe de consommateurs qui poursuivaient des fabricants de produits pharmaceutiques faisaient valoir que leur pratique uniforme de différenciation des prix entre catégories de clients, qui avait pour effet de faire payer des prix plus élevés aux plaignants, devait être considérée comme une preuve (indirecte) du fait que les défendeurs avaient conclu une entente. Mais la

48. Blomkest Fertilizer v. Potash Corp. of Sask., 203F.3d 1028 (8th Cir. 2000) (en formation plénière).

49. Dans le système fédéral des États-Unis, la plupart des affaires en appel sont entendues par un groupe de seulement trois juges, choisis au hasard.

50. *Id.*, p. 1034-35.

51. *Id.*, p. 1047.

52. Voir Brand name Prescription Drugs Antitrust Litig., 186 F3rd 781 (7th Cir. 1999).

Cour a rejeté cet argument, estimant que puisque chacun des fabricants mis en cause disposait d'un pouvoir de marché grâce à la protection de ses médicaments par des brevets, il était de son propre intérêt d'exercer ce pouvoir et de pratiquer des prix différenciés suivant les groupes de consommateurs, compte tenu de leur disposition à payer. Par conséquent, le fait que tous les défendeurs aient adopté une stratégie analogue de différenciation des prix était jugé compatible avec l'intérêt individuel de chaque défendeur et ne pouvait pas être considéré comme une preuve de l'existence d'un accord entre eux.

4.3 Examen des preuves indirectes : approche globale ou approche individuelle

58. La façon dont les tribunaux examinent les preuves indirectes, c'est-à-dire soit globalement en considérant leur effet cumulatif, soit individuellement en exigeant que chaque élément corrobore de façon incontestable la thèse de l'entente, est un facteur important de l'appréciation portée sur leur pertinence. Dans l'affaire de l'isoglucose, le juge Posner était fermement partisan de l'approche globale, faisant remarquer que si le juge de première instance avait rejeté la preuve relative aux communications, c'était :

> … parce qu'il estimait qu'elle était de nature à "exiger un large recours à la déduction pour pouvoir avoir une valeur en tant que preuve". Cela est vrai en ce sens qu'aucun élément de preuve [en matière de communication] … ne suffit à lui seul à démontrer l'existence d'une entente sur les prix. Mais là n'est pas la question. La question est simplement celle de savoir si cette preuve, considérée globalement et en même temps que les preuves économiques, est suffisante pour mettre en échec le jugement sommaire[53].

59. Le juge Posner notait en outre que le "piège" dans ces cas-là est de supposer que si aucune des preuves soumises par le plaignant ne confirme à elle seule sans ambiguïté la thèse de l'entente, alors les preuves considérées comme un tout ne peuvent pas non plus mettre en échec le jugement sommaire. Il est vrai que zéro plus zéro égale zéro. Mais les preuves sont susceptibles d'interprétations diverses, dont une seule soutient la cause de la partie qui la produit, et n'est donc pas totalement dépourvue de valeur probante pour celle-ci. Sinon quel besoin y aurait-il jamais d'intenter un procès ? Dans un cas comme celui-ci, la question pour le jury devrait simplement être de savoir si, lorsque les preuves sont considérées globalement, l'entente sur les prix est plus probable que l'absence d'entente[54].

60. On notera cependant que les avis sur ce point divergent même à l'intérieur des États-Unis. D'autres cours fédérales d'appel ont examiné une à une les preuves qui leur étaient présentées pour déterminer si elles tendaient à exclure la possibilité d'une action indépendante et unilatérale de la part des concurrents mis en cause[55].

61. Dans une affaire importante de concertation sur les prix intéressant l'Union européenne, l'affaire *Pâte de bois*, la Cour européenne de Justice a adopté elle aussi une approche étroite de la question des preuves indirectes en décidant d'examiner ces dernières individuellement.

4.3.1 Pâte de bois[56]

62. La Commission européenne avait constaté que plus de 40 producteurs de pâte de bois et trois de leurs associations professionnelles s'étaient concertés sur les prix au cours de deux périodes comprises entre 1975 et 1981, les faits ayant montré que leurs prix annoncés étaient alors quasiment identiques. Dans l'industrie de la pâte de bois, les acheteurs et les vendeurs avaient l'habitude de conclure des contrats à long

53. *Id.*, p. 661.

54. *Id.*, p. 655-56.

55. Voir Williamson Oil Co. v. Philip Morris USA, 346 F.3rd 1287 (11th Cir. 2003).

56. Affaires C-89/85 etc., Ahlstrom Oy v. Commission, [1992] ECR I-1307.

terme qui donnaient aux premiers la possibilité d'acheter une quantité minimale de pâte à un prix ne dépassant pas celui annoncé. Les annonces de prix avaient lieu tous les trimestres, pratiquement au même moment. Outre le parallélisme des prix, la Commission avait réuni quantité de preuves économiques à l'appui de ses conclusions : un grand nombre de vendeurs différents les uns des autres du point de vue de l'origine nationale (les producteurs concernés étaient établis en Finlande, en Suède, en Espagne, au Portugal, aux États-Unis et au Canada), de la structure des coûts, des frais de transport, des marchés nationaux desservis à l'intérieur de la communauté européenne ; des prix annoncés nettement supérieurs aux cours du marché spot ; une rupture apparente de la discipline des prix à deux reprises au cours de la période considérée ; des prix publiés dans la presse spécialisée ; des prix annoncés avant leur entrée en vigueur ; libellé de tous les prix en dollars des États-Unis.

63. A l'appui du grief de concertation, la Commission apportait également des preuves en matière de communication, en l'occurrence différents documents et télex émanant des parties et indiquant que celles-ci avaient pris part à des réunions au cours desquelles il aurait été question des prix. Toutefois, la CEJ demanda à la Commission de démontrer le lien existant entre chacun des documents et la concertation supposée entre des producteurs spécifiques et pour des périodes spécifiques. La Commission fit valoir que cela n'était pas nécessaire et que les preuves proposées se rapportaient de façon générale à la concertation présumée. Mais la CEJ rejeta cette argumentation et décida que les documents en question seraient écartés des débats.

64. Sur le point de savoir si les preuves économiques étaient suffisantes à elles seules pour établir la concertation, la Cour adopta la règle selon laquelle les comportements incriminés ne pouvaient être considérés comme probants que si "la concertation en constitue la seule explication plausible". Elle conclut que les relations à long terme et le système de prix qui s'étaient développés dans l'industrie de la pâte de bois étaient justifiés par des raisons commerciales valables. Les deux experts qui avaient été désignés par la Cour estimèrent eux aussi, sans écarter l'hypothèse de la concertation, que des raisons légitimes expliquaient les comportements considérés et que la simultanéité et le parallélisme des annonces de prix pouvaient être regardés comme la conséquence de "la très grande transparence qui caractérisait le marché"[57].

65. La norme stricte adoptée par la Cour pour évaluer les preuves économiques en l'espèce – à savoir que l'explication par la concertation doit être la seule plausible – est peut-être la raison principale qui a finalement conduit à l'annulation de la décision de la Commission, mais il est probable que la position de la CEJ, qui a refusé d'envisager globalement les preuves relatives aux communications entre les parties, a aussi contribué dans une large mesure à ce résultat. Il ne semble pas cependant qu'une approche aussi stricte ait été de nouveau appliquée par la suite dans des affaires tranchées par la Commission et les juridictions de l'UE[58].

66. Avec une approche aussi "détaillée", chaque élément de preuve indirecte sera presque toujours ambigu si on l'analyse isolément. Dans une perspective globale, en revanche, les preuves perdront sans doute de leur ambiguïté. Il semble que la meilleure approche devrait consister, comme l'a indiqué le juge dans l'affaire de l'isoglucose, à considérer les preuves présentées dans leur ensemble et à déterminer si elles sont suffisantes, globalement, pour satisfaire aux exigences retenues.

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57. *Id*., paragraphe 81. Voir également Suiker Unie v. Commission (*Industrie européenne du sucre*), OJ [1973] L 140/17.

58. Voir, par exemple, *PVC II*: OJ [1994] 239/14, décision confirmée sur le fond en appel, affaires T-305/94 etc., Limburgse Vinyl Maatschappij v. Commission [1999] ECR II-931 (l'arrêt du tribunal de première instance indiquant que "… les preuves ne devraient pas être considérées isolément, mais dans leur ensemble […] et les preuves individuelles ne pourraient être dissociées de leur contexte") ; *Plaques en plâtre*, OJ [2005] L. 166/8.

5. Ententes et preuves indirectes – expériences nationales

67. Les preuves indirectes ne sont pas traitées de la même façon dans tous les pays[59], et c'est en fonction des différentes normes nationales, bien entendu, qu'évolueront les règles concernant l'utilisation de ces preuves dans les affaires d'ententes. D'autres facteurs interviendront aussi dans cette évolution, notamment la nature – administrative, civile ou pénale – des poursuites engagées contre les ententes. En outre, tous les pays n'en sont pas au même point dans les efforts qu'ils déploient pour réprimer les ententes. Certains ont des dizaines d'années d'expérience dans ce domaine, d'autres quelques-unes seulement. Certains ont déjà mis en place des programmes de clémence très efficaces, d'autres n'ont adopté ce moyen d'action que récemment. Les conséquences que peuvent avoir ces divers facteurs pour la répression des ententes sur la base de preuves circonstancielles sont examinées plus avant ci-après.

5.1 Procédure administrative ou procédure civile

68. Dans la majeure partie des pays, les procédures engagées contre les ententes sont de nature administrative ou civile (comme il s'agit dans la plupart des cas de procédures administratives, c'est de cette qualification qu'il sera exclusivement question dans la suite de cette section). Dans les pays qui traitent les ententes comme des infractions administratives, la tendance est à l'utilisation de preuves directes. Ainsi, depuis 2001 environ, la quasi-totalité des poursuites intentées contre des ententes par la Commission européenne se sont appuyées sur des preuves directes[60]. Si l'on se fonde sur le troisième rapport du Comité de la concurrence de l'OCDE concernant les ententes injustifiables[61], il en va de même, semble-t-il, de plusieurs affaires récentes ayant eu pour cadre des pays de l'OCDE et quelques pays non membres disposant du statut d'observateur auprès de l'organisation[62]. Il y aurait au moins deux raisons à cette tendance, et elles sont liées l'une à l'autre : d'une part, les programmes de clémence deviennent sans cesse plus efficaces, permettant ainsi aux autorités de détecter un plus grand nombre d'ententes et de disposer contre celles-ci d'au moins quelques preuves directes ; d'autre part, les pays ont de plus en plus recours à des peines d'amende très lourdes pour sanctionner les ententes, ce qui, comme on le sait, contribue à l'efficacité des programmes de clémence. Par ailleurs, il est plus facile de justifier l'imposition de lourdes amendes lorsque l'on dispose de preuves directes de l'infraction, y compris, si possible, d'éléments démontrant le caractère conscient et intentionnel du comportement illicite[63]. Enfin, les pays ont renforcé leur arsenal de techniques et de moyens d'investigation, en y ajoutant notamment la possibilité de visites surprises.

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59. Comme on l'a vu précédemment, il peut y avoir aussi des différences à l'intérieur d'un même pays.

60. D'après les communiqués de presse publiés par la Commission au cours de la période et consultables sur son site web.

61. OCDE, *Mise en oeuvre de la recommandation du Conseil concernant une action efficace contre les ententes injustifiables : Troisième rapport du Comité de la concurrence* (2005), consultable sur le site web de l'OCDE à l'adresse www.oecd.org/competition .

62. Bien entendu, dans un grand nombre de ces affaires, le dossier comportait aussi des preuves indirectes. Comme il a été indiqué précédemment, les différents moyens de preuve peuvent en effet être utilisés simultanément.

63. A titre d'exemple, entre 2001 et 2005, la Commission européenne a infligé pour près de 4 milliards d'euros d'amendes au total dans des affaires d'ententes contrevenant à l'article 81 du traité CE. Voir l'allocution prononcée par le commissaire européen Neelie Kroes dans le cadre de l'International Forum on Competition Law, le 7 avril 2005, dont le texte peut être consulté sur le site web de la Commission européenne à l'adresse http://europa.eu.int/comm/competition. Comme il a été indiqué précédemment, toutes ces affaires reposaient au moins en partie, semble-t-il, sur des preuves directes.

69. Les affaires qui reposent sur des preuves directes solides présentent un autre avantage de taille en ce qu'elles se traduisent par un plus grand nombre de transactions judiciaires et un plus petit nombre d'appels. Dans certaines juridictions, les parties reconnaissent généralement l'infraction qui leur est reprochée et acceptent de se voir infliger de lourdes sanctions. Cette procédure a des implications importantes en termes de moyens ; les actions en justice peuvent durer très longtemps et mobiliser des ressources que les autorités chargées de faire appliquer la législation pourraient sans cela consacrer à d'autres affaires.

70. Cela dit, dans les pays qui ont une assez longue expérience de la lutte contre les ententes, les autorités continuent d'exercer des poursuites lorsqu'elles disposent de preuves indirectes solides. Le cas du *Lait infantile* en Italie, évoqué plus haut, en est un exemple. Un autre cas récent concerne une entente entre opérateurs de téléphonie mobile en France.

5.1.1 France – Téléphonie mobile[64]

71. Le 1er décembre 2005, le Conseil de la concurrence a annoncé qu'il avait prononcé des sanctions pécuniaires d'un montant total de 534 millions d'euros contre trois opérateurs de téléphonie mobile pour avoir mis en œuvre des pratiques d'entente. L'affaire comporte deux volets. D'une part, il était reproché aux opérateurs d'avoir échangé entre eux, de 1997 à 2003, tous les mois, des chiffres précis et confidentiels concernant les nouveaux abonnements qu'ils avaient vendus durant le mois écoulé, ainsi que le nombre de clients ayant résilié leur abonnement. Bien que ne portant pas directement sur les prix, le Conseil a considéré que ces échanges d'informations étaient de nature à restreindre la concurrence sur le marché.

72. Le second volet, plus intéressant pour notre propos, concerne l'existence d'un accord passé entre les trois opérateurs afin de stabiliser leurs parts de marché entre 2000 et 2002. L'existence d'une telle concertation a été établie :

> … grâce au recoupement de plusieurs indices graves, précis et concordants, tels que l'existence de documents manuscrits mentionnant de manière explicite un "*accord*" entre les trois opérateurs ou la "*pacification du marché*" ou encore le "*Yalta des parts de marché*".

73. Dans sa décision, le Conseil dénonce plusieurs pratiques mises en œuvre simultanément en 2000 par les opérateurs concernés, notamment "un relèvement des prix et l'adoption de mesures comme la priorité donnée aux forfaits avec engagements contre les cartes prépayées ou l'instauration des paliers de 30 secondes après une première minute indivisible". L'appréciation qu'il porte sur ces agissements semble tenir compte du critère de l'"action contre son propre intérêt" évoqué précédemment. Selon les termes du communiqué :

> Ces mesures … présentaient le risque de provoquer une baisse des ventes (et donc des parts de marché) de l'opérateur qui se serait aventuré à les mettre en œuvre unilatéralement. L'intérêt de la concertation était donc de faciliter la mise en place de cette stratégie, en permettant aux trois opérateurs de s'assurer qu'ils poursuivaient simultanément la même politique et que leurs parts de marché relatives resteraient par conséquent stables.

64. Le communiqué de presse du Conseil de la concurrence peut être consulté sur le site web du Conseil à l'adresse http://www.conseil-concurrence.fr/user/standard.php?id_rub=149&id_article=501. Le texte intégral de la décision est publié sur le même site à l'adresse http://www.conseil-concurrence.fr/user/avis.php?avis=05-D-65. Les entreprises sanctionnées ont annoncé leur intention de faire appel de la décision.

5.1.2 Brésil – Acier

74. En 1999, le tribunal brésilien de la concurrence a statué sur ce que beaucoup considèrent être son premier cas d'entente au regard de la législation actuelle du pays en la matière, qui date de 1988. L'affaire portait sur un accord passé en 1996 pour augmenter le prix de certains produits d'acier laminé. Il n'y avait à l'époque que trois entreprises nationales qui fabriquaient ces produits, dont deux étaient liées par une participation croisée à hauteur de 50 %. En juillet 1996, des représentants de l'Institut brésilien de l'acier avaient pris contact avec des fonctionnaires du Secrétariat pour le suivi économique (SEAE) pour les informer que les membres de leur organisme avaient l'intention de relever leurs prix d'un certain montant prédéterminé à une date précise. On rappellera que jusqu'en 1992, les produits en question faisaient l'objet de mesures de contrôle des prix en partie administrées par le SEAE. Ces mesures ne s'appliquaient toutefois plus en 1996.

75. Le lendemain de la réunion, le SEAE avait informé l'institut par télécopie que l'accord envisagé constituait une atteinte au droit de la concurrence et était de ce fait illicite. Les trois producteurs passèrent outre et décidèrent néanmoins d'appliquer les augmentations prévues au début du mois d'août de la même année. Les majorations étaient à peu près celles qui avaient été communiquées au SEAE par l'institut. Elles n'étaient pas strictement identiques d'un producteur à l'autre, mais leur marge de variation ne dépassait pas 5 % dans la plupart des cas. Environ une année plus tard, les trois entreprises appliquèrent une autre augmentation du même ordre, cette fois sans en avertir préalablement le SEAE.

76. Les producteurs mis en cause nièrent l'existence d'un accord entre eux. D'après eux, leurs dirigeants s'étaient effectivement rencontrés avant la réunion tenue avec le SEAE, mais ce n'était pas pour passer un accord. De leur côté, les autorités brésiliennes chargées de la concurrence, faute d'avoir pu interroger elles-mêmes les dirigeants des trois entreprises sur la question, n'étaient pas en mesure de produire des preuves directes de l'existence d'un accord. Elles conclurent néanmoins que les preuves circonstancielles étaient suffisantes pour fonder leur grief. Il s'agissait notamment de la réunion organisée par les dirigeants avant celle avec le SEAE, de l'annonce faite lors de cette dernière concernant les augmentations de prix, des majorations pratiquement identiques et pratiquement simultanées intervenues en août 1996 et de l'absence d'indice soutenant la thèse selon laquelle les augmentations de prix résulteraient de décisions prises de manière indépendante par chacun des producteurs à la même époque. Finalement, le tribunal déclara que les faits constatés en 1996 constituaient une infraction aux règles de la concurrence, mais pas ceux de 1997 puisque rien ne prouvait qu'une réunion ou des communications avaient eu lieu entre les entreprises avant les augmentations.

77. La sanction fut fixée au montant minimum de l'amende prévue par la loi, à savoir 1 % du chiffre d'affaires brut de l'année écoulée pour chaque entreprise, soit environ 51 millions BRL (équivalant alors à quelque 48 millions USD)[65]. La décision et les sanctions prononcées ont fait l'objet d'un recours, et certains aspects de la procédure ne sont malheureusement pas encore réglés. Plus récemment, les autorités brésiliennes chargées de la concurrence ont renforcé leurs efforts de lutte contre les ententes et perfectionné leurs moyens d'intervention tels qu'enquêtes inopinées et autres techniques d'investigation. Elles ont également mis en place un programme de clémence qui a permis de faire émerger de nouveaux cas[66].

65. Pour de plus amples explications sur cette affaire, voir Paulo Corrêa et Frederico G. de Aguier, *Circumstantial Evidence and Plus Factors in Cartel Cases*, sur le site web du SEAE à l'adresse http://www.fazenda.gov.br/seae/english/index_english.html.

66. Voir OCDE, *Competition Law and Policy in Brazil: A Peer Review*, p. 50-54 (2005), consultable sur le site web de l' OCDE à l'adresse http://www.oecd.org/dataoecd/12/45/35445196.pdf.

5.1.3 Lettonie – Œufs de poule

78. Cette affaire offre un bon exemple de l'usage que l'on peut faire de différents types de preuves indirectes, à savoir :

- indices de communications, y compris les réunions entre concurrents organisées dans le cadre d'associations professionnelles et les documents faisant état de discussions sur les prix à cette occasion ;

- preuves économiques mettant en évidence une hausse des prix à la suite des réunions suspectes et éléments infirmant les explications données par les parties en cause selon lesquelles l'évolution de leurs prix résulterait du fonctionnement normal du marché.

79. Elle présente également de l'intérêt parce qu'elle concerne un secteur, celui de la production agricole, qui semble caractérisé par l'existence de nombreuses ententes dans les pays qui commencent à faire appliquer le droit de la concurrence.

80. En 2003, le Conseil letton de la concurrence a commencé à enquêter sur une affaire d'entente supposée entre des producteurs d'œufs de poule après avoir lu dans la presse locale un article dans lequel le principal acteur du secteur annonçait qu'il allait augmenter ses prix. L'article indiquait en outre que l'association lettone des producteurs d'œufs avait recommandé à ses membres de relever leurs prix. Le Conseil, qui ne disposait pas alors de pouvoirs d'enquête en bonne et due forme, avait néanmoins chargé plusieurs de ses agents de se présenter simultanément dans les bureaux des trois producteurs pour y interroger leurs représentants de façon informelle. D'autres producteurs furent également questionnés dans le cadre d'investigations ultérieures.

81. Les enquêtes firent apparaître plusieurs éléments : l'association des producteurs comptait 12 membres ; le marché letton était dominé par un producteur à hauteur de 50 % ; trois autres producteurs avaient chacun une part de marché de 8-11 % ; il y avait effectivement eu des discussions sur les augmentations de prix à l'occasion de réunions organisées à deux reprises dans le cadre de l'association, en juillet-août 2002, puis en mars-avril 2003 ; une télécopie envoyée aux membres de l'association par l'entreprise dominante avant la réunion de mars 2003, dont les enquêteurs avaient obtenu une copie, indiquait que la question de la "politique des prix (augmentation prévue à compter du 1er avril 2003)" serait portée à l'ordre du jour ; ladite télécopie précisait en outre que l'entreprise dominante ne répondrait pas aux demandes de rabais promotionnels soumises par les revendeurs en prévision de la période de Pâques, et concluait ainsi : "En conséquence, nous vous invitons à ne pas donner suite aux démarches de cette nature entreprises par les détaillants, afin de garantir le succès des ventes pendant la période de Pâques".

82. Le Conseil fondait également son argumentation sur des preuves économiques. Une analyse du prix des œufs au cours des périodes considérées faisait effectivement apparaître des augmentations après les réunions de l'association, augmentations qui ne semblaient pouvoir s'expliquer ni par une hausse des coûts, ni par des considérations touchant l'offre et la demande, la production d'œufs étant alors excédentaire.

83. Dans ces conclusions, le Conseil de la concurrence constate que les producteurs ont enfreint la législation nationale de la concurrence en mettant en place entre eux une entente sur les prix, et il prononce une sanction à leur encontre. Cette décision a fait l'objet d'un recours actuellement pendant devant la cour d'appel.

5.1.4 Taipei chinois – essence et carburant diesel

84. Cette affaire est instructive car elle concerne un secteur – la distribution d'essence – qui fait l'objet d'enquêtes sur des ententes dans de nombreux pays, mais aussi parce qu'elle repose uniquement sur des preuves économiques, en l'absence de tout indice relatif à d'éventuelles communications. Apparemment, l'autorité de la concurrence a eu recours à une forme d'analyse économique comme celle évoquée plus haut, à la section 3, mais les raisons pour lesquelles elle a rejeté l'hypothèse de la solution optimale recherchée de façon unilatérale et non coopérative par chaque concurrent – et plus particulièrement le scénario du pilotage des prix par l'entreprise dominante – n'apparaissent pas clairement.

85. A l'époque où l'enquête a débuté, en 2003, le secteur du pétrole raffiné, sur le marché de l'essence et du carburant diesel du Taipei chinois, était caractérisé par un duopole. L'entreprise dominante, qui détenait 70 % du marché, avait été en situation de monopole jusqu'à l'arrivée du premier concurrent en 2000. Un troisième acteur, en l'occurrence une grande compagnie américaine, était venu s'ajouter aux deux premiers en 2002, mais s'était ensuite retiré du marché.

86. Pendant deux ans, les prix appliqués par les deux fournisseurs aux stations-service avaient évolué en parallèle. A vingt reprises au moins, les prix avaient été ajustés de façon simultanée et dans des proportions quasiment identiques. Chaque fois, l'une des parties annonçait publiquement à l'avance les nouveaux tarifs qu'elle allait appliquer, et l'autre réagissait en publiant à son tour ses nouveaux prix. S'il arrivait que la seconde entreprise ne s'aligne pas sur les prix annoncés par la première, celle-ci annulait alors les ajustements envisagés ou les modifiait en fonction de ceux annoncés par le concurrent.

87. Il n'y avait aucune preuve directe d'entente, mais la Commission de la concurrence du Taipei chinois conclut à l'existence d'un "accord des volontés" entre les deux entreprises, en s'appuyant pour cela sur les éléments suivants :

- le parallélisme de comportement des deux parties, mis en évidence par de nombreux ajustements de prix opérés pendant plusieurs années ;
- le fait que les ajustements de prix étaient annoncés publiquement et à l'avance ;
- le fait que les exploitants de stations-service affichaient très vite les nouveaux prix annoncés, le mécanisme des annonces servant de moyen de surveillance aux deux fournisseurs ;
- une analyse approfondie de la structure des coûts des deux entreprises faisant ressortir entre elles des différences importantes en termes de sources d'importation, de coûts de raffinage, de coûts de transport et d'utilisation des capacités, entre autres.

88. Il semble que la Commission ait eu également recours à la théorie des jeux dans son analyse de la situation, ce qui l'a amenée à constater que les résultats observés étaient conformes à une forme d'accord entre les parties[67].

89. Dans ses conclusions, la Commission sanctionne les deux entreprises pour infraction à la législation du Taipei chinois en matière de concurrence et leur inflige à chacune une amende de 6 500 000 TWD (environ 200 000 USD).

67. On trouvera une description plus complète de cette affaire sur le site web de l'APEC à l'adresse http://www.apeccp.org.tw/doc/Taipei/Case/D094q108.htm.

5.2 Procédure pénale

90. Une minorité croissante de pays traitent le comportement d'entente comme un délit passible de poursuites pénales. Les exigences en matière de preuves étant plus strictes en droit pénal, il s'ensuit que les preuves indirectes sont plus difficiles à utiliser. Ces preuves sont néanmoins admissibles, comme l'illustre ci-après l'expérience de deux pays où les ententes relèvent de la procédure pénale.

5.2.1 États-Unis

91. La pénalisation des ententes n'est pas un fait nouveau aux États-Unis[68]. Si quelques-unes des premières procédures pénales intentées en vertu de la loi Sherman ont fait appel à des preuves indirectes[69], toutes les condamnations prononcées ces dernières années se sont appuyées sur des preuves directes. Depuis le milieu des années 90, le programme de clémence mis en place par les autorités est devenu la pièce maîtresse du dispositif de lutte contre les ententes, et la plupart des nouvelles affaires qui voient le jour en sont la résultante. Elles sont désormais réglées pour la majeure partie par un système de transactions pénales qui permet de clore la procédure avant d'arriver au procès.

92. Bien entendu, les preuves indirectes peuvent aussi jouer un rôle utile et important. L'affaire *Art Auctions* à laquelle il était fait illusion en introduction en apporte un exemple. Elle mettait en cause les deux principales maisons de ventes aux enchères, Sotheby's et Christie's, accusées d'entente sur leurs taux de commission. Le procès était celui du président de Sotheby's, A. Alfred Taubman, les autres parties ayant soit reconnu leur culpabilité, soit bénéficié d'une immunité de poursuites dans le cadre du programme de clémence. Grâce à ce dernier, il y avait des preuves directes de l'entente entre les deux maisons, mais les éléments permettant d'établir le lien avec M. Taubman étaient plus ténus. Il s'agissait d'indices relatifs à des communications, pour une bonne part écrites, montrant que M. Taubman avait rencontré son homologue de chez Christie's pour discuter de questions de prix, et qu'il avait supervisé les discussions entre l'un de ses subordonnés et un cadre de Christie's sur le même sujet[70]. C'est sur la base de ces éléments que le jury a

68. La loi Sherman ouvre la possibilité de sanctions aussi bien pénales que civiles, mais pendant de nombreuses années après son adoption, en 1890, la plupart des procès intentés dans des affaires d'ententes l'ont été devant des juridictions civiles. En outre, pendant longtemps également, les infractions à la loi Sherman sont restées classée dans la catégorie des *misdemeanors* (délits mineurs) et il a fallu attendre les amendements votés dans les années 70 pour que cette qualification passe au niveau de *felony* (délit grave) et que le montant maximum des amendes prévues soit revu à la hausse. Ce maximum a été de nouveau augmenté par la suite, de sorte qu'aujourd'hui une entreprise peut se voir infliger une amende pouvant se monter à 100 millions de dollars (et même plus en vertu de dispositions spéciales prévues par la loi) et une personne physique encourir jusqu'à 10 ans de prison et 1 million de dollars d'amende. Les sanctions effectivement imposées ont reflété l'évolution de la législation : les amendes atteignent régulièrement des centaines de milliers de dollars pour les entreprises et les peines d'emprisonnement trois ans et plus pour les particuliers. Voir Scott D. Hammond, "An Overview Of Recent Developments In The Antitrust Division's Criminal Enforcement Program"**,** allocution prononcée devant l'American Bar Association, 10 janvier 2005, consultable à l'adresse http://www.usdoj.gov/atr/public/speeches/207226.htm.

69. L'une d'entre elles, *American Tobacco* (voir plus haut la note 34), a été jugée en 1946. Il s'agissait d'un recours en appel formé par trois grandes compagnies de tabac et quelques-uns de leurs dirigeants qui avaient été reconnus coupables de trois chefs d'accusation pour infraction à la loi et condamnés à payer une amende de 15 000 dollars chacun, soit le maximum légal à l'époque. Il n'y avait apparemment aucune preuve directe de l'existence d'un accord entre les défendeurs, mais, comme il est indiqué à la section 3 ci-dessus, la Cour suprême a confirmé la condamnation en invoquant une série de changements de prix considérés par elle comme "une preuve indirecte de l'existence d'une entente".

70. Il y avait aussi la déposition du subordonné de M. Taubman, que le parquet considérait comme une preuve directe. On peut trouver une bonne description des pièces produites par le ministère public dans le dossier constitué pour la juridiction d'appel (qui a confirmé la condamnation) consultable à l'adresse http://www.usdoj.gov/atr/cases/f11300/11329.htm.

finalement condamné M. Taubman à une peine d'un an et un jour d'emprisonnement et à une amende de 7,5 millions de dollars.

5.2.2 Canada

93. Le Canada fait lui aussi partie des pays où les ententes sont considérées depuis longtemps comme des infractions pénales. Comme aux États-Unis, il y a eu quelques affaires, au départ, dans lesquelles des ententes ont été condamnées uniquement sur la base de preuves indirectes et sanctionnées par des peines d'amende minimales[71]. En 1980, cependant, une affaire portée devant la Cour suprême du Canada a marqué une étape important dans l'utilisation des preuves indirectes.

5.2.3 Atlantic Sugar[72]

94. Les parties défenderesses, en l'occurrence trois raffineries de sucre, étaient notamment accusées d'avoir passé un accord pour geler leurs parts de marché sur une période de plusieurs années, mais il n'y avait aucune indice concernant l'existence de communications entre elles à ce sujet. Comme le notait la Cour, les preuves réunies en l'espèce étaient purement "circonstancielles". Elles résultaient de la constatation d'une très forte stabilité des parts de marché des trois raffineurs pendant une longue période et d'au moins une pratique de nature à faciliter une entente, à savoir un système de fixation des prix avec point de parité. Il y avait aussi des documents montrant que les parties défenderesses avaient choisi délibérément – mais apparemment de façon indépendante – de ne pas pratiquer des réductions de prix qui auraient pu être déstabilisantes.

95. Dans sa conclusion, le juge de première instance estima que la situation considérée était "le résultat d'un accord tacite entre les prévenus", motivé par le désir de chacun d'eux d'éviter une guerre des prix destructrice[73], mais que ce comportement ne constituait pas une infraction pénale. La Cour suprême confirma ce jugement (qui avait été annulé entretemps par une juridiction intermédiaire) en insistant sur l'absence apparente de communication entre les prévenus sur le point litigieux :

> Dans ces circonstances, l'accord tacite" résultant de son adoption probable par les concurrents était-il assimilable à un complot ? J'ai beaucoup de mal à admettre qu'il l'était effectivement du simple fait que le responsable de la politique de Redpath [l'entreprise qui pilotait les prix] savait très bien que ses concurrents s'en rendraient compte inévitablement de manière générale après quelque temps et qu'il comptait sur eux pour adopter une politique similaire qui apparaîtrait alors également au grand jour.[74]

96. Après l'arrêt rendu dans l'affaire *Atlantic Sugar*, la crainte se fit jour de voir les "accords tacites" échapper aux dispositions de la loi sur la concurrence concernant les infractions pénales. Cette loi fut amendée en 1986 et on y ajouta alors, entre autres choses, les dispositions suivantes :

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71. Voir par exemple l'affaire *McGavin Bakeries* dans laquelle a statué la Cour suprême de l'Alberta en 1951. Rex v. McGavin Bakeries, Ltd., 3 W.W.R. (N.S.) 289, p. 10 (1951). Comme le notait alors le juge : "… l'accusation se fonde presque exclusivement sur des preuves indirectes", mais il concluait que "la masse de données concrètes" relatives au comportement dont ont fait preuve les boulangeries pendant une période de 17 ans dans les trois provinces occidentales conduisait "à la conclusion inévitable … que l'entente présumée avait réellement existé". A l'époque, l'amende maximum qui pouvait être infligée se montait à 10 000 CAD. Les six parties défenderesses furent condamnées à payer au total 30 000 CAD.

72. Atl. Sugar Refineries Co. v. A.G. Can.., [1980], 2 S.C.R.644.

73. *Id.*, p. 7.

74. *Id.*, p. 15.

> Preuve de complot – Lors d'une poursuite intentée en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'association d'intérêts, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'association d'intérêts, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'association d'intérêts, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable[75].

97. Cet amendement est interprété comme suit dans un commentaire sur la loi :

> Le nouveau paragraphe établit clairement que les accords tacites, c'est-à-dire ceux dont on peut déduire l'existence uniquement sur la base de preuves circonstancielles, tombent sous le coup des dispositions du paragraphe 45(2.1). Cependant, il n'apporte aucun éclaircissement sur les questions plus difficiles de ce qui constitue un accord en droit, du type de communications nécessaires pour établir le complot et de ce qui distingue un accord d'un simple "parallélisme conscient"[76].

98. Quoi qu'il en soit, il semble que la tendance, au Canada, soit à une augmentation du nombre des affaires d'ententes engendrées par le programme d'immunité mis en place.

6 Conclusion

99. Lorsqu'elles engagent des poursuites contre des ententes, les autorités de la concurrence préfèrent disposer de preuves directes et c'est du reste ce qui se produit de plus en plus souvent. Les preuves indirectes continuent néanmoins de jouer un rôle important, soit isolément, soit, de façon plus générale, en complément des preuves directes. Dans les pays qui viennent de se doter d'un programme de lutte contre les ententes, elles peuvent avoir relativement plus de poids, au moins dans les premières affaires, lorsque les autorités ne se sont pas encore dotées de tous les moyens nécessaires pour recueillir des preuves directes.

100. Il existe divers moyens de preuve indirecte, et il est difficile de généraliser à ce sujet car dans chaque affaire les éléments du dossier sont très spécifiques. Cela dit, il est généralement admis que les plus importantes de ces preuves sont celles qui ont trait aux communications et aux comportements et qui tendent à montrer que chaque partie a agi d'une façon qui n'était pas conforme à son propre intérêt. Les preuves économiques font aussi généralement partie des éléments convaincants.

101. Le grand problème que pose l'utilisation de preuves indirectes est que celles-ci sont généralement ambiguës et sujettes à des interprétations diverses. Il y donc un risque de voir condamner trop facilement des comportements parallèles qui résultent en fait simplement de décisions autonomes, chaque partie agissant selon ce qu'elle estime être le plus avantageux pour elle. Comme on l'a vu plus haut, le raisonnement économique peut être d'un grand secours dans ce cas, pour distinguer les actes licites et unilatéraux des actions concertées résultant d'une entente illicite.

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75. Loi sur la concurrence, §45(2.1).

76. Robert S. Nozick, *The 2004 Annotated Competition Act* (Toronto: Thomson Carswell, 2004), p. 87.

DAF/COMP/GF/WD(2006)19

OCDE

CONTRIBUTION FROM ALGERIA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

1. General framework

1. The economic reforms undertaken over the past decade have broadly contributed to liberalising the regulation of the economy and commerce in Algeria. The measures implemented have helped to re-establish macroeconomic and financial balances and to clarify the respective roles of the State and the liberalisation of foreign trade.

2. These reform measures are now playing a key role in the establishment of the free-trade area with the European Union and in the determined efforts being made to prepare for Algeria's accession to the World Trade Organization (W.T.O.).

3. To this end, Algeria has presented a programme for the revision of legislative and regulatory texts.

4. It is in this perspective that the Government prepared Ordinance n° 03.03 of 19 July 2003 on competition. Prior to this ordinance, the legislative and regulatory framework in this field had a number of shortcomings, such as:

- insufficient development of a competition culture;
- the low number of complaints filed with the competition authorities;
- operational difficulties of the Competition Council.

5. These dysfunctions, combined with the competitive pressures generated by the opening up of our economy to international trade, have made it necessary to update the legislative framework governing competition and bring it in line with international practice.

6. The main reasons for revising the former Ordinance issued in 1995 were as follows:

1. firstly, the fact that the regulations on competition (cartels and illegal agreements, abuse of dominant position and mergers) were separate from the regulations on commercial practices (failure to issues invoices or indicate prices, etc.);
2. secondly, the need to break with the repressive character of our legislation and introduce consultation mechanisms promoting contacts and co-operation between the commerce administration, the Competition Council and the business sector so that firms can become more familiar with the competitive functioning of the market;
3. thirdly, the need to restore the Competition Council to its role as the main market regulator;
4. fourthly, the requirements for integration into both the regional economy (European Union) and global economy (WTO), which unquestionably calls for the modernisation and harmonisation of our national competition legislation.

7. The main objectives targeted by this legislative framework are to set the conditions for competition on the market, to prevent any practice that restricts competition and to monitor economic concentrations in order to stimulate economic efficiency and improve consumer well-being.

8. This legislation applies to all production, distribution and service activities. Its scope covers the activities of all public entities except when these are exercising public power prerogatives or carrying out public service missions.

9. In addition to illegal agreements and abuse of dominant position, the new Ordinance issued in 2003 prohibits other practices which distort competition such as:

- the abuse of economic dependence;
- the establishment of import monopolies through exclusive purchase contracts;
- and the practice of predatory pricing.

10. It must be pointed out that the Ordinance provides for exceptions to this general prohibition, when the restrictive practices and agreements are authorised by a specific legislative or regulatory text. These exceptions also cover agreements and practices that enable small and medium-sized enterprises to strengthen their competitive position on the market or that promote employment.

11. This Ordinance also includes a new provision introducing a preventive and educational measure consisting of a clearance certificate. Under this new procedure, firms concerned that their behaviour may not be in compliance with the rules of competition may ask the Competition Council to verify whether the practices or agreements that they are planning are compatible with the law and to grant them a clearance certificate.

2. Presentation of the regulatory framework in the field of cartels

12. With regard to **economic concentration**, the new Ordinance renews the jurisdiction of the Competition Council. Plans for concentration must be notified to the Competition Council when these will result in exceeding a threshold of 40% of the sales or purchases on a given market.

13. However, the Ordinance provides for an exception to this principle by allowing the Government to authorise economic concentrations rejected by the Competition Council when the public interest so requires and this is justified by objective economic conditions in order to develop and ensure the competitiveness of domestic firms facing international competition, to create jobs or to develop new technologies.

14. In short, this text restores to the market its role as a stimulus for productive activities and broadens the competitive nature of transactions by strengthening the regulations aimed at preventing and correcting behaviour and practices that can interfere with or distort the free play of competition.

15. For example, the following are prohibited: concerted practices and activities, explicit or tacit arrangements and agreements when they have the effect of restricting market access or the exercise of commercial activities, allocating markets or sources of supply or interfering with the pricing process by favouring higher or lower prices, abuse of a dominant or monopolistic position on a market or market segment, etc.

16. However, some agreements, arrangements or practices are not always intended to create barriers or obstacles to market access, for they can also be aimed at improving the commercial organisation of firms, creating jobs, reducing supply costs or pooling management resources or new technologies and making firms more competitive on the market.

17. It was in this context that Executive Decree n° 05-175 of 12 May 2005 specifying the procedures for obtaining a clearance certificate regarding agreements and dominant position on the market was issued in accordance with the provisions of Section 8 of Ordinance n° 03-03 mentioned above, which lay down that:

> "*The Competition Council may certify, at the request of the enterprises concerned, the fact that there is no reason for it to object, on the basis of the elements known to it, to an agreement, a concerted activity, arrangement or practice as defined in Sections 6 and 7 above"*.

18. The clearance certificate is defined as being an authorisation issued by this regulatory authority to show that the agreement or dominant position does not constitute a barrier to competition, but is intended to ensure economic or technical progress and that it helps to improve employment or consolidate the competitive position of small and medium-sized enterprises.

19. This decree also laid down the procedure for obtaining a clearance certificate regarding an agreement or a dominant position on the market being planned by a company or companies requesting the Competition Council's opinion regarding these practices.

20. These provisions enable companies to verify beforehand whether the Competition Council, on the basis of the elements known to it, considers that the agreement or dominant position planned on a given market is or is not prohibited by the Ordinance on competition.

21. In the light of the elements provided to it, the Competition Council may decide that there is no basis for it to object to the behaviour being planned with regard to an agreement, a concerted activity, an arrangement or any other practice falling within the scope of the legislation in force.

22. The Council then issues an administrative document known as a clearance certificate.

23. However, this certificate may be challenged by a referral to the Competition Council alleging evidence that the market is being disrupted. Consequently, the clearance certificate is not final and does not mean that cases involving parties that have been granted certificates cannot be brought before the Competition Council.

24. Thus, this procedure, which is of a preventive and educational nature, will enable companies that wish to ensure that their practices are in compliance with the regulations in force to apply to the Competition Council for the relevant clearance certificate.

25. Given the growing complexity of competition regulations and the business world and the fact that firms are not sufficiently familiar with these regulations, this procedure will enable businesses to take advantage of the Competition Council's expertise in this field.

26. Consequently, it will be up to the economic operators concerned to justify and demonstrate that their activities and practices are in compliance with the legislative provisions in force by using the information form annexed to the decree in order to indicate the following:

- how the company applying for clearance will benefit from the activity or practice;
- why the behaviour of the company or companies concerned will not prevent, restrict or distort the free play of competition on a given market;

- how the relevant activity or practice will be beneficial to competition, users and consumers;
- how long the planned operation (agreement or dominant position) will last.

27. This procedure will also make it possible to reduce the caseload of the Competition Council, since the prior, preventive review of applications by firms for a clearance certificate, will enable these economic operators to avoid breaking the law and having cases brought against them by adversely affected competitors or by the Competition Council acting on its own initiative.

3 Privatisation and competition

28. Firstly, it is crucial to remember that privatisation is first and foremost an eminently political act. Privatisation is aimed at meeting many objectives that are not all convergent and that must be prioritised by organising a privatisation programme.

29. In the case of Algeria, the objectives such as those mentioned below may change and be adapted depending on the activity or enterprise being privatised, **for privatisation is not an ideological goal but a means of restoring growth and creating useful jobs by pursuing the following key objectives**:

- to make the economy much more efficient, thereby stimulating growth and job creation;
- to promote competition and eliminate administrative rigidities;
- to make transactions more transparent and combat anticompetitive practices;
- to relieve budgetary constraints in order to reduce the public debt burden in the medium term;
  - to promote certain enterprises commercially and with foreign investors;
  - to promote wider participation of the population in equity markets and employee share ownership (an explicit objective of the privatisations in the UK and France).

30. There have been a number of reforms of the strategy of privatisation of the public economic sector, culminating in Ordinance n° 01- 04 of 20 August 2001 on the organisation, management and privatisation of public economic enterprises. The purpose of this text is to define the rules for the control and privatisation of these enterprises. It is also aimed at channelling the transfer of the public economic sector towards private ownership and/or management in compliance with the rules on transparency, fairness and competition using competitive bidding procedures.

31. This Ordinance specifies that the assets of public enterprises may be transferred and sold under ordinary law. The Council for State Assets (*Conseil des Participations de l'Etat*, CPE) is responsible for setting the overall strategy and implementing policies and programmes for the privatisation of State-owned economic enterprises.

32. The CPE is a collegial body chaired by the Head of the Government and composed of representatives of the ministries concerned and which makes the final decision regarding the privatisation operations submitted to it.

33. In addition, the Council for State Assets has provided Asset Management Companies (*Sociétés de Gestion des Participations*, SGP) with the legal tools required so that they can handle directly at their level

all opportunities that may arise with regard to investors, particularly when the State-owned enterprise is an SME.

34. The framework established can be summarised as follows:

- Any investor interested in acquiring all or part of the capital of an independent operating unit may express its interest to the SGP or the enterprise in question;
- In this case, the SGP must announce that the State-owned enterprise is open for privatisation, that one or more parties have expressed interest and that interested investors should come forward within a maximum period of 4 weeks;
- The interested party or parties then submit a bid;
- the SGP and the State-owned enterprise then make an estimate of the value of the enterprise or the assets to be sold;
- negotiations are initiated between the SGP and the prospective buyer or buyers;
- after both parties have reached an agreement, the SGP or the unaffiliated enterprise forwards the file to the Ministry responsible for State assets and investment promotion, which gives its approval and proposes that it be submitted to the Council for State Assets, which meets regularly.

35. In this regard, the Ministry responsible for the privatisation process has implemented a plan of communication with the public and investors regarding privatisation policies and opportunities for equity investment in public economic enterprises (cf. website).

36. It should be emphasised that the Government does not negotiate the terms directly with purchasers. Instead, the Asset Management Companies or State-owned enterprises not affiliated with them conduct the negotiations with investors.

37. However, both the supply and the potential demand for privatisation are only estimated. **The supply** is calculated by estimating the value of the enterprises to be placed on the market. This assessment is based primarily on the enterprises' accounts and actual real estate holdings.

These enterprises' accounting systems must therefore be upgraded and their assets clearly identified in order to conduct these assessments, which in any case can only be used as a general guide. **The demand** for privatisation expressed in terms of resources can be based on the domestic savings of enterprises and foreign direct investment.

38. **The techniques of privatisation are adapted to the economic objectives.** The legitimate concerns of the State, such as the protection of employment and activity, the development of employee share ownership and investment in renovation and modernisation are taken into account in the privatisation specifications. If a competitive bidding procedure is not used, the approach being promoted is to encourage a joint venture involving domestic private parties and foreign partners to take over the State-owned enterprise.

39. Another possibility available is to choose operators through a call for tenders open to all parties, setting minimum and/or maximum equity ownership amounts for local and foreign purchasers. Sale

through competitive bidding generates a capital and securities market and makes it possible to lay the foundations for a real market economy.

4. Conclusion

40. Despite this legislative and regulatory system, it should be mentioned that no case of a cartel has been detected thus far at the local level. This is explained by the newness of the system within a market economy.

41. The fact is that the majority of large strategic companies are State owned and are in a virtually monopolistic position because of the lack of competitors. This is true of the cement, pharmaceutical and milk production sectors.

42. Privatisation of the public sector remains timid and the process is affected by some endogenous barriers mainly related to the organisation of State land ownership and the definition and assessment of assets, all of which closely involve property issues, and local expertise is not well adapted to these types of operations.

43. The State, in disengaging from the economic and production sectors, is introducing a series of measures to facilitate the privatisation of the public sector without adversely affecting the interests of workers. It engages in regular consultations with management and workers' representatives.

DAF/COMP/GF/WD(2006)19

OCDE

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CONTRIBUTION DE L'ALGERIE

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

1. Cadre général

1. Les réformes économiques engagées au cours de la dernière décennie ont largement contribué à libéraliser la réglementation économique et commerciale nationale. Les mesures ainsi mises en œuvre ont participé au rétablissement des équilibres macro économiques et financiers, à la clarification des rôles respectifs de l'Etat et de libéralisation du commerce extérieur

2. Celles-ci s'imposent avec force à l'heure actuelle à la faveur de la mise en place de la zone de libre échange avec l'Union Européenne et de la préparation, de manière déterminée, de l'accession de l'Algérie à l'Organisation Mondiale du Commerce (O.M.C).

3. A ce titre, l'Algérie a présenté un programme de transformation des textes législatifs et réglementaires.

4. C'est dans ce cadre notamment qu'a été élaborée l'ordonnance n° 03.03 du 19 juillet 2003 relative la concurrence. Dans ce domaine le cadre législatif et réglementaire antérieur à cette ordonnance souffrait de plusieurs insuffisances, en particulier :

- le faible développement de la culture de concurrence ;
- la carence du contentieux concurrentiel ;
- les difficultés de fonctionnement du Conseil de la Concurrence.

5. Ces dysfonctionnements conjugués aux contraintes de compétitivité induites par l'ouverture de notre économie aux échanges internationaux, ont rendu nécessaire l'actualisation du cadre législatif régissant la concurrence et son harmonisation avec les pratiques internationales.

6. Il convient de rappeler les principales raisons qui ont motivé la révision de l'ancienne ordonnance promulguée en 1995 :

1. la première raison a trait à la séparation **des règles relatives à la concurrence** (portant sur les ententes et accords illicites, abus de position dominante et les concentrations) des **règles sur les pratiques commerciales (défaut de facturation, non affichage des prix…**) *;*
2. la deuxième raison est liée à la nécessité de rompre avec le caractère répressif de notre législation et de mettre en place des mécanismes de concertation favorisant le contact et la coopération entre l'Administration du commerce, le Conseil de la Concurrence et les entreprises, en vue de familiariser ces dernières au fonctionnement concurrentiel du marché ;
3. la troisième raison est liée à la réhabilitation du Conseil de la Concurrence dans son rôle de principal régulateur du marché ;
4. la quatrième raison, a trait aux exigences de l'intégration à l'économie régionale (Union Européenne) et mondiale (OMC) impliquant incontestablement la modernisation et l'harmonisation de notre législation nationale en matière de concurrence.

7. Les principaux objectifs visés à travers ce cadre législatif, sont de fixer les conditions d'exercice de la concurrence sur le marché, de prévenir toute pratique restrictive de concurrence et de contrôler les

concentrations économiques afin de stimuler l'efficience économique et d'améliorer le bien-être des consommateurs.

8. Cette législation s'applique à l'ensemble des activités de production, de distribution et de services. Son champ d'application couvre les activités des personnes publiques lorsque celles-ci n'interviennent pas dans le cadre de l'exercice de prérogatives de puissance publique ou dans l'accomplissement de missions de service public.

9. En plus des pratiques d'ententes illicites et des abus de position dominante, la nouvelle ordonnance promulguée en 2003 intègre d'autres pratiques restrictives de la concurrence, à savoir :

- l'abus de l'état de dépendance économique ;
- la constitution de monopoles à l'importation par le biais de contrats d'achats exclusifs ;
- et la pratique de vente à des prix abusivement bas.

10. Il faut signaler que cette ordonnance prévoit des exceptions au principe général d'interdiction, lorsque les pratiques et accords restrictifs résultent d'un texte législatif ou d'un texte réglementaire pris pour son application. Ces exceptions couvrent également les accords et pratiques qui permettent aux petites et moyennes entreprises d'affermir leur position concurrentielle sur le marché ou qui favorisent l'emploi.

11. Elle intègre en outre, une nouvelle disposition qui consacre une mesure préventive et pédagogique à travers l'attestation négative. En vertu de cette nouvelle procédure, les entreprises dont les comportements sont susceptibles d'être non conformes aux règles de la concurrence, peuvent demander au Conseil de la Concurrence de vérifier si les pratiques ou accords qu'elles souhaitent mettre en œuvre, peuvent être considérés comme compatibles avec la loi et bénéficier d'une attestation négative.

2. Présentation du cadre réglementaire en matière d'entente

12. En matière de **concentration économique**, la nouvelle ordonnance reconduit la compétence du Conseil de la Concurrence. La concentration doit être communiquée au Conseil de la Concurrence lorsqu'elle vise la réalisation d'un seuil de plus de 40 % des ventes ou achats à effectuer sur un marché.

13. Ainsi, consacre-t-elle une exception à ce principe en accordant la faculté au Gouvernement d'autoriser, lorsque l'intérêt général l'exige, les concentrations économiques rejetées par le Conseil de la Concurrence à chaque fois que les conditions économiques objectives l'exigent pour développer et assurer la compétitivité des entreprises nationales face à la concurrence internationale, pour créer des emplois ou pour développer des technologies nouvelles.

14. En résumé ce texte restitue au marché son rôle de stimulant des activités productives et élargit le caractère concurrentiel des transactions qui interviennent et ce, par le renforcement des règles qui visent à prévenir et à corriger les comportements et les pratiques de nature à entraver ou à fausser le libre jeu de la concurrence.

15. Ainsi, sont prohibées les pratiques et actions concertées, les conventions et ententes expresses ou tacites lorsqu'elles tendent notamment à limiter l'accès au marché ou l'exercice d'activités commerciales, répartir les marchés ou les sources d'approvisionnement, à faire obstacle à la fixation des prix en favorisant leur hausse ou leur baisse, les abus de position dominante ou monopolistique sur un marché ou un segment de marché.

16. Cependant, certains accords, conventions ou pratiques n'ont pas toujours pour objet de constituer des barrières ou des obstacles à l'accès au marché. Ils peuvent avoir, en effet, pour but notamment d'améliorer l'organisation commerciale des entreprises, la création d'emplois, la réduction des coûts des approvisionnements ou la mise en commun de moyens de gestion ou de technologies nouvelles et l'amélioration de leur position concurrentielle sur le marché.

17. C'est dans ce cadre qu'intervient le décret exécutif n° 05-175 du 12 Mai 2005 fixant les modalités d'obtention de l'attestation négative relative aux ententes et à la position dominante sur le marché, pris en application des dispositions de l'article 8 de l'ordonnance n° 03-03 précitée, qui édictent que :

> « Le Conseil de la Concurrence peut constater, sur demande des entreprises intéressées, qu'il n'y a pas lieu pour lui, en fonction des éléments dont il a connaissance, d'intervenir à l'égard d'un accord, d'une action concertée, d'une convention ou d'une pratique tels que définis aux articles 6 et 7 ci-dessus. ».

18. **L'attestation négative se définit comme étant une autorisation délivrée par cette autorité de régulation à l'effet de prouver que l'entente ou la position dominante n'est pas intervenue comme une entrave à la concurrence et qu'au contraire cette action a pour objectif d'assurer un progrès économique ou technique ou qu'elle contribue à améliorer l'emploi ou encore qu'elle permet de consolider les petites et moyennes entreprises dans leur position concurrentielle.**

19. Le décret précité a par ailleurs, de fixer les modalités d'obtention d'une attestation négative concernant une entente ou une position dominante sur le marché, envisagée par l'entreprise ou les entreprises sollicitant l'avis du Conseil de la Concurrence sur ces pratiques.

20. Ces dispositions, permettent aux entreprises de vérifier a priori si le Conseil de la Concurrence, en fonction des éléments dont il a connaissance, considère que l'entente ou la position dominante projetée sur un marché déterminé est ou n'est pas interdite par l'ordonnance relative à la concurrence.

21. Sur la base des éléments qui lui sont fournis, le Conseil de la Concurrence peut constater qu'il n'y a pas lieu pour lui d'intervenir à l'égard du comportement envisagé et portant soit sur un accord, une action concertée, une convention ou sur toute autre pratique contenus dans la loi en vigueur.

22. Ce constat est concrétisé à travers la délivrance d'un document administratif, dénommé *« attestation négative »*.

23. Toutefois, cette attestation négative peut être remise en cause par une saisine du Conseil de la Concurrence lorsque des preuves de perturbation du marché concerné sont avérées. En conséquence, l'attestation négative ne revêt pas un caractère définitif et n'exonère pas ses bénéficiaires de poursuites auprès du Conseil de la Concurrence.

24. Cette procédure qui revêt un caractère préventif et pédagogique permettra ainsi aux entreprises qui voudraient faire confirmer que leurs pratiques ne contreviennent pas aux règles édictées ci-dessus, de recourir au Conseil de la Concurrence pour solliciter la délivrance de l'attestation négative considérée.

25. En effet, du fait de la complexité de plus en plus croissante des règles de la concurrence et du monde des affaires et de leur non maîtrise suffisante par les entreprises, celles-ci auront, à travers la procédure ainsi instituée, le moyen de bénéficier de l'expertise du Conseil de la Concurrence en la matière.

26. Il appartiendra, en conséquence, aux opérateurs économiques concernés de justifier et prouver que leurs actions et pratiques ne portent pas préjudice aux dispositions législatives en vigueur, à travers l'utilisation adéquate du formulaire de renseignements annexé au décret, en indiquant notamment :

- les avantages que procure l'objet de la demande au profit des entreprises concernées ;
- les raisons pour lesquelles le comportement de l'entreprise ou des entreprises concernées n'a pas pour objet ou pour effet d'empêcher, de restreindre ou de fausser le libre jeu de la concurrence dans un même marché ;
- les avantages que la demande est susceptible de procurer à la concurrence, aux utilisateurs et aux consommateurs ;
- la durée de l'opération projetée (entente ou position dominante).

27. Cette procédure permettra, en outre, de réduire le volume des contentieux du Conseil de la Concurrence sachant qu'à travers l'examen préalable et préventif des demandes d'obtention de l'attestation négative introduites par les entreprises, il évitera à ces opérateurs économiques de contrevenir aux dispositions de la loi précitée et de s'exposer, par voie de conséquence, aux plaintes des entreprises concurrentes lésées ou à une auto-saisine du Conseil de la Concurrence en la matière.

3. Privatisation et concurrence

28. D'emblée, il y a lieu de rappeler avec force que la privatisation est d' abord et avant tout un acte éminemment politique. La privatisation répond à de nombreux objectifs qui ne sont pas tous convergents et qu'il convient de hiérarchiser dans la formulation d'un programme de privatisation.

29. Dans le cas de l'Algérie, les objectifs tels que cités ci-dessous peuvent varier et être adaptés en fonction de l'activité ou l'entreprise objet de la privatisation, c**ar la privatisation est non une finalité idéologique mais un moyen du retour à la croissance et à la création d'emplois utiles autour des axes fondamentaux suivants** :

- parvenir à une grande efficience de l'économie donc croissance et création d'emplois ;
- promouvoir la concurrence et éliminer les rigidités administratives ;
- favoriser la transparence des opérations et lutter contre les pratiques contraires à la concurrence ;
- alléger les contraintes budgétaires, dans la mesure où à moyen terme, elles peuvent permettre de réduire le poids de la dette publique :
  - permettre la promotion de certaines entreprises sur le plan commercial et auprès des investisseurs étrangers ;
  - développer l'actionnariat populaire et la participation des salariés au capital de leur entreprise (objectif explicite des privatisations britanniques et françaises).

30. La stratégie de la privatisation du secteur public économique a fait l'objet de plusieurs réformes dont l'aboutissement a été la promulgation de l'ordonnance n° 01- 04 du 20 Août 2001realative à l'organisation, la gestion et la privatisation des entreprises publiques économiques. Ce texte a pour finalité

de définir les règles de contrôle et de privatisation de ces entreprises. Son objectif est aussi de canaliser le transfert du secteur public économique vers la propriété et/ou la gestion privée dans les règles de transparence, d'équité et de concurrence, par le recours aux procédures d'appel à la concurrence.

31. Ce texte édicte que le patrimoine des entreprises publiques est cessible et aliénable conformément au droit commun. C'est le Conseil des Participation de l'Etat (CPE) qui fixe la stratégie globale et met en œuvre les politiques et programmes de privatisation des entreprises publiques économiques.

32. Le CPE est un organe collégial présidé par le Chef du Gouvernement et composé des Ministères concernés se prononce en dernier ressort sur les opérations de privatisation qui lui sont soumises.

33. Par ailleurs, le Conseil des Participations de l'Etat a doté les Sociétés de Gestion des Participations (SGP) d'une instrumentation juridique leur permettant de traiter directement à leur niveau toutes les opportunités qui peuvent se présenter de la part des investisseurs notamment, lorsqu'il s'agit d'une entreprise publique de taille PME.

34. Le cadre fixé est résumé comme suit :

- tout investisseur, intéressé par l'acquisition de tout ou partie du capital constituant une unité d'exploitation autonome peut manifester son intérêt à la SGP ou à l'entreprise concernée ;
- dans ce cas, la SGP doit annoncer que l'EPE est ouverte à la privatisation, qu'elle a reçu une ou des manifestations d'intérêt et que les investisseurs doivent se manifester dans un délai maximum de 4 semaines ;
- le ou les repreneurs s'engagent dans la remise d'une offre ;
- la SGP et l'EPE quant à elles, procèdent à l'estimation de la valeur de l'entreprise ou des actifs à céder ;
- des négociations sont engagées entre la SGP et le ou les repreneurs ;
- après accord des deux parties, la SGP ou l'entreprise non affiliée transmet un dossier au Ministère des Participations et de la Promotion de l'Investissement qui après validation, propose l'inscription du dossier à la session de Conseil des Participations de l'Etat, qui se réunit régulièrement.

35. A ce titre, le Ministère de Participations a mis en œuvre un plan de communication à l'endroit du public et des investisseurs sur les politiques de privatisation et sur les opportunités de participation au capital des entreprises publiques économiques (Site web notamment).

36. Il y a lieu de souligner que le Gouvernement ne négocie pas directement les avantages avec les acquéreurs. Ce sont les Sociétés de Gestion de Participations ou les EPE non affiliées à celles-ci qui négocient avec les investisseurs.

37. Cependant, l'offre comme la demande potentielle de privatisation sont estimées. Concernant **l'offre**, celle-ci repose sur une estimation de la valeur des entreprises à mettre sur le marché. Cette évaluation se base pour l'essentiel sur la comptabilité de l'entreprise et sur la réalité du patrimoine immobilier que cette dernière détient.

38. Aussi, s'agit-il de procéder à la mise à niveau des comptabilités et à la régularisation du patrimoine pour pouvoir effectuer l'évaluation qui en tout état de cause, ne peut servir que de référence. **La demande** de privatisation exprimée en ressources peut provenir de l'épargne domestique d'entreprises et des investissements directs étrangers.

39. **Les techniques de privatisation sont adaptées aux objectifs économiques. L**es préoccupations légitimes de l'Etat, notamment la sauvegarde de l'emploi et de l'activité, l'intéressement des salariés, les investissements de renouvellement et de modernisation sont pris en considération dans le cahier des charges. Dans le cas d'une cession ne faisant pas appel au marché, la démarche à favoriser est celle d'une reprise de l'entreprise publique par une société en joint-venture entre des privés nationaux et des partenaires étrangers.

40. Une autre possibilité est offerte, au plan du choix des opérateurs au terme d'un appel d'offres ouvert à tous les intéressés auxquels on fixe des participations minimales et/ou maximales pour les acquéreurs locaux et étrangers. La cession par appel au marché induit le développement d'un marché de capitaux et de valeurs mobilières et permet d'asseoir une réelle économie de marché.

3. Conclusion

41. Malgré ce dispositif législatif et réglementaire, il y a lieu de mentionner qu'aucun cas d'entente n'a été constaté jusqu'à présent au niveau local. Cet état de fait s 'explique par la nouveauté du système relatif à l'économie de marché.

42. En effet, la majorité des grandes entreprises stratégiques sont publiques et se situent dans une position quasi monopolistique du fait de l'absence de concurrents. Il en est ainsi pour les secteurs du ciment, des produits pharmaceutiques, de la production du lait.

43. Quant à la privatisation du secteur public, elle reste timide et le processus connaît quelques entraves endogènes dues principalement à l'organisation domaniale à la définition et l'évaluation des actifs, questions éminemment liées à la propriété et l'expertise locale est peu adaptée à de telles opérations.

44. L'État dans son action de désengagement du secteur de l'économie et de la production est en train de mettre en place un train de mesures pour faciliter la privatisation du secteur public sans pour autant porter atteinte aux intérêts des travailleurs. Des concertations Sont régulièrement engagées avec le patronat et les représentants des travailleurs.

DAF/COMP/GF/WD(2006)7

OCDE

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CONTRIBUTION FROM ARGENTINA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Special definition of Hard Core Cartels

1. In Argentina article 1° of the Competition Law (Law 25.156) prohibits acts or conducts, related to the production and exchange of goods or services, whose intent or effect is to restrict or to distort competition, and those that constitutes an abuse of dominant position, so that damage for the general economic interest can result. On the other hand, article 2° of the mentioned law enumerates in a non exhaustive form a series of conducts, that to be considered illegal must fulfil at the same time the requirements of article 1°. In this way a special definition for hard core cartels is absent in the Argentine antitrust law. To the extent that the law refers to "acts or conducts", it can be observed that the demonstration of the existence of an explicit agreement is not required. In that sense it is possible to sanction conducts on the basis of the demonstration of consciously parallel conduct plus one or more facilitating practice. It must be noted that the National Commission for the Defense of Competition (CNDC) is the technical organism that produces the reports (called “dictamenes”) on the basis of which the Secretary of Technical Coordination makes the final decisions in the administrative branch.

2. Status of Hard Core Cartels under the Antitrust Law

2. Under the Argentine antitrust law hard core cartels do not have any special status. Neither there are criminal provisions in the Law. The law effective prior to the present one contained criminal sanctions but they were never applied. The Argentine antitrust law does not contemplate “*per se*” illegal conducts. With regard to the harshness of the sanctions, article 49 of the law establishes that in the imposition of fines it will have to be considered, among other elements, the loss incurred among all the persons affected by the prohibited activity, the benefit obtained by all the persons involved in the prohibited activity, the gravity of the infraction, the damage caused, the intention. Therefore by virtue of this provision the fines imposed to hard core cartels could be increased according to the mentioned criteria. It should be mentioned that the maximum amount of the fine that allows the law ascends to one hundred fifty million Argentine pesos ($ 150,000,000), approximately. U$S 50.000.000. Under the Law there is not a more demanding standard to prove hard core cartels than to prove other anticompetitive conducts.

3. Prove of Cartels through indirect evidence

3. Yes, it is possible to prove the existence of an agreement of cartelisation or other types of anticompetitive practices without direct evidence. In the case of the cement cartel fined by the CNDC in July of the present year a combination of indirect evidence, economic evidence and facilitating practices (exchange of sensible competitive information) was used to sanction the involved companies.

4. Judicial experience in cases of indirect evidence in Cartels

4. To date judicial resolutions have not existed pronouncing on this topic.

5. Difference in the applicable sanctions

5. In principle, that the evidence of the cartel is direct or indirect it does not make a difference in relation to the applicable sanctions.

6. Prosecution of Cartels

6. The possibility of prosecuting cartels without need to produce direct evidence is a key factor for an effective fight against that type of practices, mainly in Argentina, that has not yet implemented a clemency program.

7. Evidentiary standards for developing countries

7. Evidentiary standards should not have to be more lenient by the circumstance that in developing countries little experience in the prosecution of cartels exists, since otherwise constitutional guarantees of due defense could be affected.

8. Example of a case of cartel in Argentina

- In Argentina recently, in the month of July of the current year, a record fine was imposed to the cement companies for having cartelised the cement portland market during a period of almost twenty years. The investigation took account of a journalistic publication whose source turned out to be an ex-employee of one of the investigated companies. This ex-employee, according to the journalistic publication, had compiled documentation and written an unsigned document (Book) where all the functioning of the cartel was described in detail. Unfortunately; this person could not be found during the investigation. The hard core cartel consisted basically of the allocation to each cement company of a predetermined percentage of the market on national scale, complemented with agreements on prices and other commercial conditions at a local (city/region) scale. The illegal practice was demonstrated with a series of elements of indirect evidence.

- One of the most important elements of indirect evidence turned out to be the competitively sensible exchange of information between the cement companies via the association that gathered them (Association of Cement Manufacturers Portland - AFCP). The AFCP handled a Statistical System of exchange of information by which each associated cement company sent to the AFCP information on its production and quantities of cement sold, with a high degree of detail. In that sense the companies sent with monthly regularity the production by plant of each company. On the other hand, the monthly sales (in quantities) were sent with diverse openings: by localities of a size suggestively narrow, by province, and also on a national scale, by type of client (public sector, private sector and export), by package (bags and bulk), and by means of transport (by truck, railroad, by sea, by waterway and internal consumption). In some occasions the AFCP also processed information of cement sales (quantities) of weekly character. The interchanged information had recent character, in the sense that it referred to the months immediate previous to the production of the information. After processing all this information, the AFCP gave back to the companies the production and individual sales (quantities) of all the companies associated. In this way each company knew strategic commercial information of its competitors. The interchanged information was classified as "confidential". The Statistical System was improved throughout the investigated period, displaying a degree of increasing sophistication whereas the information disclosed through the official publications of the AFCP was becoming more and more sparse. The System was designed to produce exits that allowed to compare the market share of each company and their evolution over time. In addition to numbers of definitive sales the statistics included provisional sales, which demonstrated that the companies needed the provisional numbers to adjust more perfectly to the agreement, since the definitive numbers were produced with a delay of only a month. In conclusion, the implementation of an exchange

of information with the aforementioned characteristics could only be fully explained by the necessity to control the fulfilment of an anticompetitive practice in the cement industry.

- Another element of indirect evidence turned out to be three audits of invoicing and sales (quantities) that the AFCP ordered to consulting companies. Specialised literature emphasizes the existence of audits like a typical characteristic of the cartelisation of an industry, whose purpose is to verify that the participants in these practices do not cheat declaring inferior sales or departing in some other way from the terms of the agreement.

- Thirdly, it was proved that the people who took part by the companies in the exchange of information through the AFCP, sending or receiving data, and/or in the operation and implementation of this system, turned out to be in their great majority commercial personal from the area of sales, of diverse hierarchies within each company.

- In fourth place, it was proved the existence of reclamations of the companies and the AFCP when delays in the sending of the information on the part of any of the associate companies took place. The typical delays in the delivery of some of the statistics of competitively sensible information that the statistical system of the AFCP produced did not go beyond few months: two, three, four or at the most five months. At the same time the reclamations made reference to the information exchanged as a "tool" that was useless if produced “out of time” and consequently it would lose its "value". The CNDC concluded that this type of reclamations, conducted so much by the companies associated as by the AFCP, obeyed to the urge of each associate to control other‘s market share and to fit its commercial decisions to the terms of the agreement, otherwise it is not understandable why delays of two, three or four months would make lose "value" to the mentioned "tool".

- Another element of indirect evidence turned out to be the fact that the information in which the journalistic article was based was provided by an ex-employee of one of the cement companies. This circumstance was considered by the CNDC as an element that gave credibility to the facts narrated in the Book and that ex-employee told to the journalist. On the other hand, although the cementer company where this person worked repeatedly claimed that the Book comprised of a manoeuvre of extortion in his against and that the journalistic publication was slander, at no moment it mentioned that it had initiated legal actions on the matter, as was expected if the version in it contained were false.

- An element of economic evidence consisted of the accreditation of diverse episodes of collusion in prices and other commercial conditions in different localities (city/region), that appeared mentioned in the documentation accompanied by the journalist, who was as well given to him by the mentioned ex-employee.

- The CNDC also proved the existence of meetings between personnel of sales of the companies investigated outside the scope of the AFCP. These meetings are mentioned in the Book and the documentation accompanied by the journalist, who as well received it from the mentioned ex-employee.

- Another element of economic evidence consisted of a predatory action undertaken in concert by the associates against one of the companies associated to force it to add itself to the cartel. This coordinated operation, that according to the Book was called “Operativo Patagonia”, consisted of invading the patagonic region, in which the mentioned company was established, with cheaper cement and much more soft conditions of sale that the

effective ones in the rest of the country. This joint invasion was an atypical behaviour as in it participated companies whose plants were located very far away and was initiated in a simultaneous way by the firms. After this incursion the mentioned companies practically disappeared of the zone. At the same time during these years there was a fall in the sales and participation of market of the company attacked in the alluded region that was not explicable either considering its advantages from location.

- Another evidence of economic character turned out to be the evolution of the market shares on a national scale of the cement companies during the investigated period. These market shares behaved in accordance with which the Book indicated like fruit of the agreement. The allocation of market shares on a national scale for each one of the companies constituted the fundamental variable in the agreement during the investigated period. According to the narration contained in the Book, in year 1981 the initial market shares were agreed among the companies, and were subsequently modified in 1983 and 1991. The CNDC considered as a suggestive circumstance - corroborating in that sense the narration contained in Book- the fact that the three audits of invoicing and sales ordered by the AFCP took place very close to the years when according to the Book the market shares were fixed. Throughout all the investigated period the market shares observed indeed adjusted remarkably with the agreed participation.

- Finally, the CNDC considered that the facts independently verified gave credibility to the central aspects of the narrative contained in the Book, even though this was an unsigned document. In that sense it was proved a series of core affirmations contained in this document, as far as which: a) in the system of exchange of information participated personal in the companies of the commercial area, b) the information was processed by the employees of the AFCP, c) the imputed companies, by its side and with similar lists, verified the process, d) the system tracked the sales factory by factory and company by company and the respective participation within the dispatched total of cement, e) of those numbers also took an accumulated ones that was watched in a percentage form, f) there existed an interchange of weekly numbers of sales, g) the interchanges of numbers had confidential or reserved character, h) to ensure that the associate companies did not cheat in the numbers of interchanged sales the Association contracted an external auditor, i) between years 1987 and 1989 it was verified the so called “Operativo Patagonia”, and j) the companies agreed in prices in diverse localities.

- The amount of fines applied to the cement producers and the AFCP was the following: Loma Negra ($ 138.700.000, U$S 47,8 millions), Minetti ($100.100.000, U$S 34,5 millions), Cementos Avellaneda ($34.600.000, U$S 11,9 millions), Cemento San Martín ($28.400.000, U$S 9,8 millions) and Petroquímica Comodoro Rivadavia ($7.300.000, U$S 2,5 millions), AFCP($ 529.289, U$S 182.513). In total: $309.629.289.000, U$S 106,70 millions.

- A recent pronunciation of the Court of Appeals confirmed the decision of the Antitrust Agency in this case with regard to the statute of limitation. The decision on the substantive matters is still pending.

DAF/COMP/GF/WD(2006)37

OCDE

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CONTRIBUTION FROM BRAZIL

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. This paper discusses the legal aspects of prosecuting a cartel in Brazil without direct evidence of collusion, as well as which are the steps taken by the Secretariat of Economic Law when a complaint is filed in such situation. Further on, some cartel cases where the Administrative Council for Economic Defense (CADE) found the parties guilty based on indirect evidence of collusion will also be analysed.

2. In Brazil, cartels can be prosecuted both criminally and administratively and in neither spheres there are legal restrictions about prosecuting and/or condemning a case only with circumstantial evidence. Specifically regarding the administrative jurisdiction, Law 8.884/94 does not award any discretion for the authority to decide whether or not to investigate a case. Therefore, whenever a complaint of a cartel is filed, there is a legal obligation to investigate the case, regardless of the value of the evidence presented. Nevertheless, the competition authority can decide which procedure it will adopt in order to investigate the complaint.

3. More generally, every case submitted to the competition authority is filed as an Administrative Procedure (*Procedimento Administrativo*) and, depending on the strength of the evidence and the circumstances of the case, the competition authority will have the following options: i) initiate a preliminary investigation (*Averiguação Preliminar*); ii) initiate an Administrative Process (*Processo Administrativo*); or iii) dismiss the claim without further investigation, if the complaint is unrelated to competition matters or if the practice clearly does not pose any anticompetitive harm. The competition authority can adopt any of such decisions, provided that it includes relevant justification.

4. It is also worth mentioning that, aside from the decision to dismiss the case while it is still an Administrative Procedure; all the other decisions of the Secretariat of Economic Law are submitted for the approval of CADE. If CADE disagrees with the decision of the Secretariat of Economic Law to close a case, it can send that case back to the Secretariat and demand that further investigations are conducted.

5. Specifically regarding cartels, complaints will always be investigated, even if filed only with circumstantial evidence, regardless of its strength. Depending on the findings derived from this investigation, SDE will decide which procedure to take. It is important to reiterate that our system has no formal restrictions about prosecuting and/or punishing a cartel case based only on circumstantial evidence.

6. In the criminal jurisdiction (Law 8.137/90), the situation is alike, with few procedural differences. Within this jurisdiction, the case is submitted to the Public Attorney's Office, which evaluates the given evidence. If the evidence is considered insufficient, the “Public Attorney's Office” can close the case, provided that a formal justification for the dismissal is presented. It can also send the case to the Police Department so that it conducts further investigations, where a technical report will be prepared at the end of the procedure, in which it can recommend whether or not the case should be closed. The Public Attorney's Office, then, can accept or reject the content of the technical report, but always justifying why.

7. So, as a matter of fact, there are several possibilities to deal with cases that are based on circumstantial and/or economic evidence, but in all of them, there is the obligation to, at least, conduct some preliminary investigations in order to decide whether the case should be summarily closed or not.

1. Special criteria to evaluate complaints on gasoline retail market

8. Complaints must always be investigated, however, since this is a time consuming endeavour and the Brazilian Competition System faces human resource limitations, it's important to have some criteria to evaluate them.

9. In practice, some complaints can be dismissed based merely on economic grounds, when there is no direct evidence associated to it. For instance, cartel complaints involving the gasoline retail market are no longer pursued whenever there is no market indication of collusion. The use of economic methods in the evaluation of complaints has reduced the time spent in the analysis. This is a major step, considering the large number of complaints in this sector, and the fact that in most of these complaints the only cartel evidence presented is the homogeneity of prices (or similar price raise).

10. In order to avoid time-consuming procedures, the Secretariat for Economic Monitoring developed a method to analyze those complaints taking into consideration pricing behaviours and profit margins. Such method – which is a first attempt to reach a filter and is still under discussion – is three pronged. Complaints are only prosecuted if cumulative conditions based on economic analysis are met.

11. First, the profit margin tendency is verified. If the profit margin should decrease, the market is considered to be under a competitive behaviour, in which case the complaint is dismissed. Second, we analyze whether the margin increase is linked to the reduction of price dispersion. If not, the case is dismissed. Third, if there is such a margin increase, then we verify whether the margin and price dispersion behaviours follow the same pattern within a State geographical area (we consider that the monitoring costs of a cartel in a State – as opposed to a City - would be much too high). If they do, the case is dismissed. Therefore, we prosecute cases only if there is a margin increase linked to the reduction of price dispersion not following the State pattern. In these cases, we continue with the investigation, trying to gather more evidence through the investigative methods allowed by Brazilian law, such as inspections, dawn raids and wiretapping.

12. It is very difficult to reach a conviction in the gasoline retail market based solely on economic evidence, nonetheless, this methodology might enable Seae and SDE to eliminate cases that do not deserve to be thoroughly investigated and concentrate resources on those where there is a preliminary indication of collusion and thus, of potential harm to consumers.

2. Summary of relevant cartel cases based on circumstantial evidence

2.1 The Steel Cartel Case

13. In Brazil, the steel cartel is the leading case where CADE found the parties guilty based on indirect evidence of collusion.

14. The case involved an agreement to increase the prices of flat rolled steel products. There were only three domestic producers in the market, two of which were linked by a 50% cross-ownership. "*In July of 1996 representatives of the Brazilian Steel Institute met with officials of SEAE and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day. The background to this meeting is that until 1992 these products were subject to price controls, which were administered in part by SEAE. On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of the competition law and illegal. Nevertheless, the three producers*

each implemented price increases on these products in early August of that year. The increases were approximately the same as those given to SEAE by the Steel Institute".[1]

15. Aside from the information the parties themselves presented to the competition authority during the meeting, there was no direct proof that the firms had coordinated the price increase; therefore the investigation was based on the economic evidence of collusion. Two interesting points the Respondents raised in their defense were that the steel market is an example of market with "price leadership", which would explain the "apparent" concerted behavior of the Respondents; and that whenever a case deals only with indirect evidence, a condemnation would only be acceptable if no rational explanation for the fact were available.

16. In the steel case, CADE expressly stated that it was possible to condemn a cartel based exclusively on economic evidence, if all the other possible rational explanations for the practice were excluded. It should be noted, however, that CADE did not only consider the economic evidence in this case. In fact, CADE's decision that the parties were guilty was based on the "parallelism plus" theory: the first issue taken into account was the fact that the price increase of the companies, at similar rates and dates, could not be explained just by referring to it as oligopoly's interdependence.

17. In addition to that, although CADE did not consider the meeting as direct evidence of collusion, the commissioners understood that it constituted a strong indication that there had been previous meetings among the companies to discuss matters before actually taking them to the government. According to CADE, the circumstantial evidence indicated that the steel companies had already reached a decision regarding the price increase when they asked for a meeting at SEAE.

18. In two other cartel cases, a strong weight was also given to circumstantial evidence in CADE's decision: the Rio de Janeiro – São Paulo airline case and the investigation involving the four largest newspapers in Rio de Janeiro .

2.2 The Rio de Janeiro – São Paulo Airline Case

19. This case was initiated after some of the major newspapers in the country reported that the presidents of Brazil's four major airlines had met at a hotel and five days later, the prices of the plane ticket for the Rio de Janeiro- São Paulo route had simultaneously increased by 10%. *"SEAE's investigation concluded that the price move was not merely a case of conscious parallelism. In addition to the meeting of the companies' executives, evidence revealed that price data were exchanged among the companies through postings on ATPCO, the computerised airline price data system maintained by the Airline Tariff Publishing Company. A company could configure a price change notice so that, for an initial three-day period, the change could be viewed only by other airline companies and not by consumers or travel agents. The posting company was thus able to abort the change if competitors failed to follow suit. This feature of the ATPCO system had earlier been attacked by the U.S. Department of Justice, but system modifications arising from that case had been implemented only in North America. In September 2004, CADE determined that the four airlines had colluded to raise prices. Each carrier was fined 1% of the revenue earned on the affected route during 1999 and was enjoined from fixing prices and from posting price adjustments in advance. In March 2005, in a separate action, CADE accepted a settlement agreement negotiated between SDE and ATPCO under which ATPCO terminated the three-day notice feature of its system with respect to Brazilian airlines."*[2].

1. From "Brazil OECD 2000 Report", elaborated by John Clark.

2. Peer Review of Brazil's Competition Law and Policy DAF/COMP(2005/8)

20. Apart from the chairmen's meeting, the investigation showed that the companies had a very efficient tool for coordinating their prices, which was the ATPCO system.

21. Based on the association of three factors (the price parallelism, the chairmen's meeting and the tool for coordinating prices), CADE decided that there was a strong indication that the firms were colluding to fix prices. It should also be noted that CADE, in its decision to punish the firms, made a point of justifying why the "price leadership" theory could not be applied in the case.

2.3 The Newspaper Cartel Case

22. The case involved the four largest newspapers in Rio de Janeiro. Here, there was also a price increase at the same time and same percentage rates. In addition to the price parallelism, the indirect evidence consisted in the fact that the newspapers published simultaneously an editorial note informing readers of their price increase on the same day and with very similar content.

23. In addition to this aspect, during the investigation, executives of the companies gave testimonies to the authorities and CADE identified numerous contradictions in their statements, specially referring to the explanation for the price increase. For example, one of the newspaper's executives stated that they simply waited for the leading newspaper company to raise their price so as to do the same. However, this newspaper was unable to explain why the price rise happened exactly on the same day of their competitor, considering that on the same day of the price rise the other newspapers were out with the modified price.

24. CADE found the firms guilty of cartel because of the association of price parallelism with the publication of the editorial note to explain the price increase, together with the lack of a plausible explanation for the price increase at the same time and at the same percentage rates.

25. In short, the jurisprudence shows that CADE admits indirect evidence as proof to punish a cartel. Nonetheless, some qualifications are appropriate: First, in all previous cases, CADE has indicated that it is important to exclude the "price leadership" explanation for the price parallelism; and second, although the indirect evidence available in the cases were important to indicate the existence of illegal behaviour, CADE did not punish the firms exclusively based on that. In the cases referred above, in addition to the economic evidence, some circumstantial event was associated to the price parallelism. Thus, CADE applies the "parallelism plus" theory to condemn cartel based on indirect evidence.

DAF/COMP/GF/WD(2006)16

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CONTRIBUTION FROM CHILE

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. A brief view of the Chilean system.

1. Chile has an important tradition on competition. The first principles about competition and market access were issued in 1959, even when the actual institutionality on competition was created by the Decree Law number 211 of 1973 and the subsequent reforms approved during the past decade.

2. The competition law in force has not considered a special definition or treatment for hard core cartels. This situation is explained by the fact that the Chilean law has only generic definitions of anticompetitive conducts.

3. The article 3 indicates: *"He who enters into or executes, whether individually of collectively, any deed, act or contract that prevents, restricts or hinders free competition or tends to produce such effects shall be liable to the measures prescribed by article 26 of this law, without prejudice to the corrective or restrictive measures that may be decreed in each case in respect of any such deed, act or contract. Among others the following deeds, acts or contracts shall be regarded as preventing, restricting or hindering free competition: (a) Expressed or implied agreements between business agents or concerted practices between them having the intent of fixing sale or purchase prices, limiting production or assigning themselves market zones or quotas, abusing the power conferred upon them by such agreements or practices*."

4. In simples words, according with the law, the hard core cartels are included in the generic form of "collectively agreements between business agents" under an explicit or implicit way. In the first case, the hard core cartels have an explicit agreement (but usually not written) in order to affect or cause distortion on the market. In the second, there is not an agreement, just a common behaviour between the competitors that produces the same effect. Both kinds of conducts are illegal under the Chilean competition law. The cartel under an "implicit agreement" creates a consciously parallel conduct.

5. From the view of the sanctions, the cartels, like all other anticompetitive conducts, are not prosecuted criminally in Chile, and they are principally subject to fines up to US$12.5 millions. Also, the law gives to the Competition Court the faculty to impose the amend or terminate the acts, contracts, agreements, systems or arrangements which are contrary to the provision of the law, including the amendment or dissolution of the partnerships, corporations of other private-law entities involved in the conduct.

6. The proof and the evidence are very important issues in the hard core cartel investigation and prosecution. In the Chilean case, the competition law provides some flexibility. One of them (and the most relevant) is the evaluation of the proof according with the *"sana crítica"* rule. This form of evaluation gives to the judges the opportunity to assign value to every single proof in harmony with the merit of the process and his or her logic and experience.

7. Other important matters are the presumptions or circumstantial evidence which is admitted in the process like effective way to prove a conduct. The article 22 indicates: *"The means of evidence indicated in the article 341 of the Code of Civil Procedure shall be admissible as proof, as well as any findings or grounds that, in the opinion of the Court, are fit to establishing the relevant facts…"*

8. The economic evidence is particularly relevant in those cases because the cartels and the collusive conducts in general, are not crimes under the Chilean law. Thus, the power of the Prosecutor to investigate is limited by law and cannot considere measures like interception telephones or other ways of communication.

9. In merit of that, the Court's treatment of cartels implies a thorough analysis of the facts and proof to conclude in economic evidence that permits enacting the collusive agreement. However, from the legal perspective, there is not any difference between the cartel with direct evidence and the other case (without it). In both cases, it is power of the Court to determine the sanctions and fines, considering, for legal mandatory, the "seriousness of the conduct" (article 27).

10. From the view of our system, the existence of some rules that give flexibility to the proof in the investigation of cartels and all other anticompetitive conducts, permits effective prosecution. However, the lack of some rules to investigate –in terrain- more effectively the conducts some time can create difficulties to carry on a case behind the Court.

2. "The fresh milk case"

11. On 1995, the Fiscalía Nacional Económica started an investigation in the market of fresh milk[1]. The investigation pretended to determinate the existence of some anticompetitive conducts among the six more important industries of milk-based products in the center and south of Chile.

12. After a long investigation, the competition authority required behind the "Resolutive Commission" (the preceding of the current Court of Competition) for the followings conducts: market distribution, refuse to buy[2], price discrimination, arbitrary reduction of prices in prejudice of providers and absence of a regular, clear and public process for the control of the fresh milk quality.

13. The Court's decision, issued in 2004, resolved this case and determined three relevant aspect for this market: (1) even when there is no barriers to entry or to exit from the market, it is very necessary to avoid the explicit or implicit agreements among the companies in order to coordinate they price politics, specially because they conform an effective oligopsony; (2) according with the proof, the market shows some imperfections and transparency absence that it needs to be correcting to prevent the exercise of market power; and (3) the transparency and the "no discrimination principle" are consubstantial for the competition, and it must be considered in the price determination process.

14. The more important measures in the decision were: (1) the milk processor industries must have a price list to buy with adequate information for the sellers; (2) any change in the conditions to buy, by the industry, must be notified at least with month in advance to the fresh-milk providers; (3) the refusal to buy must be founded; (4) the milk industries must have a register of refusal-bids; (5) the milk process industry must implement, within six months after the decision, a common system to determinate the milk quality. Also, this system must be approved by the competition agency.

15. This case shows with clarity a kind of agreement among competitors where there was no direct evidence of it. The Court, following the evidence and the proof compiled by the competition agency, stressed the necessity to incorporate such measures in order to improve the information on the market, giving protection to the providers and reducing the asymetry information.

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1. This market includes the milk producers like sellers and the milk products industry like buyers.

2. Refusal to buy for the fresh milk provider of the competitors in the market restricting the mobility of the provider in the milk industry.

16. At present, the competition agency is watching over the behaviour of the industries in this market to prevent those kinds of conducts, especially because the fresh-milk market structure is favourable to parallel conducts or agreements.

DAF/COMP/GF/WD(2006)25

OCDE

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CONTRIBUTION FROM CROATIA

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Croatian Competition Act – Legal Definitions

1. Croatian Competition Act (CCA; CCAct)[1] (2003) provides legal definitions for hard core cartels. The notion of hard core cartels is covered under the section of the CCA which establishes the prohibitions of certain categories of agreements among undertakings[2].

2. Prohibited Agreements among Undertakings

2. The CCAct stipulates that there shall be prohibited all agreements between undertakings, contracts, single provisions of agreements, explicit or tacit agreements, concerted practices, decisions by associations of undertakings (hereinafter: agreements) the object or effect of which is to prevent, restrict or distort competition in the relevant market, and in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3. The above listed agreements that prevent restrict or distort competition, and which may not be exempted from above mentioned prohibitions, shall be declared as null and void.

3. Exemptions from the General Prohibitions

4. The conditions for exceptions from the prohibition of restrictive agreements, both individual and group, have been determined by the CCA and they are in line with the provisions of Article 81 (3) of the EC Treaty. Article 10 of the Competition Act lays down the conditions for exception for certain categories of agreements, such as agreements that contribute to improvement of production or distribution of goods and/or services, promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that such agreements do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the goods and/or services in question.

5. Furthermore, the CCAct recognizes that certain categories of agreements that contribute to improving the production or distribution of goods and/or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit shall be granted individual or block exemption under certain conditions[3].

6. However, such agreements among undertakings may never:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of goods and/or services constituting the subject of the agreement.

3.1 Block Exemptions

7. The Competition Act provides in several provisions for horizontal and vertical restrictions the agreements may not contain, i.e. those which they may contain if they meet certain conditions. The restrictions concerned are set out in Article 9 of the Competition Act, according to Article 81 (1) of the EC Treaty. Block exemptions for agreements containing horizontal and vertical restrictions of competition fall within the scope of Article 10 of the Competition Act. The provisions of Article 10 regulate basic conditions the agreements must satisfy in order to be exempted; however, the detailed regulations on the matter are yet to be adopted pursuant to Article 10 paragraph (1) of the Competition Act. These regulations shall determine the conditions that particular agreements must contain, restrictions or conditions they may not contain, as well as other conditions that have to be fulfilled so as to make block exemption applicable.

8. The CCAct establishes the notion of block exemptions for certain categories of agreements among undertakings which relate to the following categories of agreements[4]:

- agreements between undertakings not operating on the same level of production or distribution, and in particular, agreements on exclusive distribution, selective distribution, exclusive purchase and franchising;
- agreements between undertakings operating on the same level of the production or distribution, and in particular, research and development and specialisation agreements;
- agreements on transfer of technology, license and know-how agreements;
- agreements on distribution and servicing of motor vehicles, and
- insurance agreements.

9. Finally, block exemptions are regulated by corresponding bylaws adopted pursuant to the CCA, which are legally binding and based on EC Regulations 240/96, 2790/1999, 2658/2000, 2659/2000, 1400/2002 and 358/2003.

3.2 Individual Exemptions

10. The CCA provides for individual exemptions from the prohibition of restrictive agreements, and covers basic provisions on block exemptions. Individual exemptions are defined in Article 12 of the Competition Act, which lays down the procedure in deciding upon individual exemption for certain categories of agreements that contribute to improving the production or distribution of goods and/or services, or to promoting technical and economic progress, or those allowing consumers a fair share of the resulting benefit.

11. Namely, at the request of the parties to the agreement in question, the Agency may take a decision granting individual exemption from the banning of the agreement in question, if that particular agreement fulfils the conditions set out in the Law[5].

12. Articles 10 and 11 of the Competition Act regulate the main issues concerning block exemptions, laying down conditions such agreements must comply with and restrictions they may not contain; at the same time they determine the adoption of regulations, which shall identify particular cases of block exemptions applied to vertical agreements, particularly exclusive distribution and selective distribution agreements, exclusive purchase agreements, franchise agreements; as well as horizontal agreements, and especially to the categories of research and development agreements, specialisation agreements, transfer of technology agreements, licensing and know-how agreements, agreements on motor vehicles distribution and servicing and insurance agreements.

13. The decision on individual exemption shall be issued upon the request of the parties to the agreement, for a limited five-year-period, whereby it may be extended for not longer than additional five years at the most. Further provisions define the decision on individual exemption in more detail, provide for the possibility to meet additional conditions and apply measures required for exemption, as well as time limits to be observed.

3.3 De Minimis Rule

14. CCA in its Article 13 establishes a notion of the De Minimis Rule, whereby it identifies agreements of minor importance as agreements in which parties to the agreement and the controlled undertakings have an insignificant common market share, on the condition such agreements do not contain provisions that in spite of the insignificant market share lead to prevention, restriction or distortion of competition. The agreements concerned shall be granted exception from the prohibition laid down in Article 9 of the Competition Act, if they comply with the Competition Act and meet the conditions laid down by a separate regulation.

15. According to the provision of Article 13 paragraph (4) the Agency holds the power to ex *officio* initiate proceedings on assessment of the agreement that complies with the conditions set for the agreements that fail under the scope of the De Minimis Exemption.

4. Investigative Techniques

4.1 Collecting of Data

16. In order to assess the very nature of the agreement among entrepreneurs, Agency conducts an investigation, during which it by the means of a written request[6]:

- seeks from the undertaking which participate in the agreement in question, in writing or through oral statements, all the required data, and ask for submittal of the required data and documentation for the inquiry;

- seeks to undertake a direct inspection of all business premises, all immovable and movable property, business books, data bases and other documentation;

- seeks the submission of other necessary data and information from other persons, which the Agency deems may contribute to solve and clarify certain issues on prevention, restriction or distortion of competition;

- orders to the undertaking to pursue other activities which it deems necessary for the purpose of stating all the facts relevant to the procedure.

4.2 Right to Search Apartment, Business Premises and Seizure of Property

17. If there is a reasonable doubt that any of the parties to the proceedings or a third person, holds in possession documents or other instruments relevant to the establishing of the material truth in the proceedings, the Agency shall request the competent Court of Misdemeanour in Zagreb to issue a written warrant ordering the search of particular persons, apartments, or business premises, and the seizure of objects and documents in possession of the undertakings concerned or a third person[7].

18. The Agency can also request the competent r Court of Misdemeanour in Zagreb to issue a written warrant referred to in paragraph (1) of this Article also in cases when a party to the proceedings or a third person fails to act in accordance with the request of the Agency[8].

4.3 Right of Access to Files

19. Parties to the proceedings carried out before the Agency have the right of access to case files and are allowed by the Agency to make a photocopy of the file or of single documents at their own expense[9].

20. Without prejudice of the stated above, drafts of the decisions of the Agency, official statements and protocols from the sessions of the Council, internal instructions and notes on the case, correspondence and information exchanged with the European Commission or other authorities of the European Communities, as well as other documents considered an official secret in the sense of the CCA or other legal statutes, may neither be inspected nor photocopied.

4.4 Secrecy obligation

21. The president and the members of the Council, as well as the employees of the Agency, are obliged to keen and not to disclose any information classified as an official secret, irrespective of the way they came to know it, and the obligation of official secrecy shall also continue to be in effect after the expiry of their engagement with the Agency[10].

22. Under the term official secret are considered, in particular the following:

- all which is defined to be an official secret by law or other regulations;
- all which is defined to be an official or a business secret on the basis of bylaw regulations or other regulations of the undertakings,
- all that undertakings, or natural persons who are parties in the respective proceeding, have defined as a business or an official secret;
- all correspondence with the European Commission and other authorities of the European Communities.

23. Without prejudice of the above, data and documents which have been made accessible to the general public in any way, or decisions of managing or administrative bodies of the undertakings published to be available to the general public pursuant to particular regulations, shall not be considered an official secret.

4.5 Keeping Files and Documentation

24. Files and documentation of the undertakings received by the Agency in the course of the proceedings or those elaborated by the Agency itself in order to carry out the proceedings, shall be kept in the archives of the Agency in accordance with the relevant rules on keeping of archive materials.[11]

4.6 Oral Hearing

25. It is obligatory to hold the oral hearing in all cases with parties of contrary interests. The oral hearing is, open to public[12].

26. The Agency is entitled to conduct the oral hearing in any case when it deems useful, but, if the Agency, after it has received the written statement of the party against which it has started the proceedings, decides that the facts of the case between the parties is beyond dispute and that there are no other hindrances preventing the decision to be made, and if it is in the public interest, the Agency may render a decision without calling for the oral hearing.

27. If any of the summoned parties, or their attorneys, fails to appear at the first hearing in the proceedings, the Agency shall, as a rule, postpone the oral hearing and call for a new one.

28. If any of the summoned parties to the proceedings fail to appear at the following hearing, convened in accordance with the provision laid down in the CCA, the Agency shall not convene another oral hearing, but shall make its decision on the basis of its own findings, data and information.

5. Interim Measures

29. The Agency may decide upon interim measures where it deems that particular activities of restriction, prevention or distortion of competition, within the meaning of this Act, represent a risk by creating a direct restraining influence on undertakings, or on particular sectors of the economy or consumers' interests[13].

30. In its decision on interim the Agency would suspend all actions, and order the fulfilling of particular conditions or impose other measures reasonably necessary to eliminate prevention, restriction or distortion of competition, as well as the duration of the relevant measure, which as a rule, may not exceed the period of three months.

6. Time Limits for Decision-Making

31. Agency enacts decisions within the time frame of three (3) months following the day of the resolution on institution of the proceedings[14], having in mind that the entire proceeding shall be closed within four (4) months following the day of the starting of the proceeding. However, the Agency may also extend the time limit for the decision making for a subsequent period of three i.e. four months in cases where it is necessary to carry out additional expertise or analyses defining the state of facts and examination of the evidence, or where delicate industries or markets are concerned, about which the Agency has the obligation to inform the parties to the proceedings before the expiry of the prescribed time limits.

6.1 Types of the Agency's Decisions, as Regards their Meritum

32. In relation of the assessment of agreements among entrepreneurs, the Agency[15] is, inter alia, entitled to render following decisions:

- whereas the assessment of the compliance of the agreement in case with the provisions of the CCA is made;
- whereas the exemption of an particular agreement pursuant to CCA is granted;
- whereas the interim measures are ordered, for the purposes of reinstating the fair competition conditions on the market;
- whereas it annuls, cancels or amends the previously made decision by means of a separate decision;
- whereas it determines particular measures to be taken in order to restore efficient competition in cases of prohibited concentrations,
- whereas it renders other kinds of decisions, whatsoever, which serve as the legal basis for various kinds of procedural orders in a course of the proceeding.

6.2 Court Protection

Article 58

Against the decisions of the Agency referred to in previous section of this paper, no appeal is permitted, for they are final as regards their litispendation before the administrative authorities, but the challenging party may file an administrative dispute before the Administrative Court of the Republic of Croatia[16].

6.3 Publication

33. Decisions, i.e. verdicts that Agency brings are published in the Official Gazette[17] *Narodne novine*. Also the rulings and other kinds of decisions rendered from the side of the Administrative Court in matters concerning claims against the Agency's decisions are published in the Official Gazette. Frequently Agency publishes some of its decisions and/or expert opinions which might be of greater interest for wider public on its website (*www.aztn.com).*

34. However, the data which are contained in the respective acts of the Agency are treated as official secret, [18] and therefore are never published without prior permission of the parties.

7. Penalties

7.1 Initiation of Proceedings before the Court

35. Based on the condemnatory ruling of the Agency, whereas as a result of the proceeding before the Council, the infringement of the Competition Act was found, the Agency issues a claim, which is served to the Court of Misdemeanour, for starting the proceeding against the undertaking and/or its management. [19]. The result of said proceeding would be, if the Court established the violation as it was proposed by the Agency's claim, financial fine for the party against which the proceeding was led.

7.2 Severe Violations of the Provisions of this Act

36. The undertaking – legal or natural person, shall be fined at the most 10% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed[20], if it:

- concludes a prohibited agreement or participates in any other way in the agreement that caused prevention, restriction or distortion of competition in the sense of Article 9 of the CCA;

- abuses a dominant position (Article 16 of the CCA);

- participates in prohibited concentration of undertakings (Art. 18 of the CCA); or

- fails to comply with the decision made by the Agency in which it orders some obligatory interim or final measures (Article 57 items 1 to 7of the CCA).

37. For the above listed infringements referred the management of the undertaking – legal person concerned can also be fined ranging from cca 10.000 through 40.000 Euro.

7.3 Fines for Other Violations of the Provisions of this Act

38. The undertaking – legal or natural person shall be fined at the most with 1% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed[21], if it:

- submits to the Agency incorrect or untrue information which may influence the rendering of the decision on individual exemption of the agreement (Article 14 paragraph (1));

- fails to notify the Agency on the proposed concentration (Article 22);

- submits to the Agency incorrect or untrue information in the concentration assessment proceedings (Article 25, Article 26 paragraph (1) item 1);

- fails to act according to the request of the Agency (Article 47 paragraph (3), Article 48 paragraph (1) and (3);

- fails to act according to the decision of the Agency (Article 57, item 8);

- fails to act according to the written order of the misdemeanour court (Article 49).

39. For the infringements listed in paragraph above the responsible person of the undertaking – legal person concerned can also be fined in an amount ranging from 2,000.00 to 10,000.00 Euro

7.4 Fines for Persons that are not Parties to the Proceedings

40. The undertaking - legal person that is not a party to the proceedings before the Agency shall be fined for the infringement committed an amount ranging from 2.000 to 10,000.00 Euro if it fails to act upon the request of the Agency[22]

41. For the infringement referred to in paragraph above, the responsible persons of the legal person in question can also be fined an amount ranging from 1.000 to 2.000 Euro.

42. Furthermore, the undertaking and/or natural person that is not a party to the proceedings before the Agency and that fails to act according to the request of the Agency can be fined for the minor infringements in amounts up to 2. 000 Euro. [23]

8. Statutary Limitation

43. The minor offence proceedings instituted upon the violation of the provisions of the Competition Act may not be started after three years from the day when the infringement was committed[24].

44. The limitation period referred to in paragraph above shall be interrupted by any action of the competent body undertaken for the purpose of persecuting the offender. After any interruption, the limitation period shall be restarted; however, the minor offence proceedings may in no case be conducted after the expiry of the double time limit laid down in paragraph above.

45. Furthermore, the imposed penalties may not be enforced if three years have passed from the date when the decision on the violation became legally valid.

46. However, the statutory limitation for the enforcement of the penalty shall be interrupted by any action of the competent body that is undertaken for the purpose of the enforcement. After any interruption, the limitation period concerned shall be restarted; however, the penalty may not be enforced after the expiry of the double time originally needed for statutory limitation, i.e. six (6) years.

9. Concluding Remarks; Cooperation with the Courts

47. As final words in finishing of this paper it is certainly worth to stress out that Agency cooperates with courts, as well as other administrative authorities, in resolving the cases relating to prevention, restriction or distortion of competition in the market of the Republic of Croatia[25].

NOTES

1. Croatian Competition Act - CCA (2003) stipulates the rules and the system of measures for the protection of competition, regulates the powers, duties and the organisation of the authorities entrusted with the protection of competition, as well as the procedure for the implementation of this Act. CCA shall also apply to all forms of prevention, restriction or distortion of competition within the territory of the Republic of Croatia or outside its territory, if such practices take effect in the territory of the Republic of Croatia, unless differently stated by particular regulations for certain markets. Furthermore, the CCA shall also apply to companies, sole traders, craftsmen and other legal and natural persons that participate in economic activities in trade of goods and/or services. The provisions of this Act shall apply correspondingly to all legal and natural persons that are engaged in a single or temporary trade of goods and/or services in the market. This Act shall apply to legal and natural persons that have their seat and permanent residence abroad, provided that their participation in the trade of goods and/or services affects the home market. This Act shall also apply to legal persons, whose founders, shareholders or holders of share capital are the state or local and regional municipalities. This Act shall also apply to legal and natural persons entrusted pursuant to special regulations with the operation of services of general economic interest, or which are by exclusive rights allowed to undertake certain business activities, insofar as the application of this Act does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by special regulations and for the performance of which they have been established; (art. 1 thru 4)
2. Art. 9 of the CCA
3. see Art.10 of the CCA
4. see Art. 11 of the CCA
5. see Art. 12 in connection with the Art. 10 of the CCA
6. see Art. 48 of the CCA
7. Art. 49 of the CCA
8. As referred in the Art. 37 item 8 and 9, and Article 48 of the CCA.
9. Art. 50 of the CCA
10. art. 51 of the CCA
11. art. 52 of the CCA
12. art. 54 of the CCA
13. see art. 55 of the CCA
14. see art. 56 of the CCA
15. see Art. 57 of the CCA
16. see Art. 58 of the CCA
17. see Art. 59 of the CCA
18. in the sense of Article 51 of the CCA

19. Art. 60 of the CCA

20. see Art. 61 of the CCA

21. see Art. 62 of the CCA

22. see Art. 63 of the CCA; in connection with Article 37 items 8 and 9, Article 48 paragraph (1) items 3 and 4 and paragraph (3).

23 Article 37 items 8 and 9 and Article 48 paragraph (1) items 3 and 4 and paragraph (3) of the CCA.

24. See Art. 64. of the CCA

25. see Art. 65 of the CCA

DAF/COMP/GF/WD(2006)42

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2006

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction to the Czech cartel law

1. Cartel agreements rank among the most serious infringements of competition rules, having a negative impact both on competition in the market and on consumers. By raising prices and restricting supply, which are obvious consequences of collusion, goods and services are made even unavailable to some purchasers and unnecessarily expensive for the others. Competition authorities worldwide therefore impose harsh sanctions on such misconduct. The highest fines ever imposed by the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as "the Office") took place in price-fixing cartel agreement cases, e.g. Fuel Distributing Companies case, Building savings companies case, Bakeries case etc.

2. The Czech Act on the Protection of Competition (Act No. 143/2001 Coll., as amended; hereinafter referred to as "the Act") clearly states in its Article 3 that collusion of at least potential detrimental effect on competition in the relevant market shall be prohibited. If the Office finds that an agreement with at least potential negative impact on the market has been concluded, it declares such fact in a decision, and prohibits performance of the agreement for the future.

3. Among cartel agreements, the Act also distinguishes the so called "hard-core" cartels, similarly to the European Community legislation and case law. The Act provides legal framework recognizing three main types of the most harmful anti-competitive conduct:

4. Horizontal agreements that contain provisions on

- direct or indirect fixing of prices, rebates or other payments
- limitation or control of production or sales,
- division of market or sources of supply

5. The competition law theory usually adds to the category of hardcore agreements also the so called *bid rigging* collusive practices, occurring in the area of public procurement.

6. Hard-core cartel agreements, directly pointed out by the Act as having extremely harmful impact on the market, are explicitly deprived of *de minimis* exemption from the prohibition of collusive agreements. Such arrangements are automatically considered unlawful and therefore always forbidden. By the definition, hard-core cartel agreements shall be deemed to mean such a conduct that causes competition distortion (or threatens to cause it) by its very nature, that is detrimental effects are always inherent to the sole existence of such agreements. Mere existence of agreements complying with the characteristics attributed to hard-core collusions is sufficient so that the Office may declare their inconsistency with the rule of law.

2. Relation between the type of infringement and categories of evidence available

7. The concept of "cartel agreements" /agreements distorting competition/ used in the Czech antitrust law covers all the three basic forms or categories of anti-competitive arrangements between undertakings, which are more or less prone to producing direct or indirect evidence:

- Agreements in the narrow sense of a word - a prohibited agreement itself, constituting direct evidence, may be obtained, which then creates basis for further proceeding by the Office; in the Office's practice, few cartel procedures were initiated when only indirect evidence on written or oral prohibited agreement was available

- Decisions by associations of undertakings, usually in the form of a code or set of rules or recommendations drawn up by such associations for their members as more or less binding, are examined upon gaining the relevant document, which then would present direct evidence on anti-competitive behaviour.

- Other arrangements between competitors that express their common interests Concerted practices - on the other hand, are usually decided by the Office on the basis of circumstantial evidence since no actual agreement exists by the nature of such competition distorting conduct (concerted practices are not based upon legal acts executed by the individual participants, which distinguishes them from agreements in the narrow sense of a word).

8. As regards approach of the Office towards the assessment of the three basic above-mentioned forms of anti-competitive arrangements, the question arises whether they may be treated as having similar or the same effect on competition in terms of the intensity of the violation of the law. As the Czech legal doctrine, similarly to the EC legislation and case law, uses the concept of a "cartel agreement" as comprising all the three mentioned forms and provides rules relevant for such anti-competitive conduct as a whole, no matter in which way it is performed, the form of such an arrangement proves irrelevant in this respect. Division of individual cartel types (price-fixing, market-dividing etc.) then rather aspires to classify collusive arrangements according to their impact on the market. However, the individual cartel forms must be approached differently as regards gathering evidence and assessment of the aspects of a case.

9. Concerning the relation of intensity of engagement in a collusive arrangement with the type of evidence that is likely to be found, two possible "scenarios" usually come to question in the Office´s practice:

- the companies in breach of competition law either don't take their conduct for indisputably infringing the rules, and see no need to hide or destroy potential evidence

- or they do, in which case they would probably have discussed the illegal nature of it, and the need to avoid detection by competition rules enforcers

10. The situation where the undertakings do not consider their conduct unlawful would often arise in case of various "general" or "framework" business agreements, drawn up by the undertakings themselves or by their consultative bodies or associations and intended to set rules for running the business, define mutual rights and duties, and improve the services provided to customers. These agreements often contain prohibited price fixing or other provisions though, and would have probably been destroyed if the competitor held them for clearly forbidden. In such cases the evidence on the conduct is usually clear

enough for finding existence of a prohibited agreement, and possible further procedure consists in arguing whether such provisions are in compliance with the Act or not.

11. In the latter case it is most likely that any possible evidence on collusion would have been concealed or destroyed. This can be illustrated by the following sentence that was revealed during local investigation by the Office in an undertaking's correspondence (for further details see the case study below): *"PS. After I send off the e-mail, I'm going to erase it, as the Devil and the Antimonopoly Office never sleep."*

3. Occurrence of the individual types of evidence in the Office´s practice

12. In this context it should be mentioned that almost all the Office´s decisions based on direct evidence fall within the first category, as it is shown by the following statistics:

- Between 2001 and 2004, practically 100 % of all cartel proceedings relating to cartel agreements in the narrow sense of a word (i.e. written agreements), or decisions by associations of undertakings, were revealed upon obtaining such an agreement, usually publicly available (above-mentioned "general" or "framework" agreement, code or set of rules drawn up by associations of undertakings etc.).

- In the same period of time, more than 80 % of cartel proceedings closed by a second instance decision were initiated by the Office on the basis of such an agreement, only few then were conducted when only indirect evidence was in the hands of the officers. And only in one case of this amount a cartel agreement in the narrow sense of a word was proved by circumstantial evidence. However, it must be emphasized that in the practice of the Office most cases winning the highest sanctions and attracting the biggest attention of the public were just the ones, where only indirect evidence was acquired (e.g. The Fuel Distributors, The Building Savings Companies…).

4. Classification of evidence in the Office´s practice

13. The Czech Antitrust Office applies the classical concepts of direct and non direct (circumstantial) evidence in a case. Both of the individual types of evidence are usually found in one or more of the following forms:

- Documentary /paper or electronic version:
  - business correspondence (top management);
  - minutes of business dealings, consultations etc. ;
  - preparatory documents for
- Verbal (testimony of a witness)

4.1 Direct evidence

14. Direct or so-called best evidence to prove a cartel agreement is typically a document containing written anti-competitive arrangement, actually the agreement itself or a memorandum written to report on business dealings or consultations during which an agreement had been concluded between competitors. In the case that the Office acquires a document that would beyond all questions prove that forbidden type of contract had been concluded, there's no need to supply other (circumstantial) evidence.

15. Testimony of a witness - participant in business dealings or consultations during which collusion had been agreed may be considered a direct evidence as well; such proof has to be supported by another evidence though (e.g. testimony of the other participants in business dealings/consultations or minutes of the dealings).

16. Confirmed testimony of a witness representing an undertaking that had been contacted by their competitor/competitors in order to join cartel agreement may also be used as direct evidence.

17. Other types of evidence on collusion are considered non-direct in the practice of the Office.

4.2 Non direct (circumstantial) evidence

18. The rather rare procedures by the Office based mainly (or solely) on circumstantial evidence resulted (except one case) in decisions on performance of prohibited concerted practices. These practices eliminate competition among the undertakings by co-operation that takes the place of independent and competitive behaviour, exclude uncertainty of future business conduct of competitors, and are reached through direct and indirect contacts. This concept doesn't assume existence of an agreement; the factual behaviour of the undertakings in the market is examined instead, that would show signs of prohibited interaction beyond reasonable doubts.

19. Common attitude to the assessment of circumstantial evidence is that such a set of information on undertaking's behaviour must be gathered that would exclude any interpretation of the evidence but that stating existence of a collusive arrangement. In other words, there must be no doubt the conduct of undertakings in question is illegal, non-justifiable and that it is resulting from performance of prohibited type of agreement.

20. Therefore in proceedings lacking direct evidence such as an agreement on collusion or positive testimony of an eye-witness, it is necessary to gather all available pieces of non direct evidence that would form a sufficient body of evidence for issuing a decision able to stand possible further appellate procedure before a court.

21. Non direct evidence – examples:

- hand-written notes;
- correspondence and email traffic between competitors;
- minutes of business dealings or negotiation;
- testimony of a witness (not participant in an agreement);
- telephone logs;

- travel records;
- other anonymous denunciations etc.

22. For detailed illustration of the individual types of evidence dealt with in the practice of the Office see the case study below.

5. Supportive types of indirect evidence

23. The collected indirect proofs often require further reasoning by means of supportive indirect evidence on collusion in a case. Assembling all the aspects and possible views on the case then resembles putting together small pieces of a mosaic. Following main types of supportive evidence are distinguished in the practice of the Office:

5.1 Economic evidence

24. Economic analysis enables the Office to describe behaviour of the undertakings by means of economic terms, methods and simplifications. The purpose of economic evidence is to distinguish whether mere parallel conduct of undertakings occurred in the relevant market or whether there's a sign of competition distortion. Possible alternative explanation (e.g. increasing prices of inputs) for the competitors' behaviour must be excluded reliably.

5.2 Information about collusion facilitating practices/circumstances

25. Certain evidential value may be attributed to practices or circumstances that facilitate cartel formation, or make it easier for competitors to reach or sustain an agreement, especially communication of competitors through consultative bodies or sector chambers (associations of undertakings). Typically, information would be exchanged beyond the authorization of an association (e.g. the association requires its members to provide it with given type of information regularly, which complies with relevant rules). The members may then co-ordinate the information exchange and provide additional information.

5.3 Characteristics of a market predisposed to collusion

26. Market situation showing following features may be regarded as predisposed to collusion:

- Existence of entry barriers (requirements for licenses etc.);
- Market saturation and low product or technology innovation;
- Symmetry among the main competitors (relating to capacity, costs, market shares);
- Structural links, co-operation arrangements (+personal and property interests);
- Market transparency for the competitors;
- Product homogeneity;
- Slow increase in demand and low demand elasticity;
- Multi-market contacts.

5.4 Possible sources of evidence

27. When collecting evidence, the Office acts on the authority granted to it by the Act, according to which the Office is authorised to request that undertakings and, unless a special legal regulation states otherwise, the bodies of public administration provide it with documents and information the Office needs for its activities, and to ascertain their completeness, truthfulness and correctness. In proceedings conducted by the Office pursuant to the Act, undertakings shall be obliged to submit to investigation by the Office.

28. Before formal steps are taken, information has to be gathered that would make sure that there is evidence on violation of the law sufficient for taking further action. First of all, information from sources other than relevant undertaking/undertakings is collected in order to obtain as much objective and impartial information as possible. There are many information sources serving this purpose such as mass media, Internet etc. Materials issued by associations or councils of undertakings represent important and reliable source of precise and up-to-date information. Pursuant to the Czech law, the Office may use evidence once already acquired, after proper updating and verification of it (the use of evidence isn't limited to the case for which it was gathered).

29. If there is reasonable assumption of competition rules infringement but not enough affirmative evidence in a case, the Office initiates administrative action formally and carries out simultaneous local investigations – so called dawn raids - to collect further information from the alleged competition rules violators. These inspection procedures bring significant advantage to the Office in the form of element of surprise that prevent frustrating the proceedings by concealing or destruction of evidence on the collusion.

30. Leniency programs represent other source of evidence to which the national competition authorities gradually turn more and more often, as the cartel agreements, secret by their nature, become more and more sophisticated. Such a program provides particular conditions allowing the fine otherwise imposed on companies in breach of competition law to be remitted or substantially reduced. This offers undertakings engaged in collusive arrangement quite stimulating incentive to co-operate with the Office in providing information on their and the other cartel members´ behaviour. Accordingly, the Czech leniency program states that: "The Program is designed for those undertakings that would like to terminate their further participation in cartel, but so far have not dared to do so because of their fear of imposition of a substantial fine."

31. So-called whistle-blowers (often dismissed or dissatisfied employees) may provide useful information on the undertaking's behaviour as well. It may therefore prove fruitful to request the investigated undertakings for providing lists of employees dismissed in recent months.

32. Co-operation with sector supervision or regulatory authorities can be very helpful in gaining information on undertakings and their behaviour in the market, relevant market structure, other than competition rules that are to be observed by the undertakings. The Office may in this way obtain better overall picture of the market situation. The Office would typically ask relevant supervision or regulatory authority to prepare an expertise that would subsequently be applied to a case.

33. According to the Office´s practice it is advisable to investigate anonymous denunciations as well (see the case study below).

6. Cartel prosecution in the Czech Republic

34. Nowadays, neither legal entities nor natural persons are prosecuted criminally for any competition rules violation under the Act. However, the Czech Penal Code provides certain types of

acquisitive offences that may be applied to possible breach of the law, e.g. provisions on tender manipulating (agreements on bid rigging).

35. The Act holds liable undertakings violating its provisions in administrative not criminal proceedings, in which the Office may impose fines of up to CZK 10 million or up to 10% of the net turnover achieved in the preceding calendar year. Both intentional and negligent infringements of the prohibitions stipulated in the Act are subject to the sanctions. When the Office establishes an infringement of the prohibitions stipulated by the Act, it may decide, according to the subject matter of the case, to impose remedial measures as well.

36. When deciding on the amount of the fine, the Office shall take into account in particular the gravity, possible recurrence and duration of the infringement of the Act. When assessing the gravity of the infringement, account must be taken of its nature, its actual impact and the size of the relevant geographic market. Horizontal restrictions such as price-fixing and market-sharing cartels are both in jurisprudence and in the practice of the Czech competition authorities regarded very serious infringements that are likely to be fined with the highest amounts possible. Again, the form of the breach of the law is not determining for the total amount of the fine; the degree of wrongfulness of such a breach is what matters. The need of sufficiently deterrent effect is also pursued by the Office in setting harsh fines for cartel formation.

6.1 Case study – Concerted Practices of Bakery Producers

37. An example of an agreement distorting competition, where the Office´s decision was based solely upon indirect evidence, follows:

38. The three most important producers of bakery products operating in the Czech Republic were held liable for performing concerted practices in the relevant market, specifically for fixing of prices of their products, by which they engaged in horizontal hard-core cartel. The bakeries co-operated particularly in the way of the exchange of information, which normally would have been be a subject of their business secret or that of their partners. They shared information on their business strategy towards their business partners - purchasers (supermarket chains), which enabled them to increase their prices simultaneously, and to retain their market shares without a threat of possible reprisal from their competitors.

39. Unannounced inspections (dawn raids) were conducted in the premises of all the three undertakings. As direct evidence, such as an agreement on collusion or positive testimony of an eye-witness, was lacking, other types of evidence must have been applied.

40. Correspondence (mostly e-mail) between the competitors was detained during the dawn raids that subsequently formed the major part of the evidence in the case, confirming anti-competitive character of the competitors' contacts. An E-mail written by the director of A company, sent to the director of B company, and forwarded to the director of C company, containing price analysis of their major purchaser (a supermarket chain), and common price strategy towards this purchaser, belongs to the most important documents acquired in the proceedings. A request of a member of a company middle management directed to the director of the company for the instructions on the dealings with the competitors concerning their price strategy may be mentioned as well.

41. Other type of evidence collected during the dawn raid in the companies' premises is represented by minutes of top management meeting held by a company, comprising price information on B Company, not publicly available at the time the meeting was held, which provably were communicated to a company by their competitor in advance.

42. During the administrative proceedings, time and place of two of the competitors' secret meetings were communicated to the Office anonymously. The Office's employees were charged with examining the

information, which turned out to be truthful. The meeting indeed took place, and photographs were taken of both of the parties' cars parked in front of a building where the meeting was held (license plates were eventually identified as belonging to both of the competitors). Even though less significant indirect proof was obtained, it was still useful for completing the "mosaic" of evidence.

43. Testimony of witnesses (supermarket chains' representatives) supported economic evidence on the anti-competitive conduct of the bakeries, concerning the non-substitutability of the main suppliers of bakery products that constituted their huge bargaining power, actually the control over the market, which the minor bakery producers were not able to compete, and the coordinated approach to their business partners. The intended price increase was announced to the purchasers of the undertakings on the same day, with similar or the same words, arguments and conditions, and the amounts by which were the price increased.

44. Personal and property interests also played a big part in the competitors' position in the market: the A and B companies were co-owners of a company distributing a part of their production, and B and C company were vertically connected to the producers of flour that strengthened their position in the market.

45. Sufficient evidence was collected that supported the Office's view that the situation in the relevant market was showing competition distortion rather than a mere parallel business conduct of the competitors. The Office found that prohibited practices were accomplished in the market, declared this in a decision, imposed fines on the undertakings amounting to CZK 120 million, and prohibited performance of the practices for the future. Aggravating factors (hard-core intentional competition rules infringement, strong position of the undertakings in the market due to their vertical integration, significant market shares, substantial damage incurred by the consumers through the cartel performance), as well as sufficiently deterrent effect were taken into account by the Office when setting the fines in the case.

DAF/COMP/GF/WD(2006)8

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2006

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. In Estonia both horizontal and vertical anticompetitive cooperation (agreements between undertakings, concerted practices and decisions by associations of undertakings) are prohibited under the Competition Law. The Competition Law neither define nor even mention hard core cartels – all forms of anticompetitive co-operation are treated alike.

2. According to Penal Code these two types of collusion are regarded as criminal offences and the Penal Code does not differentiate between the two either. Therefore, any kind of anticompetitive co-operation is criminally punishable. Both undertakings (legal person) and members of the management or of the supervisory board of a legal person will be liable and may be punished for the committed crime.

3. As referred to above, Estonian legislation does not provide any definition of the hard-core cartels but in practice the distinction is drawn between hard core cartels, other cartel activities and vertical anticompetitive activities. In Estonian Competition Law the above-mentioned restrictive anticompetitive cooperation is seen exactly the same way as in the European Union competition law (Article 81 of the EC Treaty).

4. As any kind of anticompetitive cooperation is prohibited, there is no requirement to prove an explicit agreement between the parties. Prohibited cooperation may manifest itself in any form, even tacit collusion. Still, it is highly unlikely that tacit collusion could actually be criminally punished because of the high standard of proof which comes with criminal procedure.

5. In order to impose criminal sanctions it is not important to show the actual effect of the restrictive practices – it is presumed that the anticompetitive co-operation will produce negative effects on competition. Sanctions for competition related crimes are not higher than in cases of other crimes – the rules are uniform throughout all of the Penal Code. The actual punishment depends on the circumstances of the case (including mitigating and aggravating circumstances). Of course, if the restrictive practice actually causes negative effects it could influence the sanctions depending on the effects.

6. Although it is possible to prove anticompetitive co-operation without different evidence in the administrative proceedings where part of the burden of proof is vested on the person whose activities are under investigation, the standard of proof in criminal cases is somewhat higher. Although in certain circumstances the indirect evidence could theoretically be sufficient enough to prosecute a person, for now there is no case-law to actually confirm it.

7. The hard core cartels are especially harmful to competition, so, in our view they have to be prosecuted as strictly as possible. In Estonia there is no need for the existence of explicit agreement between the parties to prove a cartel but in case of collusion not involving an agreement it is harder to find clear direct evidence and therefore we will proceed more carefully in order not to impose unjust sanctions on persons. This does not weaken the fight against cartels but enables stability and legal certainty.

8. We find the leniency programs very helpful in discovering the cartels, especially the secret cartels. We already have the necessary legal framework for leniency in the Criminal Procedure Code and we are currently working on the detailed conditions for the application of leniency. As soon as the detailed conditions are ready they will be enforced by the Chief Public Prosecutor.

DAF/COMP/GF/WD(2006)39

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CONTRIBUTION DE LA FRANCE

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

TABLE RONDE SUR LES POURSUITES CONTRE LES ENTENTES SANS PREUVE DIRECTE D'UN ACCORD

1. Dans le cadre de la session de l'OCDE, une table ronde sera consacrée le mercredi 8 février après-midi aux cartels. Cette note vise à permettre de participer à cette table ronde, en ayant comme point de départ les indications données par le Secrétariat de l'OCDE à chaque autorité de concurrence nationale sous forme de « guidelines ». Cette note pose la problématique suivante : Comment établir l'existence d'un cartel alors que l'autorité en question ne dispose pas de preuves directes pour le faire ?

1. Le cadre des débats sur les ententes en l'absence de preuves directes

2. D'après la note du Secrétariat, la réponse est n'est pas évidente surtout dans la perspective d'autorités de concurrence de pays en développement qui sont en phase de montée en puissance de leurs moyens d'investigations et avec la formation de leurs enquêteurs à développer, notamment en raison de la diversité des méthodes utilisées dans les différents pays s'agissant du traitement des cartels. Pour pouvoir apporter des éléments de réponse à la problématique posée par l'OCDE, il convient tout d'abord de s'interroger sur les questions suivantes :

- Le traitement des cartels se différencie des autres pratiques anticoncurrentielles, notamment des ententes horizontales ?
- Si oui, existe-il une définition explicite, ou pour le moins implicite d'un cartel ?
- Et s'il en existe, cette définition repose-t-elle ou non sur la présence d'un accord explicite entre les opérateurs faisant parties du cartel ?

3. Force est de constater que les cartels sont généralement considérés, notamment selon le rapport de l'OCDE sur la question, comme des pratiques anticoncurrentielles les plus graves faussant le libre jeu de la concurrence sur un marché donné. La détection d'un cartel revêt, donc, une importance particulière tant pour le fonctionnement et le bien être du marché que du point de vue économique. Encore faut-il que l'autorité de concurrence s'appuie sur des éléments de preuve suffisants pour pouvoir les détecter. Or, le problème qui se pose en la matière, c'est que les entreprises sont de plus en plus informées et que de ce fait il y a de moins en moins de preuves directes à la disposition des autorités de concurrence. C'est notamment ce cas de figure qui est mis en question dans le cadre de la problématique posée par le Secrétariat de l'OCDE dans le cadre de cette table ronde consacrée aux cartels. Cette situation est d'autant plus aggravée par le fait que le système dit de la politique de clémence n'est pas mise en place dans toutes les juridictions. Cette absence est notamment dû au fait que cette politique de clémence nécessite l'existence d'une pratique juridictionnelle et d'une expérience de mise en œuvre du droit de la concurrence confirmées.

4. Pour le Secrétariat, les différents types de preuves qui peuvent être utilisés afin d'établir un cartel sont les suivants :

- Des preuves directes : un document qui contient les éléments essentiels de la collusion, ou encore un e-mail les décrivant, ou un document écrit émanant d'une entreprise partie au cartel ;

- Des preuves indirectes : un enregistrement téléphonique, ou des correspondances entre les entreprises concernées, des e-mails, ou encore des documents prouvant les rencontres entre les dirigeants des sociétés concernées ;

- Des pratiques facilitant l'établissement d'un cartel et assurant la pérennité de celui-ci : les échanges d'informations, la police de prix ;

- Des preuves « économiques » : les comportements parallèles notamment en matière de prix, qui ne s'expliquent pas par le fonctionnement et par la seule structure du marché en question.

2. Un cas récent traité par le Conseil de la concurrence dans le marché des transports publics urbain de voyageurs

5. Le Conseil de la concurrence a notamment eu l'occasion de se prononcer sur de telles questions dans le cadre de sa décision du 5 juillet 2005[1] relative au marché du transport public urbain de voyageurs dans laquelle il a sanctionné les sociétés Kéolis, Connex et Transdev pour s'être concertées, entre 1996 et 1998, au niveau national, en vue de se répartir les marchés des transports lancés par les collectivités publiques.

6. Il a été constaté que les dirigeants de ces entreprises de transport de dimension nationale et internationale ont constitué **un cartel** visant à se répartir le marché national du transport public urbain de voyageurs. La règle de conduite adoptée par le cartel consistait en ce que les trois entreprises en cause ne se faisaient pas concurrence lorsqu'un marché détenu par l'une d'entre elles était soumis à renouvellement.

7. Sous l'égide du cartel, les entreprises pouvaient aussi s'échanger des marchés lorsqu'elles trouvaient à cet échange un avantage objectif pour leurs propres intérêts ou encore se répartir le marché par le moyen de la sous-traitance.

8. Ces pratiques anticoncurrentielles ont permis à ces entreprises d'imposer leur prix aux collectivités territoriales, lesquelles ont été, de ce fait, amenées à supporter dans le cadre de la concession de leurs réseaux de transport, des charges plus élevées que celles qui auraient résulté d'un fonctionnement concurrentiel de ces marchés.

9. La décision du 5 juillet 2005, en dehors du fait qu'elle a permis au Conseil de prononcer des sanctions pécuniaires maximum prévues par le code de commerce - dans sa rédaction antérieure à la loi NRE – a conduit ce dernier à préciser les éléments caractéristiques d'un cartel. L'analyse de cette décision montre qu'un cartel est surtout caractérisé par sa stabilité et par sa pérennité. A cet égard, le Conseil constate dans cette décision que *« …la surveillance active du marché allant jusqu'à l'étude des représailles possibles a rendu l'entente stable et pérenne, ce qui lui confère les caractéristiques d'un cartel ».*

10. **En l'absence de preuves directes**, le Conseil a par ailleurs utilisé ***la technique « classique » du faisceau d'indices graves précis et concordants*** pour pouvoir établir l'existence du cartel en question. Le Conseil s'est appuyé notamment sur des notes manuscrites des dirigeants des sociétés afin de démontrer les rencontres de ceux-ci. De même, plusieurs notes internes ont permis au Conseil d'établir que les entreprises coordonnaient leurs comportements au plan local et au plan national et qu'il y avait bien une

1. Décision n° 05-D-38 du 5 juillet 2005 relative à des pratiques mises en œuvre sur le marché du transport public urbain de voyageurs

surveillance du marché par la possibilité d'exercer des représailles à l'encontre de celui qui ne respecte pas la règle de *« chacun chez soi »*.

11. L'approche du Conseil dans cette décision a été de dire que les collusions sur des marchés locaux entre les entreprises concernées n'étaient que le reflet d'une entente plus globale nationale, présentant les caractères de stabilité et de pérennité propres au cartel. Un tel cartel, d'envergure nationale possède une dimension qui dépasse le cadre national et possède un impact à l'échelon régional lorsque les marchés nationaux sont intégrés à des ensembles géographiques plus vastes, comme c'est le cas dans l'Union Européenne. Par définition, cette entente est donc susceptible d'affecter sensiblement le commerce intracommunautaire par sa dimension et sa vocation même : empêcher les concurrents, qu'ils soient nationaux ou étrangers de remporter les marchés.

12. Cette gravité est encore accrue lorsque la pratique est mise en œuvre par des groupes parmi les plus renommés des groupes français, en raison de la malheureuse valeur d'exemple qu'ils fournissent. Elle légitime qu'une sanction exemplaire soit infligée aux entreprises en cause.

13. Dans cette affaire, le Conseil de la concurrence a décidé en conséquence d'infliger **les sanctions pécuniaires maximum** prévues par le code de commerce - dans sa rédaction antérieure à la loi NRE, applicable à l'espèce compte tenu de l'ancienneté des faits - soit 5% du Chiffre d'affaires national.

DAF/COMP/GF/WD(2006)18

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CONTRIBUTION FROM JAMAICA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. These notes fully embrace the widely held view that "hard core cartels are the most egregious violations of competition law". It is also true to say that developing countries are least able to afford to pay the high prices which are generated by cartels operating in many industries; and sadly it is these same countries that find it most difficult to identify, investigate and prosecute cartel activity.

2. In Jamaica's case, the main challenges may be categorised under the following headings:

- legal Framework;
- size of the economy;
- limitations human and financial.

2. Challenges

2.1 Legal Framework

- Of note is the fact that the enabling statute, The Fair Competition Act, 1993 (The Act/The FCA) does not contain the expression "hard core cartel" or the word "cartel". Accordingly there is no statutory definition of these terms. Instead, the Act seeks to prohibit certain activities, which can be identified as cartel activities e.g. price fixing; carving out and controlling markets; bid rigging. It could be said that the definition of hard core cartel is implicit rather than explicit in the FCA, and perhaps an inexperienced agency needs to be guided in more explicit terms. Admittedly however, this in and of itself might very well be a positive feature: agreements not hitherto contemplated could be caught, as long as the substantial lessening of competition is established.

- The offences identified above are for the most part *per se* offences; the Commission must therefore take the *rule of reason* approach to determine whether the relevant activity amounts to an offence. Under one section of the Act, the activity must have or be likely to have the effect of substantially lessening competition; another section speaks of restraining or injuring competition unduly.

- Note however that price-fixing and bid rigging manage to appear as *per se* offences elsewhere in the Act, but the Commission would be hard-pressed to justify investigating a case under these provisions, instead of under the provisions which require the *rule of reason* approach.

  The obvious conflict breeds confusion and renders the staff insecure in its efforts to apply the law.

- It is of course, no secret that "the threat of severe sanctions" can operate as an effective deterrent for persons who would be minded to engage in cartel activity. To that extent a strong case can be made for bringing such conduct within the reach of the criminal jurisdiction. The prospect of incarceration has proved exceptionally effective in some jurisdictions, notably, The United States of America (USA).

  Cartel activities under the FCA are not criminal offences and there is therefore no such threat of incarceration.

  High levels of fines may also deter persons, but it is questionable whether a maximum fine of Five Million Jamaican Dollars (J$5M) i.e. U.S. $83,000.00 can be considered sufficiently severe a sanction. The reported average annual turnover of thirty-four (34) locally listed companies for the year 2004 is US$111,643.00; and the average annual before tax profit is US$15,275,002.00.

- If fines are not sufficiently punitive then it becomes extremely difficult to conceive of a meaningful leniency programme. There is virtually no incentive for potential whistle blowers to approach the Commission.

- The Commission has no authority to impose fines. That is the sole prerogative of the Courts; and given the inordinate delays for which the Court System is reputed persons who would engage in cartel activity are less than scared of running afoul of the law. It is important to state here that to date the Courts have not been called upon to adjudicate upon a cartel case.

- An examination of the provisions which provide the actual tools for investigating cartels will reveal that although there is a power of entry and search, there are many weaknesses which can undermine the staff's best efforts:

  – While the Act allows for a warrant to be obtained to enter and search, "premises" it does not define premises so there is doubt as to whether a motor car or a boat, for example, constitutes "premises". Questions would arise too as to whether persons would be liable to being searched.

  – There is no provision authorising the sealing off of premises.

  – Documents may be removed only for the purpose of making copies and may be retained for seven days only. Admittedly, a further warrant may be obtained.

  – The relevant provision does not contemplate search of computers and other electronic systems; nor does it speak to seising of such equipment.

  – In its current form the Act does not give the staff the power to interview/examine persons, pursuant to an entry and search warrant.

3. In sum the legislative framework and the actual investigative tools are weak.

2.2 Size of the Economy

4. It is being posited that it might be significantly more difficult to detect and investigate cartel activity in an economy as small as Jamaica is, than it would be in a large economy; and the following points are being highlighted in support of that position.

- Relationships are very tightly interwoven at various levels and in an elaborate array of interlocking settings. One is therefore required to be extremely cautious in arriving at conclusions as to purport of persons who might be seen together. We need to be acutely aware of the line between correlation and co-ordination.

- To be branded an "Informer" is to be regarded as the basest among men and unworthy of the society of "honourable" men. An "Informer" might even find himself in danger of physical harm. Thus whistle blowing holds very little promise for cartel investigation.

- In their effort to pick winners/protect national champions for whatever purpose(s), public officials tend to rely not only on official Government policies but also on unofficial measures and a variety of "connections" to achieve their aims. Such official measures have the clear potential to facilitate collusion in such protected sectors; and the Competition Authority could find that its efforts to investigate are undermined.

  As can be imagined the Commission must also meet all the other challenges associated with cartel detection and investigation, where there is no direct evidence. The size of the economy serves to exacerbate the problems encountered.

3. Resources

3.1 Financial

5. Whereas the Commission is fully funded from the national budget; does not have the authority to impose fines or to charge fees, its financial resources are chronically limited. The situation was put into real perspective by Mr Gilles Ménard, UNCTAD Consultant who recently conducted a review of competition policy and law in Jamaica. His Report made the observation that a survey of the budgets of competition authorities in developing countries indicates that their average budget varies from 0.06% to 0.08% of the Governments' non-military expenditures. In Jamaica's case the budget is approximately 0.03% of the Government's non-military expenditure, 80% of which goes to paying salaries. *Res ipsa loquitur* – the thing speaks for itself. Serious cartel investigation requires proper funding.

3.2 Human

- To a large extent, the limitations that exist in this area arise out of the financial constrains under which the Commission operates. The staff is largely untrained in evidence gathering and the various techniques which would be facilitated by disciplines such as information technology, engineering and accountancy. In every sense the level of expertise and experience available in the Commission is below the required standards.

- There is deficiency in numbers as well. The professional staff comprises three (3) economists and three (3) lawyers. As at December 30, 2005 there are sixty one (61) cases assigned to the three (3) economists – seven (7) of which relate to misleading advertising; five (5) represent requests for opinions and two (2) are cartel investigations, arising out of complaints without any direct evidence.

4. Conclusion

6. In addition to the hurdles already highlighted it is conceivable that there is also lack of awareness of the harm caused by cartel activity. For this the Commission must take some responsibility. Law makers and other Government officials need to be properly sensitised as to their own responsibility to avoid

actions and policies which might/could facilitate cartel activity. Effective competition advocacy must become the *sine qua non* of the Commission's work. In this regard, the Commission anticipates meaningful assistance from UNCTAD, as an outcome of the already mentioned peer review exercise.

7. The Commission looks forward too, to receiving assistance through a consultant to be provided under a current IDB assistance Programme. This should help to boost not only the knowledge base but also the confidence of the staff. Indeed, if one feels less than competent, one will experience insecurity and that in itself is an inhibitor to action.

DAF/COMP/GF/WD(2006)28

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Organisation for Economic Co-operation and Development 2006
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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. A cartel agreement is generally reached behind closed doors among entrepreneurs. It is a very important challenge for a competition authority to determine how to detect and prove the existence of such an agreement. As entrepreneurs have recently been more skillful in establishing cartel agreements for fear of being prosecuted by competition authorities, it is becoming more and more difficult to detect direct evidence of agreement in a cartel. Thus, in cartel cases without direct evidence, it is essential to prove the existence of cartels reasonably by the accumulation of relevant facts which are established based upon indirect evidences. The Japan Fair Trade Commission (hereinafter referred to as the "JFTC"), the competition authority in Japan, bases its approach on the theory that explicit agreement among the entrepreneurs is not necessary to prove a cartel agreement; i.e., "liaison of intention," and a tacit agreement suffices. In the Toshiba Chemical case, which involved a cartel without direct evidence, the Tokyo High Court recognised this theory.

2. The following describes sanctions of cartels as "Unreasonable Restraint of Trade" and how a violation is proven in cartel cases without direct evidence of agreement.

2. Enforcement against cartels in Japan

2.1. Unreasonable Restraint of Trade

3. In RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS, a "hard core cartel" is defined as the following:

- A "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by (i) competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce; and (ii) is not reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies[1].

- There is no clear definition regarding a "hard core cartel" in the Antimonopoly Act in Japan; however, the JFTC prohibits a "hard core cartel" as defined in the above OECD Recommendation of the Council as a form of "Unreasonable Restraint of Rrade"(Section 3 of the Antimonopoly Act).

- Unreasonable Restraint of Trade is defined as the following: when any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its name, with other entrepreneurs, mutually restricts or conducts their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade (Section 2 (6) of the Antimonopoly Act).

2.2 Measures

4. The JFTC conducts necessary administrative investigations based upon Section 47 of the Antimonopoly Act when the JFTC suspects that there exists any violations, based upon the information the public provided and/or any facts that the JFTC detects. When the JFTC finds a violation, the JFTC can issue orders for elimination measures such as an injunction of the violation, and will order a surcharge payment in the case including hard core cartels.

5. The revised Antimonopoly Act, which was enacted on 20 April 2005 and enforced on 4 January 2006, imposes stricter measures on violating firms. In order to give an incentive to defect from a cartel and to pursue rapid restoration of competitive order, a leniency program has also been introduced in the revised Act[2].

2.3 Criminal sanctions

6. Criminal sanctions as well as administrative actions such as orders for elimination measures and a surcharge payment are imposed in the case of a serious violation of the Antimonopoly Act, such as that of cartels. Criminal sanctions shall be considered only after an accusation of the JFTC has been filed (Section 96 and 74 (1) of the Antimonopoly Act). Regarding criminal sanctions, the JFTC published its policy on criminal accusations regarding antimonopoly violations in 1990. The JFTC established the policy of actively accusing in order to seek criminal sanctions. As compulsory measures for criminal investigations and a leniency program were introduced by enforcement of the revised Antimonopoly Act on 4 January 2006, the JFTC revised the above policy and published its new policy on criminal accusations and compulsory investigation of criminal cases regarding antimonopoly violations (on 6 October 2005)[3].

3. Establishment of cartel cases in Japan without direct evidence of agreement

3.1 Proof of cartels

7. Typically, a cartel agreement is reached behind closed doors between two or more entrepreneurs, making it extremely difficult for an outsider to know what specific arrangements have been made in the cartel agreement. As anti-cartel enforcements have been tightened in recent years, violating firms have become increasingly careful not to leave any material evidence of cartel agreements such as minutes and memoranda of meetings among the parties to the cartel. Without direct evidence, it is essential to prove the existence of cartel reasonably by accumulating relevant facts which are established based upon indirect evidences.

3.2 Finding of agreement

8. In order to satisfy the requirements for Unreasonable Restraint of Trade as provided in Section 2(6) of the Antimonopoly Act, one must find that a "liaison of intention" existed among the entrepreneurs concerned. Any concerted action among the entrepreneurs does not in itself provide sufficient proof of the "liaison of intention." In the Toshiba Chemical case (Tokyo High Court Judgment on 25 September 1995), the court found that a "liaison of intention" means that an entrepreneur recognizes or anticipates implementation of the same or similar kind of price-raising among entrepreneurs and accordingly intends to collaborate with such price-raising. Thus, explicit agreement binding the related parties is not necessary in order to prove "liaison of intention;" a tacit agreement will suffice.

9. In the Toshiba Chemical case, which involved a cartel without direct evidence, the Tokyo High Court found that the existence of a tacit agreement is sufficient proof of a "liaison of intention." In order to prove "liaison of intention," though the mere recognition or acceptance of an entrepreneur's price-raising by another entrepreneur is not sufficient, explicit agreement binding the related parties is not necessary. In

other words, "liaison of intention" can be proven by showing mutual recognition of other entrepreneurs' price-raising and tacit acceptance of such price-raising by another. The court gave the following reason for this interpretation: "By the nature of such an agreement as "Unreasonable Restraint of Trade," companies usually try to avoid making such an agreement explicitly to the public. If we interpreted that explicit agreement is necessary to prove "Unreasonable Restraint of Trade," the entrepreneurs could easily get around the hands of the law, and therefore it is obvious that such an interpretation is not appropriate in reality."

10. As regards the proof of a tacit agreement, the court in the Toshiba Chemical case stated: "Recognition and intention of the entrepreneurs should be considered by examining various circumstances before and after the price-raising, and then evaluation of whether there is mutual recognition or acceptance among entrepreneurs regarding the price-raising or not." Thus, in the absence of any explicit, mutually-binding agreement, the existence of a tacit agreement may be proven by indirect evidence attesting to: (i) the existence of prior exchange of information and opinions among the parties concerned; (ii) the content of negotiations among the parties concerned; and (iii) a concerted act as a result.

3.3 Cases finding a tacit agreement without direct evidence of an explicit agreement

11. Different cases require different forms of evidence to prove the existence of a "liaison of intention." In particular, judgment on a tacit "liaison of intention" has to be made on a case-by-case basis. The three criteria identified in the Toshiba Chemical case would require that the following indirect facts, for example, be found:

- Existence of prior exchange of information and opinions among the parties concerned
  - Frequent meetings prior to the price increase
  - Telephone conversation or e-mail on such meetings
- Content of negotiations among the parties concerned
  - Current condition of the industry
  - Exchange of information on current price, etc.
  - Declaration of intention to raise the price
  - Discussion of measures to be taken against discounters
- Concerted act as a result
  - Actual price-raising by the entrepreneurs
  - Entrepreneurs' pricing decision process

12. The following are two of the cases where a tacit agreement was found in the absence of any direct evidence of an agreement.

3.4 Kyowa Exeo case – judgment against claim seeking to overturn a JFTC decision (Tokyo High Court judgment on 29 March 1996):

3.4.1 Outline of the case

13. The JFTC ordered the payment of a 22.12 million yen surcharge by Kyowa Exeo Corporation, a company mainly involved in the construction and storage of various types of telecommunication facilities, electrical facilities and their ancillary equipment (Surcharge Payment Order of 30 March 1994). The JFTC found that Kyowa Exeo colluded with nine other companies in the same industry to designate in advance who would make the successful bid in a tender offered by the U.S. Pacific Air Force Contracting Center (hereinafter referred to as the "Contracting Center") for the operation and maintenance service of telecommunication facilities. The other bidders agreed to cooperate to ensure that the designated company would be awarded the contract. By substantially restricting competition in the market of the operation and maintenance service of telecommunication facilities ordered by the Contracting Center the practice constituted "Unreasonable Restraint of Trade" as provided in Section 2(6) of the Antimonopoly Act and therefore violated Section 3 of the Act. The practice also pertained to the price of services to which the surcharge stipulated in Article 7-2(1) of the Act is applicable.

14. Kyowa Exeo filed an appeal with the Tokyo High Court requesting the decision to be overturned on the grounds that the JFTC's decision had not been established by substantial evidence attesting to the facts at issue including a basic agreement on bid-rigging. The Tokyo High Court rejected the appeal and supported the JFTC's decision.

3.4.2 Outline of indirect evidence and fact-finding

15. In this case, no direct evidence attested to the existence of a basic agreement to allocate received orders among Kyowa Exeo and the other nine competing companies. Nonetheless, the Tokyo High Count found that a basic agreement on bid-rigging may be inferred from the following indirect facts, among others:

- Background and objective of establishing the Kabuto Club

  By March 1981 at the latest, Kyowa Exeo, along with the other nine competing companies, had established the "Kabuto Club" for smoothly receiving orders from the Contracting Center for the operation and maintenance service of telecommunication facilities (operation and maintenance service for telecommunications and micro communications). Kyowa Exeo claimed that the Kabuto Club had been established to promote personal relationships between counterparts in the industry, and not to maintain anticompetitive practices. The Tokyo High Court, however, found that a common interest among the parties concerned was behind the establishment of the Kabuto Club, which was intended to facilitate communication in receiving orders as well as to promote friendship between counterparts. In addition to this background, it should be noted that after the Club was established, a meeting was held, sometimes preceded by an informal gathering to see whether each member was willing to participate in the bidding, with regard to each of the orders to be placed by the Contracting Center, which was then followed by cooperation in the bidding to help the designated bid-winner receive the order. In light of the fact that such practices, which had been carried out only by the members of this group, ceased with the disbandment of the Club, the establishment of the Club was in itself a valid indirect fact that attested to the existence of a basic agreement.

- Participants in, and contents of, individual meetings

Kyowa Exeo claimed that only four contracts had been specifically identified as results of negotiation among members by the JFTC's decision, which was not sufficient to prove the existence of the alleged basic agreement. Regarding this point, the Tokyo High Court noted that participation in other contracts, which only involved asking about the intention to receive the order, was also limited to those Club members who were interested in the contract and attended an on-site briefing session. The fact that the participants remained unidentified did not necessarily prevent the assumption that a basic agreement had existed. Even if only four contracts had actually been results of negotiation among members, Club members gathered on the occasion of on-site briefing sessions, etc. for other contracts to see if any of them was willing to receive the order. No further negotiation ensued just because only one of the members was willing to bid for the contract. In the final analysis, a system had been maintained among the Club members to ensure discussion on all contracts offered by the Contracting Center. Thus, the facts regarding the participants in, and contents of, individual meetings provided compelling evidence of the alleged basic agreement.

3.5 Case against Hiroshima City Federation of the Hiroshima Prefecture Petroleum Retailers' Cooperative (JFTC Decision of 24 June 1997)

3.5.1 Outline of the case

16. In its decision, the JFTC found that the Hiroshima City Federation of the Hiroshima Prefecture Petroleum Retailers' Cooperative, an association of retailers primarily dealing in petroleum products in a specific area of Hiroshima Prefecture (hereinafter referred to as "the Federation") had decided in its Executive Working Group meeting on 18 August 1992 to raise the retail price of regular gasoline by four yen except for large users, effective from 1 September 1992, and to instruct every member to follow suit. The ensuing retail price increase was apparently based upon this decision. As the Federation was a trade association as defined in Section 2(2) of the Antimonopoly Act, it effectively restricted competition in the regular gasoline retail market except for large users in the Hiroshima area by deciding to raise the retail price of regular gasoline supplied by the members. Thus, the practice violated the provision of Section 8(1)(i) of the Antimonopoly Act.

3.5.2 Outline of indirect evidence and fact-finding

17. In this case, little material or oral evidence was found which directly attested to an agreement among entrepreneurs, i.e. the decision by the Federation's Executive Working Group to raise members' retail price by four yen, effective from 1 September 1992. In its decision, however, the JFTC found that the executives, members and secretariat personnel had been systematically instructed not to keep any potential evidence of wrongdoing such as a memorandum on price, for fear of detection by the JFTC. In particular, the secretariat personnel in charge of clerical work for the Federation were strictly required to follow the instruction. They were actually discouraged against telling the truth, and were asked to pretend that they knew nothing if interviewed by a JFTC investigator. Under these circumstances, it was natural that no direct evidence could be found. The decision went on to recognize the existence of a cartel, as it inferred from relevant evidence that the Executive Working Group meeting on 18 August had indeed decided to raise the retail price by four yen and instructed each member to follow suit. The JFTC based its decision on the following indirect evidence:

- The timing and extent of price-raising by the Federation members in the Hiroshima area were uniform and therefore suspicious.

  The wholesale price increase by suppliers differed somewhat in timing and extent, which resulted in considerable differences in the timing and extent of retail price increases in other

prefectures as well as in other parts of Hiroshima Prefecture. In view of this, it was highly unique and unusual that in the Hiroshima area alone, the retail price had risen almost across the board by four yen on 1 September. Thus, it was natural to suspect that someone had orchestrated the price increase.

- The Federation had been involved ten times in price-fixing, including decisions to raise or lower members' retail price.

  The Federation adopted the policy of linking its members' retail price to the wholesale price of suppliers ("up when up, down when down"). Under this policy, the Federation (or the Branch Federation, its predecessor) held 10 consultation meetings from May 1989 through April 1992 to decide on adjusting the retail price to the fluctuation of the wholesale price, a decision to be followed by each member. Retail prices were also monitored at the level of service stations, to ensure that those decisions were actually implemented. Thus, individual members were virtually forced to raise or lower their retail price in accordance with the policy of the Federation or the ex-Branch Federation.

- The Executive Working Group meeting on 18 August was not a simple annual luncheon.

  With regard to the Executive Working Group meeting on 18 August, during which the retail price-raising was decided upon, the Federation contended: "Although it is true that the executives of the Federation got together in the meeting room of the Cooperative's office, that was only for a luncheon meeting regularly held at that time of the year in recognition of executives' services. No consultation or decision was to be made on any particular topic." However, the "Executive Working Group," composed of the chairman, vice-chairman and branch directors of the Federation, was a consultative organ distinct from the Executive Board, the Federation's formal governing body. It was also recognised as such among the parties concerned. Moreover, it was found that the Executive Working Group meeting (i.e. meeting among the chairman, vice-chairman and branch directors) on 18 August had actually been an emergency meeting convened at 11:00 am in the Cooperative's office, and secretariat personnel had notified the Working Group members to that effect by telephone. The members were also aware that an emergency meeting would be held on that day, to be followed by an annual luncheon in a restaurant. Clearly, the Executive Working Group members were not convened in the Cooperative's office at 11:00 am on 18 August simply to wait for an annual luncheon to begin.

- Measures were taken to avoid detection by the JFTC.

  It was apparent that from the autumn of 1991, both the Federation and the Hiroshima Prefecture Petroleum Retailers' Cooperative, in response to the so-called enhanced implementation of the Antimonopoly Act, had systematically directed the parties concerned, particularly secretariat personnel, to pay great attention not to keep any memorandum or other records that might provide potential evidence of wrongdoing for the JFTC. It was also found that both the Federation and the Cooperative had systematically attempted to avoid detection by the JFTC by discouraging those interviewed by an investigator from telling the truth.

- A note attested to the fact that the Executive Working Group on 18 August had discussed the necessity of passing a cumulative increase in the wholesale price on to the retail price.

The following entry was found in a note by a secretariat clerk of the Federation dated 18 August and entitled "Executive Working Group:" "The market price is on the rise nationwide. Now is the time to move toward a more favorable condition in Hiroshima." The Federation claimed that it was a private memorandum of a secretariat clerk and did not necessarily indicate that such a statement had actually been made in the meeting. However, the wording had a striking similarity with some expressions found in other notes by the same clerk regarding statements made in other Cooperative meetings which he had attended. Since those notes were preserved as an integral part of the minutes of plenary Executive Board meetings, it may be presumed that the note in question accurately reflected a statement made in the Executive Working Group meeting on 18 August. Moreover, the expression "to move toward a more favorable condition" is frequently used in industry journals and newsletters to signify preparation for a retail price increase and efforts to ensure its effectiveness. Thus, the above statement – "The retail price is on the rise nationwide. Now is the time to move toward a more favorable condition in Hiroshima." – may be construed to mean that, as the retail price is expected to follow an uptrend at the national level, now is the time to cooperate in building favorable condition for implements, a price increase, followed by an effort to ensure its effectiveness. This was, without a doubt, the meaning of the note.

4. Conclusion

18. Even if no direct evidence is found to prove the existence of an agreement in a cartel case, indirect evidence may enable a reasonable assumption that the "liaison of intention" existed for a cartel. Accumulation of small pieces of evidence such as the existence of a prior exchange of information and opinions may still prove to be instrumental in establishing key facts of a basic agreement. In light of this, strenuous and persistent investigation is necessary even when there is no direct evidence. We consider that strict measures must be taken against flagrant violations of the Antimonopoly Act, using indirect evidence as proof of even the most cunning cartels that leave no direct evidence of agreement.

NOTES

1. Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL.

2. See the document below for more information about the Amendment of the Antimonopoly Act.

OECD Annual report on competition policy developments in Japan (2004), page 2

I Changes regarding competition laws and policies – Outline of new regulations in competition laws and related legislations
1 Amendment of the Antimonopoly Act

3. The Fair trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations (abstract)
1. The Policy on Criminal Accusation
The JFTC will actively accuse to seek criminal penalties on the following cases:
(1) Vicious and serious cases which are considered to have widespread influence on people's livings, out of those violations which substantially restrain competition in certain areas of trade such as price-fixing cartels, supply restraint cartels, market allocations, bid rigging, group boycotts and other violation.
(2) Among violation cases involving those firms or industries who are repeat offenders or those who do not abide by the elimination measures, those cases for which the administrative measures of the JFTC are not considered to fulfil the purpose of the Act.

However, the JFTC will not file accusations against the following persons:
a. The first entrepreneur that submitted reports and materials concerning the immunity from the surcharge before the investigation start date*. (The entrepreneur that submits reports and materials pursuant to the provision of Section 7-2 (7) of the Act. However, the JFTC will not apply this provision to the entrepreneur that is found to be fallen under any of the paragraphs of Section 7-2 (12) of the Act; the said reports or documents contains false information, the said entrepreneur fails to submit the reports or materials or submits false reports or materials in response to the additional requests by the JFTC, and the said entrepreneur coerced another entrepreneur to commit the violative act or blocked another entrepreneur from ceasing to commit of the violative act.)
b. The officer, employee, or other person of the said entrepreneur who commit the violative act of the Act and is deemed to be in a circumstance appropriate to be treated as same as the said entrepreneur, regarding the said entrepreneur's submission of reports and materials to the JFTC, response to the investigation by the JFTC following the said submission, and others.
* "The investigation start date" means the date when the JFTC initiates its on-the-spot inspection, official inspection and search, etc., regarding the case relating to the violative act.

DAF/COMP/GF/WD(2006)38

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CONTRIBUTION FROM KOREA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. Since the enactment of Monopoly Regulation and Fair Trade Act (MRFTA) in 1980, the KFTC has recognised cartels as 'the biggest enemy to the market economy' and worked aggressively to eradicate them.

2. Especially, last year, the KFTC imposed the largest amount in surcharge in history on telecom operators for forming collusion and pulled off a remarkable achievement such as creating a cartel investigation team and successfully holding ICN Cartel Workshops.

3. However, the stricter the legal enforcement on cartels by the competition authorities get, the harder enterprisers try to conceal evidence of an agreement and conduct cartels in secret. Most of cartel cases dealt by the KFTC were those where an agreement was proven with circumstantial evidence without an explicit written agreement.

4. This contribution is to describe how the KFTC corrects cartels without direct evidence of an agreement through past cartel cases and provisions on cartel in Monopoly Regulation and Fair Trade Act (MRFTA).

2. Provisions on cartels in Monopoly Regulation and Fair Trade Act (MRFTA)

2.1 Definition of Cartel Agreement

5. Para.1 of Article 19 of the MRFTA prohibits the following improper concerted acts.

6. Article 19 Prohibition of Improper Concerted Acts

> No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means to jointly engage in an act, or let others do this kind of activities, falling under any of the following subparagraphs[1], that unfairly restricts competition (hereafter referred to as "unfair collaborative acts")

7. That is, according to the provision above, an agreement where ① two or more enterprisers (parties to the agreement), ② through contract, agreement, resolution, or any other means (means of an agreement), ③ jointly determine, maintain, or change prices and conduct other activities stipulated in Para.1 of Article 19 of the MRFTA (subject of an agreement) is defined as a cartel and banned by the KFTC.

8. Moreover, such an agreement includes both an explicit agreement such as contracts and agreements and a tacit agreement such as mutual understanding among enterprisers[2].

2.2 Circumstantial Evidence of Cartel Agreement

9. However, as cartel regulations are strengthened, enterprisers try to reach an agreement in secret and not to leave any explicit evidence, so it is not an easy task to prove the existence of an agreement.

Therefore, when there is no direct evidence of an agreement, the KFTC proves a cartel case based on circumstantial evidence. The followings are examples of such circumstantial evidence listed in 'Guidelines for Collaborative Acts,' the KFTC's internal guidelines.

10. When there is evidence of direct or indirect communications or information exchanges?

- <Example1> When suspected enterprisers' internal documents mention identical price increase, output reduction, etc.
- <Example2> When suspected enterprisers show identical conduct after having secret meetings
- <Example3> When suspected enterprisers agree to exchange information on price or output, or have regular meetings to this end.
- <Example4> When a specific company implements price increase or output reduction after observing its competitors' responses to the company's announcement of such actions.

11. When a conduct is in the interest of actors only when acting jointly, while it would harm the interest of each actor when acting unilaterally

- <Example1> When actors increase their price identically despite oversupply or decline in demand and the absence of factors triggering cost increase.
- <Example2> When there are simultaneous price increases despite mounting inventory.

12. When parallel behaviours of enterprisers in question cannot be explained by market forces

- <Example1> When price is identical or remains rigid despite changes in supply & demand, differences among suppliers of raw materials, and geographic distance between suppliers and consumers.
- <Example2> When price changes are identical even when production costs vary due to differences in raw material costs, production processes, wage increases, and bill discounting rates.
- <Example3> When large price increases cannot occur in a short period of time without collaborative actions, given market conditions

13. When parallelism in actions among enterprisers is almost impossible without an agreement, considering structure of the industry in question

- <Example1> When prices of each enterpriser are identical, even with significant degrees of product differentiation.
- <Example2> When suppliers show identical actions, even when it is hard for them to do so. For example, in markets with few transactions or those for sophisticated customers.

2.3 Presumption of Cartel Agreement

14. The 'Presumption of an Agreement' system is stipulated in Para. 5, Article 19 of the Act, and, pursuant to the system, a cartel agreement can be presumed even with the absence of an explicit agreement if there is ⅰ) "conformity of outward conduct" and ⅱ) "competition-restrictiveness."

> Article 19 (Prohibition of Unfair Collaborative Acts) ⑤ Where two or more enterprisers are committing any acts listed in the subparagraphs of paragraph (1) that practically restrict competition in a particular business area, they shall be presumed to have committed an unfair collaborative act despite the absence of an explicit agreement to engage in such act.

15. However, to prevent enterprisers from being wrongfully accused, the KFTC presumes a cartel agreement if there is ⅰ) "uniformity of outward conduct" and ⅱ) "competition-restrictiveness" and ⅲ) circumstantial evidence listed in 「Guidelines for Collaborative Acts」 supports the suspected cartel case.

3. Cartel Cases without Direct Evidence of Agreement

16. The KFTC has dealt with many cartel cases without direct evidence of an agreement using circumstantial evidence.

17. The following two cases illustrate where the KFTC and courts stand regarding what circumstantial evidence suffices to presume a cartel agreement and in what cases such presumption can be rebutted when there is no direct evidence of an agreement for several parallel price adjustments among enterprisers in oligopoly markets that can't be readily explained by usual market forces.

3.1 Case where a cartel agreement was proven: Toilet Roll

3.1.1 Fact

18. Four toilet roll manufacturers accounted for 85% of the domestic market share. Originally, their producer sale prices were a bit different as a result of competition in the market.

19. In 1995, as price of raw material for toilet rolls declined dramatically, the government issued an administrative guidance to these companies to cut price. In according to this, in 1996, company A and B, the two biggest manufactures in the market, internally determined to set their producer sale prices at 8,261 and 8,448 won respectively after consulting with the government. After that, company C and company D, the third and fourth largest in the market, set their prices at 8,448 won. Then, on 1st, Jun, 1996, the four manufactures implemented the decreased price. (The first price reduction)

20. And nine months later, on 1st, Mar, 1997, company B increased its price to 8,668 won with launch of new products. Then, company C also increased the price of its existing products to 8,668 won and Company D also increased its price to 8,668 won after launching new products in May, 1997. (The first price increase)

21. Then, on 16th, Jul, 1996, Company A increased its price to 9,306 won and on 1st, Aug, 1997, the rest also increased their price to 9,306 won simultaneously. (The second price increase)

22. Four months later, on 28th, Nov, 1997, company A internally determined to set their price at 10,494 won and implemented this price increase on 24th, Dec, 1997. Then, the rest three companies also had their own deliberations on 15th and 16th Dec, 1997 to raise their price to 10,494 won and implemented this price adjustments on 23rd, Dec, 1997. (The third price increase).

Table 1. The four toiler roll manufactures' price increases

	Company A	Company B	Company C	Company D
Market share	27.5%	28.4%	17.3%	14.8%
Original Producer sale price	8,679	8,855	8,679	8,855
First price cut	1996.6.1	1996.6.1	1996.6.1 (Product launch)	1996.6.1
(Internal deliberation)	(1996.5.14)	(1996.5.21)	(1996.5.17)	(1996.5.21)
Producer sale price	8,261	8,448	8,448	8,448
First price increase	1996.1.1 (Product launch)	1997.3.1 (Product launch)	1997.5.1 (Price increase)	1997.5.10 (Product launch)
(Internal deliberation)	(1996.12.13)	(1997.2.13)	(1997.4.8)	(1997.4.28)
Producer sale price	8,668	8,866	8,866	8,866
Second price increase	1997.7.16	1997.8.1	1997.8.1	1997.8.1.
(Internal deliberation)	(1997.6.16)	(1997.7.20)	(1997.7.22)	(1997.7.28)
Producer sale price	9,306	9,306	9,306	9,306
Third price increase	1997.12.24	1997.12.23	1997.12.23	1997.12.23
(Internal deliberation)	(1997.11.28)	(1997.12.15)	(1997.12.16)	(1997.12.16)
Producer sale price	10,494	10,494	10,494	10,494

(Unit: won)

3.1.2 Resolution of the KFTC[3]

23. Based on i) "uniformity of outward conduct" and ii) "practical competition-restrictiveness," iii) "circumstantial evidence", the KFTC presumed a cartel agreement by company A, B and C in the first price reduction & increase. Furthermore, in the second & third increase, the KFTC presumed an agreement by four manufacturers. In this case, the KFTC imposed surcharges of a total of 1.8 billion won on the four toilet roll manufacturers for the cartel agreement.

24. Here is circumstantial evidence uncovered by the KFTC.

- The four manufactures increased their prices of their toilet rolls to the same price even though each company had different manufacturing costs and compositions of them, management status, marketing strategies, and pricing strategies.
- They increased standard prices to the same level by the same rate simultaneously or around the same time even though there was neither dramatic change in supply and demand in the toilet roll market nor any factor to trigger the identical price increase.
- They had the knowledge of and indirectly exchanged information on their competitors' future policies to increase prices as they notified such policies to retailers & wholesales orally or in a written form in advance.
- Executives of the four companies testified that there were discussions on reigning in excessive price competition in the market during meetings of "the Association for Trade Order in the Toilet Paper market" in Apr, Jun, and Nov, 1997.
- With the launch of the KFTC's investigation into the case in Jan, 1998, the four companies' producer sale price has diverged since Feb, 1998.

3.1.3 Decision of the Courts

3.1.3.1 Decision of the High Court

25. Against the resolution of the KFTC, the four manufacturers appealed to the High Court arguing that the parallel pricing of company C and D were little more than unilateral acts pursuing best response to price increases or reductions by company A and B that had price leadership in the market.

26. The High Court ruled that the four parallel price adjustments of those enterprisers were presumed to be the result of a cartel agreement considering that price adjustments were implemented simultaneously or around the same time, that it would have been impossible for Company B, C and D to maintain the same price for 20 months without a collusion in advance, and that manufacturers had discussion on the restraint of excessive price competition. The Court merely pointed out some problems with the KFTC's calculation of the surcharges on these companies[4].

3.1.3.2 Decision of the Supreme Court

27. The defendants again appealed the decision to the Supreme Court, and it issued a ruling a bit different from decisions by the KFTC and the High Court. That is, in this case, for "the first price increase" and "the first price reduction," the presumption of an agreement is overturned. More specifically speaking, the Supreme Court ruled that presumption of an agreement can be overturned in the following situations.

28. "The presumption of an agreement stipulated in Para. 5 of Article 19 is overturned if a market dominant company with a large market share in oligopoly market structure determines price based on its own judgment and other companies adjust their price according to the leader's new price, then, as long as there are no special situations such as the market leader determining its price having predicted that, considering market conditions and existing practices, other companies would adjust their price accordingly.

29. Pursuant to this, the Court ruled that the "first price reduction" was the result of a unilateral price imitation, not a collusive agreement, because, even though the three companies' prices were identical, market leaders company A and B internally set their prices at 8,261won and 8,448 won respectively after consultations with the government in response to the government's administrative guidance to cut price and, then, company C and D just imitated the two market leaders' price.

30. The Court said that the presumption of an agreement is rebutted in the "first price increase" as well, because company C and D seemed to have increased their prices unilaterally two months after the price hike of market leader company B.

31. However, it found that price adjustments in the "second price increase" and "third increase" were not likely the result of unilateral price imitation as the three companies showed signs of more serious price synchronisation than they did in the first price cut & increase, such as having internal deliberations on price hikes around the same time and implementing the new price on the same date[5].

3.1.4 Significance of the Case

32. Regarding several cases of parallel price hikes or reductions among enterprisers without direct evidence of an agreement, the KFTC presumed an agreement based on various economic evidence and communications evidence, and it was successful in proving an agreement in the second and third price hikes. However, the presumption of an agreement was rebutted for the first price cut & increase as the Court found the weaker firms just set their price imitating the market leaders unilaterally.

33. However, there still remains room for discussions about whether it is possible, in oligopoly markets, to clearly distinguish unilateral price imitation from parallel price increases & reductions where market dominant firms first implement price increases or reductions predicting that the rest would follow suit and then the rest actually did. Furthermore, if such distinction is possible, it is still debatable what criteria would be considered valid.

3.2 Case where a cartel agreement was proven: Coffee

3.2.1 Fact

34. Company A and B shared the domestic coffee market. The price of two makers' products was originally a bit different. But, from 1st, Jul, 1997, company B continued increasing its product price to the same product price of company A as shown in the Table 2.

Table 2. The two coffee makers' price increase for instant coffee products

(Unit: won)

	Prior to increase		97.6.2	97.7.1	97.8.18	97.10.7	97.12.15	97.12.19	98.1.12
Company A	5,181		5,445		5,720		6,446		7,150
Company B		5,258		5,445		5,720		6,446	7,150

3.2.2 Resolution of the KFTC

35. In this case, there is no direct evidence of an agreement. But, the KFTC presumed an agreement based on i) uniformity of outward conduct, ii) practical competition restrictiveness, and iii) the circumstantial evidence, and it imposed surcharges of about 3 billion won on the concerned enterprisers.

36. Here is circumstantial evidence uncovered by authority.

- The two coffee manufacturers adopted the same price starting from 1st, Jul, 1997 despite differences in the two major price increase-triggering factors - foreign exchange rates and coffee bean prices they applied – and the composition of costs.
- They also exchanged information about its own plan of price increase.
  - On 9th, Jan, 1998, the branch office of company A faxed the plan of price increase on 12th, Jan, 1998 to the branch of company B on 9th, Jan, 1998, and then the latter faxed it to their main office.
  - The two examinees notified scheduled price increase to each other prior to actual price increases. For example, on 12th, Aug, 1997, the very next day of company A's price increase, company B's branch offices notified company B's scheduled price hike to company A's branch offices.
- Their sales and operating profit rates increased significantly after the price hikes in 1997 as compared with the previous year.

3.2.3 Decision of the Courts

3.2.3.1 Decision of the High Court

37. Against the resolution of the KFTC, the two coffee manufacturers appealed to the High Court arguing that the parallel price adjustments of company A and B was just the result of company B's imitating the price change of company A, not a collusive agreement between them.

38. The High Court ruled that the four times of parallel pricing of the two companies were presumed to be the result of a price agreement, considering that they adopted the same price despite differences in the costs, that company B failed to present internal documents and other evidences to prove that its price changes were just unilateral actions, and that the two companies frequently exchanged their price information through branch offices. And then, the Court merely pointed out some problems with the KFTC's calculation of surcharges imposed on these two companies.

3.2.3.2 Decision of the Supreme Court

39. However, the Supreme Court issued a ruling that overturned the decisions of the High Court and the KFTC rebutting the presumption of an agreement for the following reasons.

40. In oligopoly markets, similar or same price of each company's product alone is not sufficient proof of a cartel agreement. Enterprisers can independently change their prices without an explicit agreement or a tacit one among them as the result of independent decision-making that imitating competitors' prices are in their interest:

- Company B seems to have imitated Company A's price increase given the peculiar circumstances of the domestic coffee market at that time where cheap products was considered as low-grade products and did not sell well..

- Though sales representatives of two companies' branch offices faxed to each other documents containing information on price increases,

  – enterprisers had decided on the price increase at different period, and those documents were written for the purpose of notifying such price changes to their distributors, not exchanging information prior to price collusion.

  – It is not natural to believe that the enterprisers ordered employees at their branch offices, not employees at the headquarters, to exchange information to form price collusion.

3.2.4 Significance of the case

41. This case is very alike to the case of toiler roll, in that, in oligopoly market, the concerned enterprisers adjusted their prices to the same price several times at the same or similar time. Also, in these two cases, the timing of price adjustments became similar and similar over time, and that, finally, they adjusted price on the same date.

42. However, the conclusions for the two cases are different due to peculiar circumstances of the domestic coffee market where expensive products sell better than cheap ones. In case of toilet roll, the parallel pricing by enterprisers – the second and third price hikes – were judged collusive action under

significant degrees of price synchronisation. On the while, in case of coffee, a series of parallel pricing by manufacturers was judged unilateral price imitation.

43. But, there still remains a question whether circumstantial evidence such as the peculiar circumstances of the coffee market alone is valid and sufficient enough to judge the above series of parallel pricing purely price imitation. Also we can consider the way to equate price information exchange between branch offices with that between the headquarters, as branch offices are also part of a company.

4. Conclusion

44. Cartel is little more than stealing cash from consumers' pockets.

45. Therefore, the current MRFTA stipulates that, regardless of existence of direct evidence of an agreement, cartels can be subject to surcharges of up to 10 % of related sales and that concerned parties can be prosecuted and subject to either three year's prison term or fines of not exceeding 200 million won. Such sanctions are stronger than those against abuse of market dominance or unfair trade activities that impose surcharges of 3% and 2% of related sales respectively.

46. However, cartels are often formed in secret without direct evidence of an agreement, in reality; it is not easy to identify them. Therefore, what matters most in regulating cartels whose direct evidence of an agreement is not found or does not exist is determining what amount and quality of circumstantial evidence is sufficient to prove an agreement. On this, the KFTC has proved an agreement by employing communications between suspected cartel operators, market conditions, market structure, etc.

47. Cartels continue to be forthcoming among enterprisers who want to avoid competition despite strong sanctions against cartels. To better respond to this and prove a cartel agreement successfully, competition law enforcers need to thoroughly analyze evidence of communications and economic evidence to aggressively present circumstantial evidence of an agreement.

NOTES

1. An act fixing, maintaining, or changing prices;
An act determining terms and conditions for transactions of goods or services, or payment of prices thereof;
An act restricting production, delivery, transportation, or transaction of goods or services;
An act limiting the territory of trade or customers;
An act preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services;
An act restricting the types or specifications of goods or services in producing or transacting goods or services;
An act of jointly carrying out and managing the main parts of a business, or establishing a company, etc. to jointly carry out and manage the main parts of a business; or
Any practice that substantially lessens competition on a particular business area by means, other than those under Subparagraph 1 to 7, of interfering with or restricting the activities or contents of business.

2. The KFTC's「Guidelines for Improper Concerted Acts

3. The KFTC's resolution 98-63, 1998. 4. 10.

4. The Seoul High Court decision of 1.20. 2000, 98 nu 10822

5. The Korean Supreme Court decision of 5.28.2002, 2000 du 1386

DAF/COMP/GF/WD(2006)9

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Information on the Cartel agreement on prices concluded by undertakings providing taxi services in the local market of the city of Vilnius

1.1 Problem in brief

1. On 3 February 2005, the Competition Council of the Republic of Lithuania (further – the Competition Council) passed Resolution No. 2S-3 whereby the authority sanctioned the group of taxi companies for the conclusion of the anti-competitive cartel agreement.

2. The present case of the establishment of the cartel agreement should be attributed to the category of investigations where the cartel was proven (which, as could be noted in advance, has also been confirmed by the First instance court) virtually in the absence of any direct evidence.

3. The cartel under consideration has the following characteristics:

- First, the scope of the cartel agreement is not extensive, covering only the local market of the city of Vilnius. Therefore, it falls outside the scope of Art. 81(1) of the Treaty establishing the European Community and was assessed under the national competition law.

- Second, the prohibited agreement was involving over 10 market participants who were lead by the Association uniting the taxi companies and one of the taxi company, – a market participant was at the same time the founder of the Association.

1.2 The relevant market

2. The market of the product concerned is the market for the passenger carriage by call taxis

4. One of several undertakings cannot have a significant impact on the prevailing conditions of sale, such as prices if the customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. The product under consideration does not have a substitute in the public transportation area as a taxi passenger may easily reach any destination as opposed to the services provided by other public transportation means that run in accordance with the predefined route and schedule. Furthermore, the price of this service is significantly higher than the rates of other public transportation services.

5. The geographical market is the area defined by the Municipality of Vilnius as the administrative boundaries of the city of Vilnius, wherein the companies providing taxi services are obligated to charge identical rates of the service effective within the municipal territory of Vilnius.

1.3 The origin of the cartel agreement

6. Within the period under consideration (2H of 2004) there were 43 taxi companies legally operating in the city of Vilnius (population about 600.000) being holders of over 1400 license cards. In view of fierce competition in the market the rates of the call taxi services in Vilnius have remained unchanged for some 4-5 years already and where fixed at one of the lowest levels among capitals of the

European Union Member States (on the average 0,23 - 0,29 EUR, plus the boarding fee up to 0,38 EUR). No separate charge was placed for the call by telephone. Despite the surging fuel prices during the year 2004, until October of the year the prices remained stable. Such low price level was maintained due to the minimum wages paid to the taxi drivers, the outworn taxi fleet (quite a number of taxi companies operating in the city were hiring drivers with their own vehicles), as well as quite fierce competition in the service market concerned.

7. Over the several recent years the taxi company UAB"Martono taksi" (further – MARTONAS) operating over 100 vehicles was the most solid taxi company in the city with its vehicles servicing the approaches of the airport, prestigious hotels and other sites. But it was not able to dictate the price levels to other taxi companies, as the number of vehicles operated thereby accounted for as little as 8 percent within the total in the city. In late June 2004 the Taxi service providers Association was founded at the initiative of MARTONAS.

8. Approximately a month following the founding of the Association, the business news section of a major Lithuanian TV channels released a commentary in which the President of the Association (as discovered during the investigation –MARTONAS's major shareholder) and the executive director of the company publicly announced that the taxi service rates in Vilnius are unreasonably low and needed to be increased. Several days later the appendix to of the major national dailies was quoting the statements of the same persons to the effect that the taxi companies representing the major share of the Vilnius city taxi services market *intended to make an agreement* before the year end concerning the increase of the prices by one third. Responding to the statements the Competition Council warned the companies referred to in the articles that such agreement would constitute a violation of the requirements of the Law on Competition of the Republic of Lithuania (further – the Law on Competition).

9. Nevertheless, members of the Association increased the service rates simultaneously to be in effect as of 1 October 2005. The Competition Council, suspecting an infringement of the Law immediately initiated an investigation. Having obtained the judicial warrant inspections were conducted in the premises of the undertaking suspected of the infringement. Over 80 percent of the market participants (total 39 natural persons) were interviewed during the investigation. Some market participants explained that they had been instigated to join the Association and increase the service prices.

10. The investigation established that the undertakings providing taxi services in the city of Vilnius had concluded the agreement prohibited by the Law on Competition in the form of concerted actions. The rates were also discussed at the Association meeting held a week preceding the price increase. This implies that the taxi companies had not merely come into contact, but that it was a restrictive contact eventually resulting in the pricing changes, – the price jump as of 1 October 2004. The causality between the preceding contact and the resulting price increase is absolutely obvious. In accordance with Art. 5(1)(1) of the Law on Competition agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase are prohibited. Such agreement concluded by competitors in all cases shall be considered restrictive in respect of competition (Art. 5(2) of the Law on Competition).

11. Although no direct evidence has been established (most taxi companies do not use PCs), except a note in the calendar of the manager of one of the competing companies with the date of the meeting of the Association and the effective date of the new price, the contents of the minutes of the Association's meeting and the course of the further developments showed the consistent preparations for the simultaneous rate. Besides, in their explanations several Association members claimed that the service rates were discussed at the meetings of the Association. Representatives of some non-member companies indicated that they had been instigated to follow the Association and the fix of the minimum price as proposed by the Association.

12. Also the investigation concluded that some participants of the cartel agreement (8 Association members) virtually simultaneously (end of September) applied to the company adjusting and installing the taximeters with a request to enter the modified rates in the taximeters (prior to establishing any new service rates taxi companies need to adjust their taximeters).

13. At the proceedings of the first instance court, representatives of the companies involved in the infringement attempted to prove that their behaviour in the market was caused by the leader regime and the growth of operating costs. The investigation, however, arrived at an opposite conclusion, - the costs incurred by individual taxi companies are different depending on quite a range of factors, – some are using drivers‘ own cars, others run the leased vehicles, wages of the employees come in different ranges too, as well as the vehicle repair costs and types of fuels; furthermore the fuel prices were increasing on a gradual basis, and in the course of the action coordination between the companies prices of some types of fuels had been even alleviating, etc.

14. Although orders issued by some companies concerning the increase had been signed in the course of September, i.e., on different dates, according to the opinion of the first instance court this fact cannot be regarded as a proof of the absence of agreement. The Court concluded that the undertakings had been coordinating the rates (comparison and discussions about the rates), and orders of virtually all companies were enforced simultaneously, on 1 October 2004, or a couple of days earlier.

15. The Court also noted that the provisions of Art. 5 of the Law on Competition are equivalent to those of Art. 81 of the Treaty prohibiting agreements between undertakings and concerted actions, however, the Treaty establishes the rules governing trade between Member States. Although the scope of the object of the present case is limited to the local market, for the purpose of the interpretation of the said Article of the Law on Competition account was taken of the explanations of the concepts and the rules in the cases of application of Art. 81 of the Treaty (Art. 1(3) of the Law on Competition). The European Court of Justice had defined the concept of concerted actions (concerted practice) as any cooperation leading to anticompetitive behaviour without concluding an agreement or an action plan (Cimenteries case No. 8/66; Gerhard Zuchner/Bayerische Verrensbank AG case C-172/80). In conclusion, for the purpose of application of Art. 5(1)(1) it is important to prove that the concerted practice by the undertakings has taken place, which requires the establishment of the bilateral contact and the following concerted practice.

16. In the course of the judicial proceedings, the taxi companies did not deny the fact of contacts, although claiming that the subject matter of their discussion was not the rates but rather the fair calculation of costs. The Court concluded this to constitute the agreement to indirectly fix the price of the product since the calculation of costs should normally be the internal issue of each individual company. Whether or not the costs (revenues) are being calculated fairly or correctly is established by appropriate public authorities rather than the Association of the undertakings. There, as was the case, the meeting of the Association involved contacts and instructions on the correct procedure for cost calculation which eventually results in nearly all companies increasing their rates almost at the same time. The Court had noted that the evidence collected by the Competition Council provides the proof that the issue of the rates had been discussed, and part of the taxi companies acknowledged that a company could not increase the rates on an individual basis as this would result in its bankruptcy or severally impede position of the company in the market. In the opinion of the Court, this shows that competition in the market is heavy and testifies to the fact that such agreement was necessary to the companies in order to be able to maintain in the market, and of special value and benefit this agreement was to MARTONAS, since the company is using good condition vehicles and more expensive fuels, therefore it is forced to maintain higher rates which makes competing difficult.

17. It is obvious that fixing of the service rate and the increase in the price affects adversely the customer who is forced to pay the same (fixed) price regardless of whether he is riding a new and

comfortable or an old vehicle. The undertakings concerned submitted the information on the new and coordinated rates to the administration of the Municipality which shows that the companies had assumed an obligation to adhere to the fixed rates, since in the opposite case a company deviating from the agreement could be appealed to the municipality by its competitors. Such concerted actions of the taxi companies deprive the customer of a possibility to choose the quality of the service. Thus damage is incurred to the customer not only due to the higher rates but also through depriving him of the possibility to choose a better quality service for a higher rate. This is exactly what constitutes the negative consequence of the restriction of competition that is subject to the provisions of the Law prohibiting to restrict competition even by concerted actions. Having regard to the above considerations the Court concluded there to be no grounds to annul Resolution No. 2S-3 of 3 February 2005 of the Competition Council as unlawful.

18. The Competition Council imposed pecuniary sanctions to the companies concerned for the infringement of Art. 5 of the Law on Competition. Having regard to the economic status of the infringing companies, they were subjected to the lower rate of LTL 5 000 (with an exception of the initiator of the violation that was subjected to a pecuniary fine in the amount of LTL 50 000). The undertakings appealed to court the decision also in respect of the amounts of the fines claiming them to be excessive. Having investigated the case the first instance court reduced the amount of the fines.

2. Principal evidence of the agreement prohibited by the Law on Competition concluded by undertakings providing taxi services

- The evidence of the coordination of the rates of taxi services have been recorded in the protocols of explanation of the undertakings concerned:

  – UAB „Kablasta“, one of the founders of the Association, - a representative claims that in the meetings of the Association of 2004-09-24 opinions of carriers concerning the taxi service rates were different, - some said that 70 cnt/km is sufficient, and another participant said that the rate should be 90 cnt/km, another one said that it should be as high as LTL 5, etc.“;

  – UAB „Litvega“, - a representative claims that at the meeting of 2004-09-24, R.Brazys, President of the Association and R.Kriukovas, Director of UAB „Martono taksi“ suggested that the „rates are adjusted“ and indicated the notes on the board: 1 km rate – not less than LTL 1, boarding fee – not less than LTL 2. Also indicated that on 2004-10-14, R.Brazys called <...> concerning the submission of information about rates. He wanted some information about the rates and inquired why the rates were lower than they should be“;

  – UAB „Kabrioletas“, - a representative claimed that the rates needed to be increased by 1 October up to LTL 1, and the boarding fee– up to LTL 2 <...>“. He also mentioned that UAB „Martono taksi“ „had invited several firms, that had not increased their rates „on the carpet“;

  – UAB „Ritaksa“- a representative indicated that „R.Brazys on the phone was inviting others to support the Association concerning raising of the rates up to 1LTL/km and the boarding fee up to LTL“;

  – UAB „Kobla“, one of the founders of the Association, - a representative claims that in the meeting of 2004-09-24 the participants were discussing the need to „<...> increase the rates because of the increase in the fuel prices <...>“;

- UAB „Ekipažas“, - representative indicated that he had been invited to participate in the meeting of the Association and that the Association invited him to join the Association and proposed to „<...> restructure the rates“;

- UAB „Taksodromas“, - a representative indicated that in the meeting of the Association R.Kriukovas, the General Manager of UAB „Martono taksi“ said he would like to see the rates increased;

- UAB „Merselita“, – a representative indicated that in the meeting of the Association of September 2004 the participants acknowledged that one of the objectives of the Association is to readjust the tariffs, and that in other States the rates are equivalent to the price of one liter of the gasoline;

- UAB „Greitvila“, one of the founders of the Association, - representative indicated that the meeting of the Association discussed the issue of raising the taxi services rates. He also indicated that the Association proposed to calculate the costs of 1 km ride;

- UAB „Aimagrė“, – a representative indicated that the meeting of the Association of September 2004 had indicated that the „rates are too low“ <...>“;

- R.Brazys, the President of the Taxi services providers Association indicated that the companies providing taxi services had calculated the cost of carriage of passengers and that the data had been discussed during the meeting.

- Statements of R. Kriukovas, the General Manager of UAB “Martono taksi” and managers of some other entities in the press and in interviews to news agencies on the forthcoming increase in the rates;

- Public statements in the press and to the news agencies of R.Brazys, the President of the Taxi services providers Association (a shareholder of UAB “Martono taksi“) on the planned increase of rates of the taxi services and the prognosticated prices;

- It has been established that some of the entities involved in the coordination of taxi services rates (in the second half of 2004) had appealed to the company adjusting the taximeters with a request to adjust the taximeters to the modifies rates.

- Following the coordination of taxi services rates significant changes took places in the pricing of the companies providing such services – starting from 1 October the rate per 1 km was increased from - 60-90 cnt. to LTL 1, and in some companies – up to LTL 1,30, the boarding fee – from LTL 1,30 to LTL 2.

- Order of the companies concerning the increase of the rates:

  - indicated the same date for the increase of the rates – starting from 2004-10-01;

  - established virtually identical rates for the boarding and a ride of one kilometer (such rates have been coordinated in the course of bilateral contacts).

- It has been established that the increase of the service rates could not have been caused by economic conditions them being very different:

- some entities are using new vehicles acquired on leasing terms, and others drive old vehicles, or rent the vehicles from their drivers;

- entities providing taxi services use fuels of different types, – part of the vehicles use gasoline and gas, others use diesel fuels;

- entities providing taxi services employ different numbers of employees and the salaries paid to such employees is also different;

- costs incurred by undertakings are of different level, they report different revenues and profits, etc.

DAF/COMP/GF/WD(2006)11

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CONTRIBUTION FROM ROMANIA

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Romanian Competition Council has at present legislative instruments which allow it dealing with competition issues similar with the competition authorities from European Union, the Romanian antitrust legislation being in line with the provisions of the communitarian one.

2. The enforcing of the Competition Law and secondary legislation in this field is a major objective of the Competition Council; to achieve it, the Council has focused its resources principally on the most serious distortions of competition. As any competition authority, Romanian Competition Council applies oneself to discovering and stopping the agreement for fixing prices, output, for sharing the markets or clients, big-rigging or such like practices realised by competitors.

3. Cartels are forbidden by the Romanian Competition Law no.21/1996. Without an evident definition of "the cartel", Art. 5 par. (1) of the Law (which is similar with the Art. 81 of the EU Treaty) provides a non-exhaustive list of the most severe violation of the competition, such as:

> […] Any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at:
>
> - Concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, markups, as well as any other terms of trading;
>
> - Limiting or controlling production, distribution, technological development or investments;
>
> - Allocating distribution markets or supply sources according to territorial criteria, sales-and purchase volume or other criteria;
>
> […]
>
> - Participating, in a concerted manner, with bids rigged in auctions or any other forms of competitive tendering.

4. An indirect definition is done also through establishing a lower "de minimis" threshold for agreements between competitors (the total market share < 5% comparative with 10% for non-competitors' agreements) and through the provision according to which in the case of the agreements regarding prices, sharing the markets and the procurements, the "minimis" condition is not applied.

5. The distinction between the agreements which have as their object and those which have as their effect the restriction of the competition is very important, taking into consideration the probative evidences which the prosecutor must discover/constitute. If it is found that the agreement has as its object the restriction of competition, meaning that it is an agreement prohibited "per se", it is not necessary to prove the concrete harmful economic effects, knowing already that this conduct is leading to an inefficient repartition of the resources, rising in prices and to prejudices for consumers.

6. This principle is not provided for in the Law's text but by the secondary legislation, and until now the Courts have hold the Competition Council decisions, meaning that the anticompetitive effects of such agreements on competition should not be demonstrated.

7. Regarding the type of the agreement, which leads or may lead to a restriction or elimination of the competition on a market, this can be an express one – a document which reflects very clearly the purposes of the subscribers – or a tacit one. The evidence of the parties' intention to restrict competition is an important element but does not represent a necessary condition in sanctioning a cartel, in the case of the Romanian legislation. In spite that, the indirect evidence of an agreement, such as correspondence between competitors, telephone logs, together with any other evidence of a meeting between cartel operators, which must be very carefully connected with economic analysis of the market (the evolution of the prices in a certain period, characteristics of the market, similar comportments of the competitors) can constitute evidence for prosecuting a tacit cartel. These indirect evidences should be enough consistent to cover the lack of the document or the explicit prove.

8. The experience of the Competition Council in the field of hard core cartels emphasises that, for the most part of the cases, a document which was describing very clearly the intention of the subscriber to act concerted and to distort competition on the market was the basis for prosecuting. Nevertheless, there were situations when these kinds of practices were incriminated only with indirect evidences.

9. In this manner, in the case of the tendering organised by the Minister of Home Affairs of Romania for the procurement of laser equipment for surgery, three firms were sanctioned for participation, in a concerted manner, with rigged bids. The evidences of the prosecutor were the following:

- For all 5 auctions organized by the Minister, in the same year, only one firm won – Wilhelm;
- The Minister asked for offers from Wilhelm, Temco and a National Institute of research, receiving offers only from Wilhelm and other 2 companies which had not been asked for an offer, Ducatex and Master; these two companies sent the biddings following the information received from Wilhelm;
- The offers of the two companies, Ducatex and Master, were realised on the Wilhelm's type and even sent from the Wilhelm's fax;
- The offer of Master was signed by an associate of Wilhelm;
- The activities of the two firms did not have any connection with the medical field not with laser equipments; the firms did not have the special notice from the Ministry of Health necessary for commercialisation of medical equipment;
- The representatives of Ducatex and Master sustained the fact that they sent the offers for promoting but they could not prove the connection with the medical field both prior to the auction and afterwards;
- On the Romanian market of the laser equipment were present many undertakings, in special importers.

10. The conclusion of the investigative team was: Wilhelm contacted the two firms informing them about the intention of the organiser to purchase medical equipment and the other details regarding the auction especially to eliminate the competition; the two firms participated in the tender without any

intention to obtain the order from the Minister but for permitting Wilhelm to win. The sanctions applied were low having in view that the maximum threshold provided by Law at that time was ROL 250 million (trough modification of the law in 2003 the maximum amount of the sanction became 10% of the total turnover of each undertaking). The decisions of the Competition Council through which the three firms were sanctioned have not been appealed before the Court.

11. Regarding the objective to prosecute hard-core cartels as aggressively as possible, the fact that it does not exist or it have not been funded an explicit agreement between the competitors on a certain market, instead existing many other evidences which proves the behaviour of those in the direction of eliminating the competition between them, this fact should not represent an impediment for meeting the goal.

12. On the other part, it is theoretically possible that an in-depth economic analysis might reveal the fact that a price fixing cartel, for example, had no considerable effect on prices despite the explicit intent of the participants. Since this will be rather exceptional in practice because these kinds of practices have always or almost always a negative effect on competition, it can be justified by limiting the costs of proceedings and saving up the resources which should have been used in the case of analysing the effect of the cartel on the consumers.

13. Having regard that until now it has not been made a profile of the market characteristic for secret agreements but it has been marked out some features, as the existence of a high concentration or the existence of homogenous products, prove that it can not exist a standard in persecuting the cartels but only some directive lines.

14. Besides, the studies on negative effects of hard core cartels show the difficulties in calculating the effective prejudice, in most cases being required the use of various proxies and assumption.

15. The Romanian legislation in the competition field provides high sanctions in the case of discovering some “cartels”. These can amount up to 10% of the total turnover for each cartel operator. Both Romanian and European legislation operate against undertakings not individuals, so the sanctions are applied only to undertakings part of the cartel. These are culpable of committing a contravention.

16. However, there are situations which permit the sanctioning of an individual, when participates with fraudulent intent and in a decisive way to the conceiving, the organisation or the realisation of any of the practices prohibited under Art.5 (1). These individuals are culpable of committing a criminal offence being convicted to jail from 6 months to 4 years or fined.

17. The criminal action starts following the Competition Council's notification.

18. Through the guidelines issued by Competition Council on individualisation of the offenses it is made a clearly distinction between vertical restrictions – deeds of minor and medium gravity – and horizontal restrictions as cartels – very serious infringements. More, in establishing the amount of the sanction both the duration and the aggravating circumstances or attenuating circumstances are taking into account. However, the guidelines and the sanctions do not make a distinction between cartel cases in which there is direct evidence and those in which direct evidence is lacking, the infringement being proved on the basis of indirect proves and economic analysis.

19. In the year 2004, Romanian Competition Council adopted the *Guidelines regarding the conditions and application criteria of a leniency policy,* which give complete amnesty to the first conspirator to come forward and reveal the inner workings of the cartel, permitting to the Competition Council to initiate proceedings. Having in view the experience of other countries which implemented this program before, this policy can help fight the most egregious competition law violation.

DAF/COMP/GF/WD(2006)10

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CONTRIBUTION FROM THE RUSSIAN FEDERATION

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. The Recent Russian Experience in Prosecuting Cartels without Direct Evidence of Agreement: Methodological Considerations and Practical Cases

1. While preparing its presentation for the Roundtable on prosecuting cartels without direct evidence of agreement the Federal Antimonopoly Service of the Russian Federation (FAS Russia) appreciated the approach contained in the Guidelines for Contributions, specifically its core question on circumstances enabling an antitrust authority to prove the existence of a cartel without direct evidence of agreement. The further explanation of the issue as provided in the Guidelines (whether a country in fact differentiates between hard core cartels and other types of anticompetitive horizontal activity; whether there exists an explicit or implicit definition of hard core cartel conduct; whether one element of that definition is the existence of an explicit agreement among competitors) also presents a good framework for a country specific analysis. Therefore, the FAS Russia' presentation of the issue will start from an analysis of the acting Russian Law "On Competition and Limitation of Monopolistic Activity in Commodities markets" from these positions as well as from review of the relevant parts of the draft Law "On Protection of Competition" currently being prepared and intended to upgrade the effective legislation.

2. In fact, the Russian antitrust legislation does differentiate between hard core cartels and other types of anticompetitive horizontal activity since they are defined separately in the sections 1 and 2 of Article 6 of the Law, though listed by comma: "contracts, other transactions, agreements … or concerted practices, concluded between economic entities operating on the same commodity market" (Article 6, Section 1), "the conclusion of contracts or concerted practices between economic entities being active on the market of the same commodity (substitutes) that lead or may lead to the prevention, restraint or elimination of competition (Article 6, Section 2)." Thus, the Russian Law contains a definition of hard core cartel conduct, however, the existence of an explicit agreement among competitors is not considered as the only possible evidence of the cartel. In other words, if such evidence is found it would be sufficient for proving the cartel conduct, i.e. a *per se* violation according to the Russian legislation. However, this legislation also leaves a possibility to prove cartel conduct basing on other types of evidence by use of the notion of "concerted practices," i.e. cartel conduct that may not be necessarily based on the relevant documents or even revealed oral agreements between competitors. Thus, proving intentional, conscious, though implicit market sharing or price fixing can be sufficient for proving the cartel conduct, at least in theory. Regardless the presence of the direct evidence of the cartel agreement, the Russian legislation provides for the same sanctions, unless the court declines the economic evidence presented by FAS Russia as sufficient for proving cartel conduct. (The alleged cartel participants should challenge the relevant FAS Russia decision in the court in this case.)

3. The new version of the Law currently being prepared leaves this possibility, as well. Its preparation goes in parallel with the adoption of the amendments to the Russian Federation Code on Administrative Violations aimed to increase sanctions against cartels, i.e. to subject their participants to higher fines than these foreseen for other types of antitrust violations. It will be combined with the introduction of corporate and individual leniency program for cartel "whistle blowers." As such organisation of a cartel is civil and not criminal violation in Russia, though it can be considered as a criminal one in case the individuals involved combine it with actions leading to damage to property, coercion to participate in the cartel and similar activities considered as criminal ones. Failure to service an

administrative penalty (fines) may lead to arrest of corporate and/or individual property and other measures aimed to enforce the relevant FAS Russia or court decision.

4. Therefore, in its enforcement efforts the FAS Russia uses both "smoking gun" and economic evidence for prosecuting cartels. Though, the Russian courts may not be always in a position to consider the latter as sufficient as it happened about one year ago when the court refrained from recognising a cartel in the Russian steel industry basing on purely economic and behavioural evidence.

5. In some core Russian industries like oil, steel, chemicals production and others the supply side of the market can be characterised as tight oligopoly with high concentration ratios and possibility of control over prices and strategies of development of the market by a limited number of dominant companies. The concerted market behaviour of these companies is facilitated by extensive information exchange between the major actors in the course of numerous seminars, "experience exchange" workshops and other similar events. These meetings are rooted in the Soviet tradition of periodical seminars and meetings between representatives of enterprises of the same industry formerly governed by the same ministry, like ex-Soviet Ministry of Steelmaking, Ministry of Chemical Industry, Ministry of Fertiliser Production etc. Under the conditions of limited investments and slow technological change in these industries company managers especially these with Soviet experience of working in the industry are quite well aware of the competitors' production facilities, spare capacities, competitive advantages and cost functions. Combined with detailed knowledge of the demand side of the market, it provides them with possibility of cartel behaviour even without explicit agreements, though the later are quite likely but yard to reveal.

6. The literature on cartels, including that produced by the OECD, urges that hard core cartels, because of their especially harmful effects, be prosecuted as aggressively as possible and punished by the most severe sanctions available. In our view, this goal is rather furthered than weakened by evidentiary rules that permit cartel prosecutions without evidence of explicit agreement. However, we cannot agree that proving the cartel behaviour basing on economic and behavioural evidence only is a "more lenient evidentiary standard" compared with generating direct evidence of explicit agreement between the cartel participants (see question 7 of the Guidelines for Contributors). Moreover, we believe that the ability of a national antitrust enforcement body to prove the cartel conduct basing on the economic and behavioural evidence and aptitude of courts to consider this type of evidence should be regarded as a sign of maturity of the country's antitrust system since it is much more complicated than establishing cartel behaviour as a *per se* violation basing on documents, records and other types of the direct evidence.

7. In 2005 FAS Russia has successfully addressed several cartel cases basing on economic and behavioural evidence. Below some examples of these are presented.

8. On June 1, 2005 Krasnodar regional office of FAS Russia established a case against Lukoil-Yougnefteproduct, Rosneft' – Kuban'nefteproduct and Rosneft' – Tuapsenefteproduct prosecuting them for violation of Sections 1 and 2 of Article 6 of the Law "On Competition…" by means of fixing wholesale prices for Ai-92 and Ai-95 petrol (analogues of regular and premium types of petrol in the EU) in the territory of Krasnodar region. The case was initiated basing on the analysis of prices for these products for the first 5 months of 2005. The Krasnodar regional office issued a cease and desist order to these companies to cancel price fixing till July 11, 2005 and transfer the illegally received incomes to the Federal Budget. The order was not challenged in the court.

9. On February 8, 2005 the Rostov regional office of FAS Russia received a claim from the Ministry of Industry, Energy and Natural Resources of the Rostov Region and established a case against Rostov subsidiary of Lukoil-Nizhnevolzhsknefteproduct, Interneft' and Megapolis Plus prosecuting them for a violation of Section 1 of Article 6 of the Law "On Competition…" These companies were accused of price fixing basing on the analysis of their costs and prices for Ai-92 petrol in Rostov-on-Don. While

facing different costs these companies established the same price level for petrol with a minor deviation of less than 0,2% that exceeded the average prices for petrol for the same period. The companies were proscribed to transfer the illegally received incomes to the Federal Budget. Lukoil-Nizhnevolzhsknefteproduct challenged the decision of Rostov regional office of FAS Russia in the local court of arbitration.

10. On May 11, 2005 Khanty-Mansiysk regional office of FAS Russia established the price fixing case against three airline companies: Aeroflot – Russian Airlines, Sibir' and UTAir basing on the claim "Nizhnevartovskoye Aviapredpriyatie" federal government company. The case was based on the analysis of prices and costs for flight Nizhnevartovsk – Moscow – Nizhnevartovsk performed by the companies under consideration. In November-December all three companies established their tariffs for this direction at the same level exceeding the tariff as of May 2005 almost by twice. Meanwhile, these companies face different costs while servicing Nizhnevartowsk – Moscow direction because they use different types of aircrafts and different Moscow airports that lead to different costs per hour of flight and airport service. Additional argument considered by Khanty-Mansiysk regional office of FAS Russia division was that these companies established different tariffs while servicing other directions. Moreover, in the session of the Regional office's commission the representatives of the companies confirmed that their tariff setting depended on the tariff suggestion of the competitors. The commission decided that the tariff setting of the three companies was concerted and contradicted to Section 1 of Article 6 of the Law "On Competition…," therefore. The Regional office issued the cease and desist order to the companies that challenged it in the court of arbitration.

11. Basing on the considerations and cases presented above we can suggest a general conclusion that in the absence of the direct evidence of the cartel conduct the properly provided economic and behavioral evidence should be considered as a sufficient proof of this most dangerous type of antitrust violation. Both antitrust agencies and courts should have sufficient skills for presenting and considering it. Moreover, the mere possibility of revealing the cartel conduct basing on economic evidence can preclude companies from it and have a significant prophylactic effect, therefore.

DAF/COMP/GF/WD(2006)4

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CONTRIBUTION FROM SWITZERLAND

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

PROCEEDINGS AGAINST CARTELS WITHOUT PROOF OF DIRECT AGREEMENTS

1. Introduction

1. The existing law on cartels and other restraints of competition came into force in 1996. It rests not on the principle of prohibition but on that of abuse, implying that a cartel agreement is not unlawful in itself, but only when the effects it has on competition are taken into account. It follows that, where cartel agreements are concerned, proof has to relate both to the existence of an agreement and to its effect. Orginally, the law sanctioned firms not for behaviour that breached it, but only for re-offending.

2. Under an amendment to this law, which came into force on 1 April 2004, it is possible to sanction illegal agreements directly, and this also applies to abusive behaviour. The amendment also contains a leniency mechanism whereby a firm denouncing a cartel to which it belongs can be exempted from any sanction. Lastly, firms have the opportunity to check with the competition authorities whether certain of their projects might not be liable to sanctions.

2. Generalities concerning Swiss law

3. Switzerland is acquainted with the abuse system. It follows from it, in particular, that a cartel agreement is not illegal (or therefore null and void) in itself, but only if it constitutes an abuse by virtue of its object.

4. Swiss law contains standards for countering agreements in the field of competition and abuses of dominant position and for controlling business concentration.

5. Where agreements in the field of competition are concerned, both horizontal and vertical agreements are covered.

6. The rule is that cartel agreements, which in themselves are legal, can become illegal if they significantly restrict competition, are not justified for reasons of economic efficiency or eliminate effective competition.

7. Hard core cartels are assumed to eliminate effective competition on the market. Hard core cartels are either horizontal agreements which directly or indirectly set prices; restrict the quantities of goods and services to be produced, purchased or supplied or which divide markets up geographically, or they are vertical agreements which impose a minimum or fixed sale price, or else they are agreements for allocating customers geographically.

8. The LCart does not therefore really have a “per se rule” – either for horizontal or vertical agreements – but an amended “per se” rule for Arts. 5 §3 and 4, in the sense that there is only a presumption of illegality, which may prove unfounded.

3. Proof required for measures to combat cartels

3.1 Object of proof

9. As noted above, an agreement is considered to be illegal only if it eliminates competition or affects it significantly without being warranted for reasons of economic efficiency.

10. The first thing, therefore, is to prove the existence of an agreement and then prove that it has an effect on competition. Presumption of the elimination of competition, as provided for in the case of hard core cartels, does not reverse the burden of proof, it being up to the competition authorities to show that the presumption cannot be reversed. The parties involved are nevertheless required to help in establishing the facts.

11. Prior to the amendment to the law and the introduction of direct sanctions, agreements could be described as naïve in the sense that they were often known to the public so that it was not hard to prove their existence (e.g. Internet publication of price recommendations by trade associations). Even so, the effect of such agreements had still to be proven. Since the amendment to the law came into force, agreements have become less easy to detect, whence the introduction of a leniency programme which encourages exposure.

3.2 Type of proof

12. As mentioned above, direct proof of the existence of a cartel is not in itself sufficient to justify sanctions. It still has to be proved that the agreement eliminates effective competition or significantly restricts it, without being warranted on grounds of economic efficiency.

13. Proof that a competition-related agreement has negative effects is usually provided by economic analysis. This involves drawing up statistics on, for example, the prices applied on a market, the frequency with which such prices are applied, the frequency of application by non-cartel firms, etc. The object of the analysis will be to make the existence of an agreement's significant impact on competition highly probable. Such economic analysis is usually carried out on the basis of information obtained by means of a questionnaire sent to firms active in the industry under investigation, or else by means of surveys.

14. Proof can also be furnished by an extremely diverse set of indices, as the following case shows.

3.3 Case of the National Library bidding cartel

15. In March 1999, the Federal Construction and Logistics Office called for tenders for work on renovating the façade of the National Library. A selection procedure was put in place and four companies were invited to submit bids. This resulted in the receipt of bids totalling SF 2 222 916.--, SF 2 029 380.--, SF 2 000 040.-- and SF 1 911 472.--. However, an independent expert had put the cost of the work at SF 900 000.--. A new call for tenders sent to another company resulted in a bid worth SF 1 294 039.--, i.e. SF 617 422.-- less than the lowest bid submitted previously. The case was brought to the attention of the competition authorities since there was some doubt as to whether the first four companies might have colluded when drafting their tenders. In the meanwhile, the Federal Office cancelled the selective bidding procedure and awarded the contract by mutual agreement to the last-mentioned company.

16. The first four companies denied during the enquiry that they had colluded on prices. The competition authorities presented them with a draft amicable agreement which stated that a price agreement had been concluded. The representative of one of the companies agreed to sign, but the other three companies proposed a counter amicable agreement in which the existence of a price agreement was

denied. In the end, the fourth company rejected the competition authorities' draft and rallied behind that of the other companies.

17. In the end, the Competition Commission handed down a decision in which it concluded that the four companies had set up a bidding cartel. Its conclusion rested on the following pieces of evidence:

- There was a big difference in price between the expert's estimate, the bid put in by the company selected and those submitted by the first four companies.
- Notwithstanding the above point, the difference between the highest and lowest bids tendered by the four companies was small.
- None of the four companies attacked the decision to cancel the selective bidding procedure.
- One of the four companies had previously agreed to the amicable agreement, whereas it was expressly stated that an illegal agreement had been concluded.
- The four companies had learnt of each other's existence when reconnoitring the site.

18. The decision was initially rescinded by the Appeals Board for reasons of form. In addition, the decision of the Appeals Board mentioned that the evidence was sufficient to prove indirectly that there had been an agreement, but it had not in this case been sufficiently well established. The Federal Tribunal, for its part, sided with the Competition Commission where the formal aspect was concerned, but did not comment on the Appeals Board's observations. The judgement was referred back to the Appeals Board for a fresh decision.

4. Conclusion

19. Where cartels are concerned, the competition authorities have first of all to prove the existence of an agreement between companies. Proof of the existence of a cartel agreement can derive from a series of pieces of evidence that make it likely. This can, however, be difficult to establish.

20. Secondly, proof has still to be provided as to the effect of the agreement. This usually stems from economic analysis of the case in question, which is carried out by by means of questionnaires or surveys.

DAF/COMP/GF/WD(2006)4

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2006

POURSUITE DES CARTELS SANS PREUVE DIRECTE D'ACCORDS

1. Introduction

1. La loi actuelle sur les cartels et autres restrictions à la concurrence est entrée en vigueur en 1996. Elle ne repose pas sur le principe de l'interdiction, mais sur celui de l'abus, qui implique qu'une entente n'est pas illicite en elle-même, mais uniquement en tenant compte de ses effets sur la concurrence. Il en découle, en ce qui concerne les ententes, que la preuve doit porter tant sur l'existence d'un accord que sur son effet. Cette loi ne permettait pas, à l'origine, de sanctionner les entreprises pour les comportements qui lui étaient contraires, mais uniquement en cas de récidive.

2. Une modification de cette loi est entrée en vigueur au 1er avril 2004 et permet de sanctionner directement les ententes illicites, ainsi que les comportements abusifs. La modification prévoit en outre un système de clémence en vertu duquel l'entreprise qui dénonce un cartel auquel elle participe peut se voir exemptée de toute peine. Enfin, les entreprises ont la possibilité de s'adresser aux autorités de la concurrence afin de faire vérifier si certains de leurs projets peuvent ou non être susceptibles de sanctions.

2. Généralités sur le droit suisse

3. La Suisse connaît le système de l'abus. Il en découle notamment que l'entente n'est pas illicite (ni donc nulle) en elle-même, mais uniquement si, par son objet, elle constitue un abus.

4. Le droit suisse contient des normes contre les accords en matière de concurrence, contre les abus de position dominante ainsi qu'en matière de contrôle des concentrations d'entreprises.

5. Concernant les accords en matière de concurrence, ce domaine couvre les accords horizontaux et verticaux.

6. La règle est que les accords, en soi licites, peuvent devenir illicites s'ils restreignent la concurrence de manière notable et qu'ils ne sont pas justifiés par des motifs d'efficacité économique, ou s'ils suppriment la concurrence efficace.

7. En ce qui concerne les cartels durs, ceux-ci sont présumés supprimer la concurrence efficace sur le marché. Les cartels durs sont soit des accords horizontaux qui fixent directement ou indirectement les prix, qui restreignent les quantités de biens ou de services à produire, à acheter ou à fournir ou encore qui répartissent géographiquement des marchés, soit des accords verticaux qui imposent un prix de vente minimum ou fixe, ainsi que les accords de répartition géographique de clientèle.

8. Par conséquent, la LCart n'a pas vraiment de «per se rule », ni pour les accords horizontaux, ni pour les verticaux, mais une règle « per se » modifiée pour les art. 5 al. 3 et 4 LCart, dans le sens où il s'agit uniquement d'une présomption d'illicéité, laquelle peut être renversée.

3. Preuves requises en matière de lutte contre les cartels

3.1 Objet de la preuve

9. Comme on l'a vu ci-dessus, un accord n'est considéré comme illicite que s'il supprime la concurrence, ou qu'il l'affecte de façon notable sans être justifié par des motifs d'efficacité économique.

10. Il conviendra dès lors dans un premier temps de prouver l'existence d'un accord et ensuite, de prouver que celui-ci a un effet sur la concurrence. La présomption de suppression de la concurrence, prévue pour les cartels durs, ne renverse pas le fardeau de la preuve. En effet, il appartient aux autorités de la concurrence de démontrer que la présomption ne peut pas être renversée. Les parties sont toutefois tenues de participer à l'établissement des faits.

11. Avant la modification de la loi et l'introduction des sanctions directes, les accords pouvaient être qualifiés de naïfs, en ce sens qu'ils étaient souvent connus du public et qu'il n'était dès lors pas difficile de prouver leur existence (par exemple publication sur internet de recommandations tarifaires par des associations professionnelles). Il restait néanmoins à prouver l'effet de ces accords. Depuis l'entrée en vigueur de la modification de la loi, les accords sont devenus moins faciles à détecter, d'où l'existence d'un programme de clémence, qui favorise leur dénonciation.

3.2 Type de preuve

12. Comme mentionné ci-dessus, la preuve directe de l'existence d'un cartel ne suffit pas à elle seule à justifier des sanctions. La preuve doit encore être apportée que cet accord supprime la concurrence efficace, respectivement la restreint notablement, tout en n'étant pas justifié par des motifs d'efficacité économique.

13. La preuve qu'un accord en matière de concurrence a des effets négatifs ressort en général de l'analyse économique. Celle-ci consiste en l'établissement de statistiques portant par exemple sur les tarifs appliqués sur un marché, la fréquence d'application de ces tarifs, la fréquence d'application par des entreprises hors cartel etc. L'analyse aura pour but de rendre hautement vraisemblable l'existence d'un effet notable d'un accord sur la concurrence. Cette analyse économique est en général effectuée sur la base de renseignements obtenus au travers de l'envoi de questionnaires auprès des entreprises actives dans la branche investiguée, ou encore par le biais de sondages.

14. Les preuves peuvent aussi être amenées par un faisceau d'indices les plus divers, comme l'illustre le cas suivant.

3.3 Cas du cartel de soumission de la bibliothèque nationale

15. Au mois de mars 1999, l'Office fédéral de la construction et de la logistique a mis en soumission la rénovation de la façade de la bibliothèque nationale. Une procédure sélective a été ouverte et quatre entreprises ont été invitées à présenter une offre. Des offres pour des montants de CHF 2'222'916.--, CHF 2'029'380.--, CHF 2'000'040.-- et CHF 1'911'472.-- ont été présentées. Or, un expert indépendant avait estimé le coût du chantier à CHF 900'000.--. Une nouvelle offre a été demandée à une tierce entreprise, laquelle a présenté le montant de CHF 1'294'039.--, soit CHF 617'422.-- inférieur à l'offre la plus basse présentée précédemment. Le cas a été dénoncé aux autorités de la concurrence, dans la mesure où il existait un doute que les quatre premières entreprises se soient entendues lors de la rédaction de leur offre. Entre temps, l'Office fédéral a annulé la procédure sélective de soumission et a adjugé le marché de gré à gré à la tierce entreprise.

16. Les quatre entreprises ont nié durant la procédure d'enquête avoir conclu un accord sur les prix. Les autorités de la concurrence leur ont présenté un projet d'accord à l'amiable, lequel constatait qu'un tel accord avait été conclu. Le représentant d'une des entreprises a accepté de le signer. Les trois autres entreprises ont présenté une contre proposition d'accord à l'amiable, dans laquelle l'existence d'un accord était nié. La quatrième entreprise a finalement rejeté le projet des autorités de la concurrence et s'est ralliée à celui des autres entreprises.

17. La Commission de la concurrence a finalement rendu une décision dans laquelle elle a conclu à l'existence d'un cartel de soumission entre les quatre entreprises. Cette conclusion se fondait sur les indices suivants :

- La différence de prix entre l'estimation de l'expert, l'offre présentée par la tierce entreprise et celles présentées par les quatre premières est grande.
- Malgré le point ci-dessus, la différence entre l'offre la plus grande et l'offre la plus basse des quatre entreprises est petite.
- Aucune des quatre entreprises n'a attaqué la décision d'annuler la procédure sélective de soumission.
- Une des quatre entreprises avait au préalable accepté l'accord à l'amiable, alors qu'il y était expressément mentionné qu'un accord illicite avait été conclu.
- Les quatre entreprises avaient pris connaissance de l'existence des autres au cours d'une reconnaissance du chantier.

18. Cette décision a dans un premier temps été annulée par la Commission de recours, pour des raisons formelles. En outre, la décision sur recours mentionnait que les indices suffisent pour prouver indirectement un accord, mais qu'ils n'avaient in casu pas été suffisamment établis. Le Tribunal fédéral a pour sa part donné raison à la Commission de la concurrence pour ce qui avait trait à un aspect formel, mais ne s'est pas prononcé sur les remarques de l'autorité de recours. L'arrêt a été renvoyé à la Commission de recours, pour nouvelle décision.

4. Conclusion

19. En matière de cartels, les autorités de la concurrence doivent préalablement prouver l'existence d'un accord entre les entreprises. La preuve de l'existence d'une entente peut résulter d'un faisceau d'indices qui la rendent vraisemblable. Cela peut toutefois être difficile à établir.

20. Ensuite, la preuve de l'effet de cet accord doit encore être apportée. Celle-ci résulte en général d'une analyse économique du cas d'espèce, effectuée notamment par le biais d'envoi de questionnaires ou de sondages.

DAF/COMP/GF/WD(2006)34

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Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. The term "hard core cartel" is not defined in Chinese Taipei's Fair Trade Act, regulations or guidelines, but the concept is certainly well-understood. The Fair Trade Act has regulated general cartels, other restraints on competition and unfair competition practices since it came into force in 1992. The term "concerted action (or cartel)," as defined in Article 7 of the Fair Trade Act, refers to the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby restrict each other's business activities. It further qualifies "concerted action" as being limited to horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, the trade in goods or the supply of and demand for services. Also, the term "any other form of mutual understanding", as referred to here, means other than by contract or agreement, a meeting of minds whether legally binding or not which would, in effect, lead to joint actions.

2. Important here is that Article 7 of the Fair Trade Act only covers horizontal arrangements. Suppose the involved enterprises are not at the same level of production and/or marketing; in other words, suppose they are not competing enterprises. Under this scenario, they could never be considered to be in violation of the Act which prohibits concerted actions. There are, therefore, other provisions (Articles 18 and 19) in the Fair Trade Act to deal with the vertical arrangements, such as resale price maintenance, tying, exclusive dealing, territorial restraints, and so on. To determine whether the enterprises involved are at the same level of production and/or marketing or are competing firms, the Fair Trade Commission (FTC) makes its decisions on a case-by-case basis. Thus, in cases where there is some inability to obtain direct, unambiguous evidence of an agreement on concerted actions, the FTC does not dispose of the case on the grounds of insufficient evidence, but rather, it may investigate the issue from the angle of Article 19.

3. In addition to enterprises, the prohibition of concerted actions is applied to trade associations because of the extreme ease with which trade associations can engage in restricting the activities of enterprises either through their charter, a resolution of a general meeting of members, or a board meeting of directors or supervisors, or other means (Paragraph 4, Article 7 of the Fair Trade Act). The FTC takes the position that the decision made by a trade association to establish a cartel is sufficient to affect the market functions, even if the scale of the trade association is not so large. Added to this, a trade association is often the planner, or initiator of concerted actions, signifying that the concerted actions on the part of a trade association that affect market competition should be subject to punishment. In cases where self-discipline among members of trade associations affects market competition, the Fair Trade Act does indeed apply. To maximize the understanding of and adherence to the Act and to serve as a source of reference, the FTC issued the Policy Statement on Trade Associations under the Fair Trade Act in 1993.

4. There are many different types of concerted actions, and their effects on markets vary. In principle, to have concerted actions is to limit competition, to impede the adjustment of prices and to harm consumer interests. For these very reasons, the Fair Trade Act makes it a point to impose tight scrutiny. On the other side of the coin, some concerted actions are actually beneficial to the economy as a whole and are in the public interest, too; therefore, in order to be legal, intended actions must be approved by the FTC.

5. Article 14 of the Fair Trade Act provides several exceptions for firms to be able to engage in concerted actions; for these exceptions to apply, a concerted action must satisfy one of the circumstances listed below:

- unifying the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;

- joint research and development on goods or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency;

- each developing a separate and specialised area for the purpose of rationalizing operations;

- entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports (so-called export cartels);

- joint acts in regards to the importation of foreign goods for the purpose of strengthening trade (so-called import cartels);

- joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting the demand orderly, while in economic downturn, the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulty to maintain their business or encounter a situation of overproduction (so-called recession cartels); or

- joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small and medium sized enterprises.

6. The commonly granted exemptions are for import cartels. Some of the larger users of wheat, soybean and corn, for instance, need to import such goods in bulk from abroad. They claim that they need to conduct joint purchases of such goods from abroad and joint acquisition of shipping services in order to reduce the risks and extra costs that would arise if individual firms were to procure large amounts of these goods on their own. Considering the advantage of the reduced costs, and thus, that it is beneficial to the economy as a whole and in the public interest, the FTC decided to grant approval for such companies provided that they observe certain specified conditions.

7. The FTC grants exemptions in a very strict manner. For instance, although the FTC was allowed to grant exemptions to recession cartels under Subparagraph 6 of Article 14, it rejected applications filed by certain man-made fiber industries under such a provision. Its reason to reject those applications was that despite an economic downturn at that time, the markets were still able to function and the inventory on hand was not extraordinarily high.

8. When granting an exemption to firms to conduct concerted actions, the FTC is always allowed to impose terms, qualifications or conditions. The period to conduct concerted actions shall not exceed three years unless such period has been extended prior to the expiration of the said exemption. The FTC can always terminate such exemptions in cases where there is a change of circumstance or a violation of the terms or conditions set forth in the approval.

9. Article 14 of the Fair Trade Act specifically exempts concerted actions where the intent is to improve operational efficiency or strengthen the competitiveness of small and medium sized enterprises on the condition that these actions are beneficial to the economy as a whole, are in the public interest and have had prior approval. Considering that the number of small and medium sized enterprises is about 98% of all enterprises in Chinese Taipei and that it is necessary to prevent such enterprises from abusing the exemption provisions, a strict procedure has been established for the review of applications for exemptions for joint price fixing by small and medium sized enterprises.

10. The FTC received an application for joint price fixing from tire repair operators, and as part of the rationale behind its decision to approve it, the FTC took into consideration that the explosion of tires is only an occasional and accidental occurrence and that the time and location of receiving necessary repairs are not fixed. Aside from this, repair procedures are quite simple, consistent and of low transactional value. In the case at hand, joint price fixing could reduce the transaction costs of conducting an inquiry, provide an impetus for product or service providers to compete and could prevent obvious unfair opportunistic behaviour when operators are dealing with consumers' problems or urgency. The FTC found joint price fixing in this case was beneficial to the economy as a whole and in the public interest, and consequently, it granted its approval.

11. Before the amendments of 2002, during which time the Fair Trade Act did not specifically provide for direct exclusions, many concerted actions were inherently completely legal -- for example, those involving joint research and development for the purpose of technological upgrading or the concerted actions of two small shops, or in cases where there were possibly slight effects on market functions; in these cases, the drawbacks of such activities were far outweighed by their benefits to the economy as a whole and in the public interest. However, if they had been carried out without prior approval, such actions would have faced the threat of illegality. Because of a lack of regulatory necessity coupled with society's tendency to complain about over-control, Article 7 of the Fair Trade Act was amended to limit concerted actions to horizontal concerted action which could affect the market functions of production, the trade in goods or the supply of and demand for services.

2. Effects of Concerted Actions

12. Article 14 of the Fair Trade Act prohibits enterprises from engaging in concerted actions, save for specific conduct that is listed among the exceptions and is beneficial to the economy as a whole and in the interests of the public at large. The legislation seems to apply the "per se" illegal rule, under which no analysis on the effects of market competition is required. If we look at the definition of concerted action under Paragraph 1, Article 7 of the Fair Trade Act, it seems that whether there is a contract, agreement or any other form of mutual understanding between or among competitors, and if their joint decision on price, quantity, etc. is to restrict each other's business activities, then it should be considered that they are engaging in a concerted action. Also, for Paragraph 2, Article 7 of the Fair Trade Act to apply, it requires that the concerted action would affect the market functions of production or trade in goods, or supply of and demand for services. It seems that the "rule of reason" should be applied.

13. In practice, the FTC applies the "rule of reason" to most forms of horizontal arrangements and thus, the effect on the relevant market must be examined. Yet it is sometimes very difficult to decide whether the market would be affected in fact. In certain cases, there are some differences in opinion as to the definition of a relevant geographical market, and this could result in the different affected portion in fact.

14. Paragraph 2, Article 7 of the Fair Trade Act requires that joint actions be capable of affecting market functions. In other words, merely a potential effect would be enough. A real effect on the functions of a relevant market is not necessary. Thus, if a concerted action is capable of affecting the market, the provisions regulating concerted actions can be applied without regard to the length of time the concerted action has been in existence and without regard to whether the agreement was in fact still being carried out after the conclusion of the agreement.

15. Although the FTC has not explicitly stated that it applies the "per se" rule in certain types of cases, in practice, it does use the "per se" principle in some limited situations. For instance, prior to the putting into force of the Government Procurement Act, bid-rigging activities were subject to the regulations on concerted actions in the Fair Trade Act. The FTC made quite a number of decisions against

bid-rigging activities without entering into a substantive analysis of the effects from such activities on the relevant market. It was considered a *de facto* application of the "per se" rule. It should be noted that current bid-rigging activities are subject to criminal punishment under the Government Procurement Act.

16. Cases in violation of Article 14 of the Fair Trade Act, which prohibits concerted actions, have accounted for the largest percentage of all fines imposed since the Fair Trade Act came into force in 1992. The total fines for concerted actions imposed during the 14-year period from 1992 to 2005 reached approximately 46% of total fines for all actions covered by the Fair Trade Act. Worth noting is that during the same period, the value of all fines imposed for horizontal agreements was particularly steep in 2003 when it reached NTD 352 million. This was primarily because in 2003, 30 enterprises operating cylinder-filling plants, which were in a competitive relationship with each other, established organisations to reach an agreement to raise the installation fees and delivery rates by their downstream distributors and subsequently imposed restrictions on competition among enterprises as well as restricted the trading counterparts of their distributors. These acts were enough to disrupt the supply and demand functions in retail pricing plus the installation and delivery of cylinder-packaged gas in certain regions, hence violating Article 14 of the Fair Trade Act prohibiting concerted actions. As a punitive measure, an administrative fine of over NTD 300 million was imposed.

3. Forms of Agreements

17. In Chinese Taipei, whenever the FTC is unable to obtain direct concrete evidence of a cartel agreement, it makes every attempt to get indirect evidence to substantiate the notion of a "mutual understanding of a cartel" among competitors. Such evidence is based on the FTC's observations of competitors with the same or similar conduct which might substantiate a "meeting of minds". The most common types of cartel among enterprises involve price fixing, output restrictions, technology restrictions, division of customers, and division of territories. For example, competitors in question have a "meeting of minds" by jointly participating in trade associations, get-togethers, and other informal meetings, which enable them to engage in concerted action; clearly, there is parallel behaviour among such firms after such meetings or occasions. During its investigations, the FTC further makes inferences from its observations of the "inducement, economic benefits, the timing of such similar action, the possibility of substituting different actions, the frequency and the duration of the acts which are deemed harmful to market order, the concentration and concordant degree of the conduct, etc." And such testimony has been made by respondents when they have presented themselves before the FTC. To be sure, the FTC has applied such circumstantial evidence in the past to support its decisions against some accused parties.

4. Case Study: Petroleum Products Market

18. Since the FTC was established, it has usually investigated and found cartel agreements based on direct evidence. Until now, the administrative courts have almost supported the FTC's decisions on cartel cases when appellants have appealed competition litigation. In 2003, the FTC dealt with a cartel agreement where there was no direct evidence, and this was in the petroleum products market. In this case, the two disposed parties appealed litigation to the Taipei high administrative court. This case is currently on appeal. Detailed information about the case is presented in the following.

19. The FTC opened an investigation against the only two gasoline suppliers in Chinese Taipei, and this was to examine their pattern of simultaneously adjusting their wholesale prices of 92 and 95 unleaded gas and premium diesel oil. Chinese Petroleum Corp. ("CPC") had long been the monopoly provider. Formosa Petrochemical Corp. ("FPCC") later entered the market in September 2000. (Esso also entered the market, but it soon exited after less than two years.) CPC and FPCC account for about 70% and 30%, respectively, of the market for gasoline and diesel fuels.

20. CPC and FPCC simultaneously adjusted wholesale prices within the same range at least 20 times from April 2002 to September 2004. Typically, the initiating party would announce its decision to change prices in the media. Whenever one of them made such an announcement, its rival would follow; then the two competitors would make the same changes at the same time. If the rival announced it would not, then the initiating party would withdraw or amend its earlier announcement.

21. The FTC contended (among other things) that this public exchange of views and intentions was more than parallel action and, in fact, constituted a "meeting of minds"; as such, it was deemed a prohibited "concerted action." The FTC argued that disclosing sensitive market information, exchanging business strategies or directly communicating business intelligence can be construed as reaching a "meeting of minds." This was inferred from indirect evidence based on what the FTC described as inducement, economic benefits, the timing or the amounts of the price increases, the possibility of substituting different actions, the frequency, duration and concentration of the actions and the unanimity. The FTC admitted that simple uniform pricing would not necessarily have been unlawful. But it contended that the two enterprises here did not just reach the same price levels, but rather, they communicated their intent in advance and their actions led to simultaneous moves, which retail operators typically followed too.

22. The FTC sent a letter to the two firms warning them not to use advance announcements to change wholesale prices simultaneously and demanded that they make price decisions in accordance with their own individual operating conditions instead. On account of their having disregarded the warning and on account of their concerted action in violation of Article 14(1), in October 2004, the FTC imposed an administrative fine of TWD 6.5 million on each firm. The parties appealed, and the matter was returned to the FTC for it to justify the fines. In July 2005, the FTC again imposed the exact same fines, reciting the considerations that are set out in its sentencing guides, namely motive, objective, expected improper benefits, degree of damage to trading order, duration, benefits obtained, scale of business, business operations, revenue and market position, previous correction of or warning about the conduct, type and number of previous violations, interval of violations, punishments incurred, conduct after the violation, cooperation during the investigation and other factors. Once again, the decision is on appeal.

5. Conclusions

23. After 14 years of implementing the rules on cartels, the FTC has found more than 114 violations of Article 14 of the Fair Trade Act. The FTC was not very vigorous in applying the provisions against concerted actions prior to the amendments to the Fair Trade Act in 1999, due to the fact that there was an immediate criminal punishment against such violations. Since the 1999 amendments, the FTC has been able to apply Article 14 and has imposed administrative fines in a more active manner. It can be expected that the FTC will continue to adhere to its strict position when carrying out its law enforcement against concerted actions.

24. Given the difficulty in obtaining substantive evidence of concerted actions, it has become increasingly more prevalent among competition law authorities to adopt leniency programs. With these, conspirators who voluntarily reveal to the competition law authorities or judicial organisations such collusive agreements and assist in the investigation may receive immunity or reductions in their administrative and criminal liability. While the contents of leniency programs vary across countries, generally speaking, conspirators should voluntarily reveal or assist before the authorities learn of the agreement or obtain adequate evidence; alternatively, they are required to provide concrete evidence in the investigation process that enables the authorities to successfully complete their investigation. Such a program can save on investigative costs, prevent the spread of injury, deter hard-core cartels and contribute to preventing and discouraging enterprises from being so inclined. In light of the potential benefits derived from leniency programs, the FTC has researched the designs and the methods of enforcement of such

programs in other countries. The findings will serve as important references for the adoption and introduction of such a program to Chinese Taipei.

25. As mentioned above, it is often very difficult for the FTC to collect information to prove the existence of anti-competitive activities. The FTC has entered into agreements with competition authorities in New Zealand, Australia and France under which there are provisions for cooperation between the enforcement agencies in the respective jurisdictions. However, there has not been an agreement entered by the FTC with those enforcement agencies of the foreign jurisdictions under which the FTC has been able to obtain useful confidential information to correct illegal activities. The FTC is exploring the possibility of entering into cooperation arrangements with its other counterparts in other countries to ensure that enforcement activities can be undertaken in an even more effective manner and to improve the enforcement of competition law to combat cross-border anticompetitive practices and international cartels.

DAF/COMP/GF/WD(2006)17

OCDE

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CONTRIBUTION FROM TURKEY

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Does your competition law, either as written or as enforced, have a special definition for hard core cartels? If so, what is it? Does the definition require, as one element, that there be an explicit agreement among competitors, or does it also provide for the possibility of implicit agreements, perhaps through consciously parallel conduct "plus" one or more facilitating practices?

1. The Law on the Protection of Competition No 4054 (the Law) does not have a special definition for hard core cartels. It has a general prohibition for agreements, concerted practices and decisions limiting competition with a non-exhaustive list of examples such as price fixing, market sharing, controlling supply and demand, and complicating the activities of competing undertakings, excluding firms in the market via boycotts, discrimination and tying. The prohibition does not require the existence of an explicit agreement. Rather, the Law overtly says that in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice (concerted practice presumption). Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

2. Apart from the definitional issues, do cartels have special status under your law? In particular, are they?

- prosecuted criminally;
- subject to a per se rule;
- subject to harsher sanctions, particularly higher fines, than other violations of the law?

3. What effect do these special attributes, if any, have on the evidentiary burden that the cartel prosecutor must meet?

2. The agreements limiting competition are not prosecuted criminally under the Law. Fines imposed to undertakings party to an agreement limiting competition are administrative in nature. The agreements fixing prices are cited among the most severe cases in competition law. An agreement itself or at least its clauses distorting competition are subject to a per se rule and as a result there is no need to prove their effects if it is obvious that the objective is to limit competition. Being a party to an agreement limiting competition is prohibited according to the Law even effects of the agreement have not been realised. Because of this per se rule and the existence of concerted practice presumption, it can be said that the standard of proof is loosened. Agreements that fix prices or share markets may be subject to higher fines because they are generally more harmful than other anticompetitive conducts.

4. Is it possible to prove a cartel agreement in your country without direct evidence? If so, what evidence is sufficient? In particular, what combination of type's ii-iv evidence (i- direct evidence of agreement; ii- indirect evidence of agreement, iii- practices that facilitate cartels, or make it easier for competitors to reach or sustain agreement iv– economic evidence) can suffice?

3. In *Cement* decision (2.12.2004; 04-77/1108-277), parallel price increases among four cement producers operating in Aegean region were the subject of the investigation. At the end of the investigation, an overt text of an agreement showing that undertakings violated the Law could not be found. However, there were many findings demonstrating existence of infringements of competition in the market. In this case, in line with the concerted practice presumption, cement prices in Aegean region were analysed and as a result parallel and high price increases were observed. The possibility that costs that might explain such increases was discarded as a result of cost-price comparisons proving that costs during the relevant year followed a stable course. Therefore, it was seen that price increases have been realised independent of costs.

4. To give a brief account of the analyses carried out during investigation in general, for instance, in 2002, despite price falls in bagged cement in January-April, prices charged by some cement producers doubled in a short period of four months beginning from April. Increase in inflation and exchange rate in this period was around 20% whereas costs incurred by the cement producers remain unchanged. To be more specific, prices increase by some cement producers was 100% whereas inflation rate was 21% and exchange rate was 23% in April-October in İzmir, the largest city in the Aegean region.[1] Moreover, in 2003 although there was no change in costs, a sudden increase in prices began in June when inflation rate was around 2% and exchange rate decreased by 2%. To give a more specific example for 2003, the increase in price of bagged cement in June-December in the Aegean region around 50% despite the inflation rate was around %2, 20 and increase in exchange rate was minus. Price comparisons with other regions demonstrated that price of the same product was up to 65% higher in Aegean region than for instance that in Ankara although changes in costs between the two regions were minimal.

5. Moreover, two documents found during on the spot inspections were regarded as signs of coordination among competitors in the sense that the competitors held a meeting to realise price fixing practice. In one these documents, it was written that one of the cement producers was appointed as the secretariat to organise the "business". To summarise, business was defined as to prevent unfair competition, unnecessary practices, price decreases, discounts and dumpings; preparing regional plans regarding production-consumption. The other document showed that the cement producers held meetings in certain cities and those cement producers operating in a certain city attended the relevant meeting. However, it must be said that these two documents were supporting documents indicating coordination among competitors and they were not the main element that the decision was based on. On the contrary, concerted practice presumption based on price increases is at the heart of the decision and the use of the presumption does not require the existence of such supporting documents.

6. The undertakings subject to investigation could not produce rational and economic facts such as increase in demand as the cause of price increase.

7. Without employing concerted practice presumption, it could be impossible to prove a cartel agreement of a secret nature in sectors in which competition law and instruments of proof are known and cement industry is such an industry and has experienced two investigations before.

1. The decision also includes price analyses in other cities such as Aydın, Manisa and counties such as Ayvalık, Burhaniye, Edremit. Because İzmir is the largest city of the region, it is selected here as example.

8. As a result this case is a good example of use of economic evidence (type iv) that is evidence of price increases that can not be justified.

5. Is there a difference in the sanctions that are applied to cases in which there is direct evidence of agreement and those in which direct evidence is lacking?

Imposition of sanctions does not depend on the existence of direct evidence of agreement. The concerted practice presumption is a good example that there is no difference in sanctions that are applied when direct evidence is missing vis-à-vis sanctions applied when direct evidence is available. While imposing fines, the Law just says that the Competition Board takes into account factors such as the existence of intent, the severity of fault, the market power of the undertaking or undertakings upon which a penalty is imposed, and the severity of potential damage.

6. The literature on cartels, including that produced by the OECD, urges that hard core cartels, because of their especially harmful effects, be prosecuted as aggressively as possible and punished by the most severe sanctions available. In your view, is this goal furthered or weakened by evidentiary rules that permit cartel prosecutions without evidence of explicit agreement?

7. Developing countries and those with little or no experience in prosecuting cartels will almost certainly find it difficult, at least initially, to generate direct evidence of explicit agreement in cartel cases. Should these countries employ a more lenient evidentiary standard? If so, should it become stricter over time?

9. The reasoning of concerted presumption is granted as "In a legal system in which agreements limiting competition are prohibited, such agreements are made secretly and proving their existence becomes very hard and sometimes impossible. Therefore, in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, a presumption that undertakings are in concerted practice has been adopted. As a result, the burden of proving that they are not in concerted practice has been shifted to the relevant undertakings and it has been aimed that the Law does not become inoperative due to difficulty of proof." Consequently, strength of the Law has been consolidated against anticompetitive conduct in case it is hard to find an explicit agreement although the conditions in the market are similar to those where competition is prevented, distorted or restricted.

10. Although it may be hard for a country with little or no experience to draw a clear line to distinguish a secret cartel from parallel behaviours that have economic and rational causes, this presumption can be valuable to deal with anticompetitive conduct where it is hard to find a smoking gun provided that the presumption is used cautiously.

DAF/COMP/GF/WD(2006)12

OCDE

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CONTRIBUTION FROM THE UNITED STATES

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. The United States' position on the importance of an effective anti-cartel enforcement program has long been clear. Detection and prosecution of hard core cartels has always been, and remains, a primary law enforcement priority.[1] There is a broad consensus that hard core cartels – whether in the form of price-fixing, output restrictions, bid rigging, or market division – are the most egregious of antitrust law violations; in the words of our Supreme Court, these acts of collusion are the "supreme evil of antitrust."

2. The term "hard core cartel" is not defined in U.S. law, regulations, or guidelines, but the concept is well-understood. As stated in the antitrust offenses section of the United States Sentencing Commission Guidelines,[2] there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market- allocation, can cause serious economic harm. ... The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual anticompetitive effect.

3. In the U.S., cartel conduct is treated as *per se* illegal. A *per se* rule for evaluating hard-core cartel conduct focuses solely on the conduct. This approach does not require any proof of harm to competition and does not allow parties to claim an efficiency justification. Hard core agreements, because of their pernicious effect on competition and lack of redeeming economic value, are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry as to the precise harm they have caused. Moreover, under a *per se* analysis, companies are not entitled to attempt to demonstrate the alleged reasonableness or necessity of the challenged conduct. For example, price fixing cannot be justified by arguing that it was necessary to avoid cutthroat competition, or that it resulted only in reasonable prices. The *per se* approach provides certainty with respect to the legality of specific conduct.

4. In the U.S., cartels are prosecuted as criminal offenses under the Sherman Act. Section One of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Criminal violations of the Sherman Act are punishable by fines of up to $100 million for corporate defendants and $1 million for individuals. Fines may also be set at double the gross amount gained by the defendants or lost by the victim. Criminal violations by individuals of the Sherman Act are also punishable by up to ten years' imprisonment. If a private civil suit follows a government action under the Sherman Act in which the defendant has been found liable, the plaintiff may use the earlier judgment as *prima facie* evidence of a violation. Private parties can obtain injunctive relief and are generally entitled to treble damages, as well as recovery of reasonable attorneys' fees, for violations of the antitrust laws. The U.S. Government can also sue for treble damages to recover for injury to its business or property resulting from an antitrust violation.

5. To prove concerted action, "there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). Furthermore, "it is generally believed ... that an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act." *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 654 (7th Cir. 2002)(Posner, J.).

6. The DOJ usually proceeds with prosecution only when there is direct evidence of an unlawful agreement. In cases where a defendant does not plead guilty, the direct evidence offered most often takes the form of testimony from a cartel participant, who may be a leniency applicant, cooperating witness, or immunized co-conspirator, but can also include video- or audiotapes or documents providing direct evidence of the unlawful agreement.

7. Only in unusual circumstances will the DOJ proceed with a criminal prosecution when direct evidence is lacking. One such case, *United States v. Champion International Corporation,* 557 F.2d 1270 (9th Cir. 1977), involved bid rigging by firms purchasing timber at auctions held by the U.S. Forest Service. Before the period covered by the indictment, the firms engaged in "intensely competitive bidding." The trial court found that at a certain point this competitive process ended when one defendant found no competing bidders against him in a small auction and decided "to experiment" later that day by not bidding on another sale. "The trial court agreed with the defendants that a new bidding pattern had thus developed by 'normal economic forces', presumably in a noncollusive evolution." *Id.* at 1273. From these "innocent beginnings," representatives of the defendants began to meet and discuss future sales and their relative desirability to each firm. "Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants 'had an understanding' about bidding." *Id.* The Court of Appeals upheld the trial court's finding that circumstantial evidence proved the existence of the agreement, even though the DOJ was unable to introduce direct evidence of an express agreement.

8. Fuelled by the prospect of treble damages, allegations of hard core conduct are frequently litigated between private parties in U.S. courts, and are often based on circumstantial evidence.

9. Because price fixing is a *per se* violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs. In the absence of such an admission, the plaintiff must present evidence from which the existence of such an agreement can be inferred.... The evidence upon which a plaintiff will rely will usually be ... of two types – economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types ... : evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelized if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a noncompetitive manner. Neither form of economic evidence is strictly necessary, since price-fixing agreements are illegal even if the parties were completely unrealistic in supposing they could influence the market price. *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 654-55.

10. There have been and continue to be many private cases seeking damages based on allegations of unlawful cartel agreements. In the absence of direct evidence of an agreement, courts have considered a wide range of economic evidence that might support a finding that a market is conducive to price-fixing. Judge Richard Posner, a leading antitrust scholar, lists the following possible indicia, all of which can be subject to ambiguous inferences and are highly fact dependent:[3]

- the market is concentrated on the selling side;
- there is no fringe of small sellers;
- demand at the competitive price is inelastic;
- entry takes a long time;
- the buying side of the market is unconcentrated;

- the product is standardized (not customized);
- the principal firms sell at the same level in the chain of distribution;
- price competition is more important than other forms of competition;
- there is a high ratio of fixed to variable costs;
- there are similar cost structures and production processes;
- demand is static or declining over time;
- prices can be changed quickly;
- the market operates with sealed bids;
- the market is local;
- competing firms cooperate legally on other matters;
- the industry has a history of cartel behaviour.

11. He lists other types of economic evidence that can demonstrate "the existence of collusive pricing even though no overt acts of collusion are detected":[4]

- fixed relative market shares
- marketwide price discrimination
- exchanges of price information
- regional price variations
- identical bids
- price, output, and capacity changes at the formation of the cartel
- industry wide resale price maintenance
- declining market shares of leaders
- amplitude and fluctuation of price changes
- demand elastic at the market price
- level and pattern of profits
- market price inversely correlated with number of firms or elasticity of demand
- basing-point pricing

- existence of exclusionary practices

12. One leading antitrust treatise describes the use of circumstantial evidence in private cases as follows:[5]

> [L]ower court decisions consistently have held that conscious parallelism, by itself, will not support a finding of concerted action. While some decisions have suggested that parallelism is a factor 'to be weighed, and generally to be weighed heavily,' other facts and circumstances, often referred to as 'plus factors,' typically must be combined with evidence of conscious parallelism to support an inference of concerted action. The courts emphasize that these plus factors should not be viewed in a vacuum but should be considered as a whole against the entire background in which the alleged behaviour takes place.
>
> Courts generally have not articulated a specific hierarchy of plus factors. Nonetheless it is possible to identify some broad patterns from the relevant decisions. Among the most important plus factors are those that tend to show that the conduct would be in the parties' self-interest if all agreed to act in the same way but would be contrary to their self-interest if they acted alone. Evidence satisfying this requirement has included artificial standardization of products and raising prices in time of oversupply. Giving pretextual reasons for action also has been considered a strong plus factor. Conversely, where each defendant has legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, an inference of conspiracy based solely on that conduct is improper. Similarly, when the defendants would have little motive to engage in the alleged conspiracy, the courts will require the plaintiff to introduce additional evidence before permitting the fact finder to infer concerted action.
>
> Less determinative in the hierarchy of proof is evidence that indicates an opportunity for collusion. This plus factor includes evidence of correspondence, meetings, or other communications among the alleged conspirators, especially when quickly followed by simultaneous identical actions. This plus factor also includes similarity of language, terms, and conditions used by alleged conspirators where ... such similarity is improbable absent collusion. ... [S]everal courts have held that meetings or other communications among conspirators, which show no more than a 'mere opportunity to conspire,' are insufficient, by themselves, to support an inference of conspiracy, at least where the defendants offer plausible, legitimate business justifications for the communications.

13. Some Thoughts on an Effective Anti-Cartel Program

1. A *per se* rule prohibiting hard core cartels is efficient and predictable, and greatly simplifies the investigation and prosecution of the most harmful antitrust offenses. It properly focuses the inquiry on the existence of an unlawful agreement, and runs no risk of deterring beneficial business conduct. As stated by Judge Bork,[6]

   > Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market. There is no unfairness in applying the *per se* rule to parties whose agreement was useless, since their intent was wrongful. This consideration bears more properly on prosecutorial discretion in bringing such cases and on judicial discretion in imposing penalties. The *per se* rule against naked price-fixing and market-division agreements is thus justified not only on economic grounds but also because of the rule's clarity and ease of enforcement.

2. Agencies should focus their enforcement efforts on cases where direct evidence is available, and on obtaining the necessary investigatory tools to uncover this evidence. An effective leniency program is the best tool for acquiring such evidence, along with physical evidence obtained from searches and testimony from direct participants testifying under a grant of immunity or pursuant to a plea agreement.

3. In our experience, prosecutions that depend on complex, indirect economic evidence should be a much lower priority for agencies. The types of circumstantial evidence described above that are used in private cases in the U.S. tend to be ambiguous, and require detailed and highly fact- specific expert testimony to provide context. For this reason our Supreme Court has properly imposed a high standard for plaintiffs in these cases: "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of §1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)(citations omitted).

NOTES

1. When a matter is before the Federal Trade Commission (FTC) and it determines that the facts may warrant criminal action against the parties involved, the FTC notifies the DOJ and makes available to the DOJ the files of the investigation. If the DOJ determines that a matter should be referred to a grand jury for criminal prosecution, it will request that the FTC transfer the matter to it. If, on the other hand, the DOJ decides not to pursue the matter with a grand jury, then the FTC may proceed with its own civil investigation. In addition, for some *per se* horizontal offenses which could be prosecuted criminally, the agencies may decide on rare occasions, based on particular factual circumstances suggesting that criminal prosecution would not be appropriate, to proceed instead by means of civil proceedings.

2. United States Sentencing Commission, *Guidelines Manual,* §2R1.1 Commentary (Nov. 2005).

3. Posner, Richard A., Antitrust Law (2d. ed.), University of Chicago Press (2001), pp. 69-79.

4. Id. at 79-93.

5. ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), pp. 10-15.

6. Bork, Robert H., The Antitrust Paradox, The Free Press (1978), p. 269.

DAF/COMP/GF/WD(2006)31

OCDE

OECD

CONTRIBUTION FROM ZAMBIA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

EVIDENCE GATHERING AND COOPERATION ISSUES IN HARD CORE CARTEL INVESTIGATIONS

1. Introduction

1. In recent years, there has been heightened discussions, research and literature on hardcore cartels. While the average person in the street may not understand why a cartel is wrong and meriting criminal sanctions, the anti-cartel enforcer knows that "hardcore cartels are the equivalent of theft" and should be met with unequivocal public condemnation. In Zambia, cartels in the fertiliser, grain and oil procurement and marketing, are projected to cost hundreds of millions of US $ annually. However, due to a low level of the competition culture, these matters have not received the attention they deserve to warrant public expenditure on investigations and prosecution of individuals. However, there have been several instances reported in the national press alleging collusive tendering in the oil procurement, grain and fertilizer procurement. These activities, hitherto unquantified, have had a telling effect on the State treasury and on the competitiveness of industries dependent on these products in Zambia. Unfortunately, the Competition and Fair Trading Act of Zambia does not apply to activities where the Government of the Republic of Zambia is a party.

2. While about five (5) cartels have been investigated by the Zambia Competition Commission in Zambia between 1998 and 2004, it is estimated that in only 20 cartel cases investigated in the United States in the 1990s, the annual worldwide turnover in the affected products exceeded US $30 billion.[1] In as far back as 1997, the World Trade Organisation (WTO) also highlighted the growing significance of international cartels for policy makers, noting that these cartels undermine international integration and decrease the benefits of liberalisation to consumers.[2] It is undoubted that aggressive prosecution of cartels should be enhanced, but the sustainability of such a fight is possible only where there are effective means to gather evidence and put a stop to hardcore cartel activity.

3. While Zambia's cartel provisions under Section 7 and Section 9 of the Competition and Fair Trading Act prohibit cartels outright and prefer criminal sanctions of imprisonment, the enforcement of the provisions have been ineffective due to various reasons that shall be explained later in this paper. Section 9 of the Act specifically addresses the following practices and declares them prohibited offences:

- Price Fixing.
- Collusive tendering.
- Market or customer allocation agreements.
- Sales and production quotas.
- Collective action to enforce arrangements.
- Concerted refusals to supply goods and services to potential purchasers; or
- Collective denials of access to an arrangement or association which is crucial to competition.

4. Due to lack of a precedent prosecution, there is no sufficient deterrent effect to cartel activity in Zambia. The word "cartel" in Zambia, like in many developing countries, does not usually connote any

punishable offence to the reasonable person. This makes the Competition Authority in such countries to be the lone voice in cartel investigation and prosecution. While cartels are "theft" and distort both domestic and international trade and create market power for a few companies and their agents, it yet remains to be proven as to how much Court sympathy that cartel cases would receive.

5. To experts, students and victims of cartels, cartels bring about waste and inefficiency in industries whose markets would otherwise be competitive without the cartels, such as the aforesaid grain, fertiliser and oil sectors in Zambia. Great attention to cartels in Zambia has otherwise been connected to the public transport system where public outcry has largely been towards the concerted price increases under the now disbanded United Transport and Taxis Association (UTTA) – a notorious organisation for road passenger operators. Similar outcries have been heard in recent years in the oil sector. In 2001, the Zambia Competition Commission and the Energy Regulation Board (ERB)[1] agreed to jointly prosecute Oil Marketing Companies for price fixing. Details of the case are explained later in this paper.

6. While cartel activity continues to be sophisticated, complex and perhaps undetectable, the problem with the matter would also be eluded to the high resources and man hours required to fully investigate a so called "hardcore cartel", especially by developing and under developed competition authorities. At international level, there is a recognised difficult in getting evidence, interviewing and even extraditing defendants. This calls for international cooperation with allied anti-cartel enforcement agencies. While at global competition enforcement level evidence gathering is more successfully conducted by more resourceful regulators, such regulators do not and cannot operate in a global vacuum and need the assistance of other regulators.

7. Cartels naturally operate secretly and gathering of evidence is a critical process in establishing such conduct. Evidence gathering is a primary function of any law enforcement agency, and its scope and usefulness is relative to the powers of the law enforcer. Evidence gathering in cartel cases includes any relevant documents, statements, other electronic or non-electronic records, eyewitness accounts and whistle-blower confessions. The complexity of hardcore cartel cases entails that where prosecution is planned, the Courts would likewise require hardcore evidence, in the case of Zambia, beyond reasonable doubt. This is because cartel activity is an offence attracting criminal sanctions. While some countries have legislations regarding evidence e.g. the UK and Ireland, some countries would rely on common law principles of evidence e.g. most Commonwealth Countries, including Zambia, Zimbabwe, Canada and Australia.

2. Obtaining evidence

8. The Commission is given wide ranging powers under Section 14 of the Competition and Fair Trading Act to obtain evidence. These include (after obtaining a Court warrant): authority to enter any premises; and access to, or production of, any books, accounts or other documents relating to the trade or business of any person and the taking of copies of any such books, accounts or other documents: Provided that any books, accounts or other documents produced shall be returned forthwith if they are found to be irrelevant.

9. In the exercise of the above powers, the Commission officers may be accompanied or assisted by any such police officers as are necessary to assist in entering into or upon any premises.

10. Further, under Section 16 of the Competition and Fair Trading Act, it is a criminal offence to fail to comply with any provisions of the Act or any regulations made under it, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made under it. Therefore, to refuse or omit to furnish or produce any information or documents when required by the

Commission to do so; or to knowingly furnish any false information to the Commission attracts a fine of **US$2,000 or imprisonment for a term not exceeding five years or to both.**

11. Under Section 6 of the Act, the Commission can commence investigations on its own initiative or upon receiving a complaint. It is clear that the Commission has sufficient mandate and powers to institute investigations and obtain evidence.

12. However, whether evidence obtained is relevant to the prosecution of a cartel is another thing. The fact that prices in a relevant market are the same and that they increase almost at the same time, is not enough to establish the existence of an agreement, or even coordination of prices through some practice such as leadership. This has largely been the case in oil procurement and marketing in Zambia. Similar price increments may be attributed to firms having the same monopoly or oligopolistic suppliers of key raw materials upstream. In Zambia, the sole State Owned importer and refiner of crude petroleum, from whom all the oil marketing companies source their supplies, pegs the wholesale price in conjunction with the Energy Regulation Board[2]. It is likely then, that the retail price is going to be substantially similar, especially in view of the oligopolistic nature of the industry. To obtain cartel evidence would entail going beyond the monitoring of prices.

13. Generally, evidence gathering in critical anti-trust cases has to go many steps further, to include any evidence that two or more sellers of a particular product have agreed to price their products in a certain way, to produce or sell only certain amounts of their products, or to sell only in certain areas or to certain customers; large price changes by a number of sellers of very similar products, particularly if the price changes are of similar amount and occur at about the same time; and a statement by a firm that it cannot sell to you because of an agreement with another firm that only the latter can supply you.

14. In *grain procurement and marketing* in Zambia, the Commission observed the seemingly concerted price movements of maize-meal during the months of March to June 2004. The major maize milling companies appeared to increase prices at the same time. Their defence was that the price of the raw commodity, maize, was increased by the main buyer, Food Reserve Agency (a Government agency which manages the strategic food reserves). Further, a seemingly understandable defence was advanced that the price of petroleum had increased, hence increasing the logistical costs because the main procurement sources were in the rural towns and villages. Therefore, while analysis of price movements over time may be useful in detecting and establishing a prima-facie case of price-fixing, it would not stand in the Zambian courts where the evidence has to be beyond reasonable doubt. Such evidence will have to include a written agreement or at least a confession from one of the parties so involved.

15. While presently a number of Competition Authorities appear to follow the whistle-blower leniency program direction in the enforcement of cartels, the effective use of such programs would depend on the level of competition culture in a particular country. It has been noted that in February 2002, the European Commission published revised leniency guidelines and plans to expand its enforcement tools by strengthening its information gathering powers. The new powers include searching company executives' homes in the process of evidence gathering[3]. The UK government also announced ground breaking set of reforms to combat cartels. As eluded above, the Zambian Act confers powers to search premises or conduct a "dawn raid". These powers have not been used as yet.

16. In Zambia, we have a procedure similar to a leniency program. The Constitution of Zambia empowers the Director of Public Prosecutions to turn an accused person into a State witness with a promise to spare him from prosecution, if he cooperated fully by providing vital evidence to the prosecution. As stated earlier, the Courts in Zambia for instance are yet to be tested as to their consideration of a cartel offence. Section 16 of the Competition and Fair Trading Act prescribes penalties applicable *"... upon conviction to a fine not exceeding ten million Kwacha or imprisonment for a term not exceeding five years*

or to both". The financial penalty (about US$2,000!) and jail term of not more than five years may only be awarded concurrently at the Judge's discretion. It is likely that the parties to a cartel may escape with a fine of a maximum of US$ 2,000 and a "stern warning" and suspended jail term. In this regard, the criminal sanction remains an effective deterrent compared to a fine.

17. The Law provides for relatively strong sanctions against hardcore cartels which include a fine and a criminal sanction of imprisonment. The fine has proved to be very low to achieve deterrence against future activity of that kind. The law provides for sanctions against persons for their participation in the conspiracy. The prospect of individual liability can add an important level of deterrence, and individual sanctions also have another beneficial effect – they create an incentive for culpable individual store defect from the cartel and cooperate with investigations, in order to avoid punishment. In this regard, **Section 16 of the Act** is directed against company officials.

3. Cartel investigation in the Oil Marketing Sector in Zambia

18. In Zambia, the Commission investigated a cartel in the oil marketing sector, principally involving BP, Caltex and Total. Following the fire incident at Indeni Petroleum Refinery (Zambia's principal oil refinery) in May 1999, the Government issued a Statutory Instrument (S.I.) No.119 of 1999 that reduced the customs duty on imported and finished petroleum products from 25% to 5%. This was a temporal measure to allow for private companies to import petroleum products and thus mitigate the envisaged shortages.

19. Consequently, Energy Regulation Board (ERB) issued import licences for petroleum products to nine (9) Oil Marketing Companies (OMCs), namely BP, Caltex, Mobil, Agip, Total, Jovenna, Engen, Ody's and Agro-fuel. Upon resumption of production at Indeni, the Government issued SI No. 54 of 2001 that reinstated the 25% import duty on all petroleum products effective 18th May, 2001.

20. On 29th May 2001, the ERB received a joint written complaint from the OMCs about the effects of the S.I No. 54 on their operations. ERB brought the complaint by OMCs to the attention of Government through the Ministry of Energy and Water Development, who promised to consider the matter. However, while Government was in the process of holding consultations with all stakeholders, the OMCs concertedly increased the prices of petroleum products on 30th May 2001.

21. On 31st May 2001, ERB wrote to all OMCs individually directing them to revert to the old prices. With Caltex acting as a secretariat, the OMCs responded by asking for a meeting with ERB on 1st June 2001. After the meeting with ERB, the OMCs responded (through a joint letter to ERB) that new prices would remain in effect for four to six weeks, thereby continuing to defy the directive given by the ERB. The ERB then responded to the joint letter individually stating that the directive remained in force. The ERB Board Chairman further reiterated this during a press conference on 1st June 2002, at which he warned the OMCs that they risked having their licenses revoked or suspended if they continued to defy the ERB directive of reducing fuel prices. By Monday 4th June 2001 none of the OMCs had complied with the ERB order. In order to address this act of defiance from the OMCs, the ERB held consultations with ZCC.

22. Upon reviewing the conduct by OMCs, it was proposed that the conduct by OMCs was in breach of Section 7 of the Competition and Fair Trading Act. Further, Section 6(1)(c) of the Energy Regulation Act provides for concurrent jurisdiction in the energy sector with ZCC: " *In conjunction with the Zambia Competition Commission established by the Competition and Fair Trading Act, monitor the levels and structures of competition within the energy sector with a view to promoting competition and accessibility to any company or individual who meets the basic requirements for operating as a business in Zambia"*

3.1 Evidence gathering in the case

23. The Commission was assisted by evidence of price-fixing, which was received from the disgruntled ex-workers of the OMCs. This led to the discovery of various incriminating correspondence between the OMCs and the ERB. Both the companies and the ERB did not realise that an offence was being made in the competition legislation. There were further interviews with the Chief Executive Officers and senior officers of the oil marketing companies, who cooperated with the verification of the incriminating correspondence.

24. While the ZCC under Section 14 has powers to conduct searches on premises, in this case the Commission did not exercise this power as sufficient evidence was already obtained from the ERB and the OMCs themselves.

4. Conclusions

25. Investigations established, prima facie, that:

- There was an agreement on price increases by OMCs;
- There was an agreement on a standard formula according to which prices were to be computed;
- There was an agreement to adhere to published prices;
- There was an agreement to use a uniform price as a starting point for negotiations;
- There was an agreement not to sell unless agreed-on price terms were met; and
- The conduct of the OMCs appeared to be in contravention of Sections 7 and 9 of the Competition and Fair Trading Act as their joint conduct had the object of preventing price competition to an appreciable extent in Zambia.

4.1 The Commission decision

26. On the basis of the foregoing, the Board of Commissioners of the Zambia Competition Commission determined that all the OMCs, in particular BP, Caltex and Total, should be prosecuted under the Competition and Fair Trading Act for price fixing. The Board also resolved that the OMC trade association, serviced by Caltex, should be abolished as it was providing a forum for cartel activities.

4.2 Succeeding events

27. Despite the overwhelming evidence against the OMCs and the evident breach against Section 7 and Section 9 of the Competition and Fair Trading Act, the prosecution did not take off. There were seemingly some legal technicalities more especially the role of Government in the procurement of fuel and the pricing of the commodity. It was observed that the Government was equally at fault and hence, provided a strong defence to the oil marketing companies if the Commission had opted to prosecute. Further, at the time, there was serious lack of financial and human resource at the Commission to carry out the prosecution. It was considered that the best way forward would be to intensify advocacy activities in the sector and suspend the prosecution.

28. The Commission considered that an administrative action be taken as follows:

- A stern warning be issued to the OMCs;
- A report was made to Government
- Negotiations are instituted with OMCs to ensure that they did not engage in conduct that prevents, restricts or distorts competition. To this effect, undertakings from the OMCs were to be sought;
- The Commission should review the mandate of OMCs and formulate the new mandate for the association.

4.3 Lessons for Zambia Competition Commission

29. It was evident during the investigations that the parent companies of the OMCs were not forthcoming in cooperating in the investigations. Although the Commission managed to establish a prima facie case, it was doubtful whether the evidence located abroad could be easily made available.

30. While cooperation in cartel investigation is resounded at international fora and levels, the Commission's experience shows that cooperation with various allied and interested institutions at the national level is also cardinal to a successful anti-cartel drive. Where key institutions do not and are perhaps not even obliged to cooperate, as in the case of ERB, it would render anti-cartel enforcement ineffective.

31. In view of the above, it would appear a competition specific leniency programme may not necessarily be the panacea to effective cartel investigation and prosecution in the Zambian setting and perhaps, other countries at this level of development.

4.4 Modalities for Cooperation

32. The exchange of information and assistance rendered between competition authorities is an important feature of deepening cooperation. In our COMESA region, cooperation in cartel investigations is increasingly growing. In most cases, this takes the form of informal cooperation among heads of the competition authorities and/or case handlers. This is a result of regional seminars by UNCTAD, which have exposed case handlers in the region to develop close working relationships overtime.

33. Zambia has also established through the Joint Trade Protocol a formal cooperation agreement with its neighbour, Zimbabwe for the exchange of information in competition cases. As a result, there has been substantial 'case-specific' cooperation through exchange of information involving specific cases or investigations. Further, the incidence of cross-border mergers in the COMESA region has increased informal and formal cooperation. This was the case in the assessment of mergers/takeovers involving Cadbury Schweppes and Coca-Cola, Lafarge in the cement industry, British American Tobacco and Rothmans of Pall Mall, etc.

34. As regards institutional cooperation, Zambia and the other countries in the region have benefited from UNCTAD, OECD and the WTO in building working relationships among competition enforcement officials and between national competition agencies. We have also benefited in building consensus on best practices in competition law enforcement. A growing phenomenon in regional cooperation in competition law enforcement is the proposed enactment of the regional COMESA Competition Law and Policy, and the establishment of the Southern and Eastern Africa Competition Authorities Forum. The organisation

provides for exchange of information, for coordination and investigations and proceedings, for positive comity and for consultations.

35. It is possible that at international level, countries with different approaches to cartel enforcement may find it difficult to cooperate successfully. In South Africa for example, most of the information is under the cover of confidentiality and a foreign authority requesting for credible information to combat similar cartel activities in its territory may receive information that is inherently not useful to the cause, despite convergence of the laws. Countries with differing levels of development may also have difficulties in cooperation. While a developed country may have the resources to locate and collect credible evidential information, a less developed country may not reciprocate with similar information due to resource and expertise constraints.

36. Notwithstanding the above, cooperation in combating cartel activity is a relevant starting point to effective enforcement as cartels become more secretive and complex. It is incumbent upon developed competition authorities and multilateral organisations to assist developing competition authorities with appropriate technical expertise and other means for them to effectively attend to the cartel problem both domestically and in the context of international cartel cooperation.

NOTES

1. Simon J. Evenett (the World Bank), Margaret C. Levenstein (University of Massachusetts), and Valerie Y. Suslow (University of Michigan Business School) *International Cartel Enforcement: Lessons from the 1990s*,

2. World Trade Organisation, 1997 Annual Report

3. Anthony Rosen (McDermont, Will & Emery, London), Enhanced Cartel Enforcement Rules Target Executives' Homes, Spring 2003,

DAF/COMP/GF/WD(2006)15

OCDE

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CONTRIBUTION FROM THE EUROPEAN COMMISSION

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. Article 81 of the EC Treaty prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. More in particular the direct or indirect fixing of purchase or selling prices or any other trading conditions, the limitation and control of production, markets, technical development, or investment and the allocation of markets or sources of supply are prohibited.

2. In order to effectively fight these practices, the European Union legislator has given the European Commission extensive enforcement powers. These have most recently been laid down in Council Regulation No. 1/2003[1] and further specified in the Commission Implementing Regulation No. 773/2004[2]. These regulations give the Commission the power, for instance, to carry out unannounced inspections at undertakings or associations of undertakings in order to obtain evidence and, in case a cartel has been detected, to impose fines of up to 10 % of annual (group) turnover on undertakings involved in anticompetitive activities.

2. The definition of a cartel

3. Cartel behaviour can vary in intensity and scope. Hard core cartels are considered to be the most serious infringements of competition rules. Although Article 81 EC does not define the concept of "cartel" (or the concepts of "agreements" or "concerted practices" underlying cartel activities) guidance for the definition can be found from the Commission notices and guidelines.

4. A more detailed definition of a hard core cartel is given in the Commission's "leniency notice"[3]:

> *"This notice concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports. Such practices are among the most serious restrictions of competition encountered by the Commission and ultimately result in increased prices and reduced choice for the consumer. They also harm European industry."*

5. Second, the Commission's guidelines on the method of setting fines[4] set three categories of infringements for the purposes of calculating fines: minor, serious and very serious infringements. Hard core cartels would be seen as very serious infringements, which, following the guidelines "will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardize the proper functioning of the single market".

6. However, the categorisation of infringements into minor, serious and very serious as well as any distinction between "hard core cartels" and other anticompetitive agreements, decisions or concerted practices prohibited by Article 81 EC does not have, per se, an impact on the question of standard of proof. This categorisation serves in first place to determine the level of any possible sanction. The standard of proof stays for all kinds of infringements the same, as long as they lead to an imposition of a fine[5].

3. Agreements and concerted practices

7. As mentioned above, following Article 81 EC the core elements underlying any horizontal cartel activity are agreements between undertakings, decisions by associations of undertakings or concerted practices. Most commonly cartels discovered by the Commission have been based on either publicly known or secret agreements or tacit agreements that express themselves through a concerted practice. The categorisation of the concrete circumstances of the case under the terms ”agreement” or “concerted practice” will have an impact on the question of standard of proof.

8. In EC competition law an **agreement** can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing, no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, to have agreed in advance upon a comprehensive common plan and the concept of agreement would also apply to the inchoate understandings and partial and conditional agreements which are short of definitive agreement.

9. In order to prove the existence of an agreement it is, according to the European Court of First Instance (CFI)[6] “well established in the case law that for there to be an agreement within the meaning of Article [81(1) EC] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way”.

10. An agreement for the purposes of Article 81(1) EC does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the European Court of Justice (ECJ) has pointed out it follows from the express terms of Article 81 EC that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[7]

11. Conduct may as amount to a **concerted practice** even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour[8]. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also be characterised as a concerted practice.

12. To prove the existence of a concerted practice the Commission has to demonstrate in a first place the alleged concertation between the undertakings. Although in terms of Article 81 EC the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market. This presumption applies all the more when the concertation occurred on a regular basis and over time. Consequently such a concerted practice is caught by Article 81 EC even in the absence of evidence of anticompetitive effects on the market[9].

13. Finally in cases of a **complex infringement** over time, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The anticompetitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. It would be artificial analytically to sub-divide what is

clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time[10].

14. Accordingly the CFI has stated that "in the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty".[11]

15. It remains, however, essential for the Commission to prove participation for each individual undertaking concerned. When this burden of proof is met, it belongs to the companies confronted with the evidence of their culpability to prove that this evidence is either insufficient or the conclusions based upon it are unsound[12]... In line with the above the Court spelled out in the *Cement* case: *"When the Commission establishes that the undertaking in question has participated in an anticompetitive measure, it is for that undertaking to provide, using not only the documents that were not disclosed but also all the means at its disposal, a different explanation for its conduct. It follows that the complaints alleging reversal of the burden of proof and breach of the presumption of innocence are unfounded."* [13]

4. Administrative nature of the Commission's proceedings

16. Cartel proceedings conducted by the European Commission are directed at undertakings, not individuals, and accordingly the investigative measures are targeted essentially at undertakings. Also the sanctions imposed by the Commission are administrative in nature. There are no criminal sanctions in EC competition law.

17. However the **administrative character** of the proceedings does not significantly lower the standard of proof which lies upon the Commission in comparison to criminal proceedings found in common law jurisdictions. The Commission *"must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place"*[14]. Furthermore any doubt in the Commission's evidence to prove an infringement of competition rules has to be construed in favour of the suspected undertaking[15]. This means that the undertakings accused *"do not necessarily have to go so far as to show that the Commission's assertions are wrong, but merely had to show that they are unsafe or insufficiently proven".*[16]

5. Direct and indirect evidence

18. To comply with the burden of proving an infringement the Commission can rely on both direct and indirect evidence. It is sometimes hard to make a distinction between these two forms of evidence as there is just a very thin dividing line between them[17] and until now the Community Courts have not given any clear cut definition of the one or the other. On the basis of the case law of the EC Courts, certain principles can, however, be drawn.

19. Firstly, regarding **direct evidence,** which allows the Commission to establish that precisely designated companies (or persons in charge of these companies) concluded an agreement that has as its object or effect to restrict competition, the following principle holds whether the evidence is provided in writing or orally: the greatest probative value comes from the so called "smoking guns", which can be contemporary documents such as formal agreements[18], gentlemen's agreements[19], minutes or notes of meeting or contacts, budget notes and meeting notes[20] or notes about monitoring systems.

20. Corporate statements from undertakings directly involved in the infringement have become more and more important in the Commission's fact finding. The CFI ruled in the *Graphite electrodes case* that such statements may be used as direct evidence and that the Commission can prove an infringement solely on the basis of statements, as long as there is sufficient mutual corroboration of the respective statements[21].

21. It has become a common practice to provide corporate statements in the framework of cooperation under the Commission Leniency Notice. These corporate statements often include recollections of employees involved in the infringement[22]. Finally oral evidence can be obtained during the oral hearings under Art. 27 of Regulation 1/2003.

22. Furthermore, evidence in the form of statements can be obtained at different stages of the procedure. The Commission is entitled to conduct interviews during the inspections[23] or at any time procedure pursuant to Article 19 of Regulation No 1/2003 (the Commission may interview any "natural or legal person" who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation)[24].

23. The Commission also has to bear in mind that a statement by one company accused of participation in a cartel, the accuracy of which is contested by other alleged participants, cannot be regarded as constituting adequate proof of a violation unless it is supported by other evidence[25]. This issue was recently addressed by the CFI in the *Seamless Steel Tubes* case[26]. To prove the cartel, the Commission had relied heavily on a written statement made by an executive of one undertaking during the dawn raid in response to oral requests for explanations. In the decision, it sought to find corroboration for his statement in various contemporaneous documents that each confirmed different parts of the declaration. On appeal, although the CFI acknowledged certain concerns as to the corroborative effect on the statement of a few of the documents, which in some respects contradicted the declarant, it held that the statement was intrinsically "of particularly great probative value" so that the degree of corroboration required was correspondingly less.

24. Summing up the factors cited by the CFI on how to evaluate the probative value of statements, the CFI stressed the importance of the following factors[27]:

- whether the answers had been given on behalf of a company or in an individual capacity;
- was the author under a professional obligation to act in the interest of the company:
- was the author a direct witness speaking from personal knowledge of the facts;
- were the statements made deliberately and after mature reflection;
- did the individual supplement and confirm the statement at a later stage in the investigation;
- was the statement against the own interest of the individual or against the interest of the employing company.

25. The CFI has also pronounced that, if the Commission could not base the proof of incriminating facts exclusively on statements of the accused, or on the statements of other accused undertakings, "*the Commission's burden of proving conduct contrary to Articles* [81] *and* [82] *of the Treaty would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaty*"[28].

26. The notion of **indirect or circumstantial evidence** in contrast comprises of evidence which is appropriate to corroborate the proof of the existence of a cartel by way of deduction, common sense, economic analysis or logical inference from other facts which are demonstrated. For example, the Commission often finds evidence on the precise rates of prices increases implemented by the companies suspected having participating in a cartel. Parallelism of behaviour for instance in price increases is only an indication and does not in itself constitute evidence of collusion and this indication can only be appraised

in the light of the anticompetitive object that the parallel behaviour is supposed to have[29]. It will be necessary, therefore, to uncover other elements of proof or indications from which the existence of collusion may be inferred.

27. Accordingly indirect evidence gains its evidential value normally when it is seen in conjunction with other facts[30].

28. However, by the 1980's, on one hand with the increased awareness in the European business circles of the scope of EC competition law and the fact that the Commission decisional practice also had become stricter as regards to cartels and, on the other hand, with the increased use of modern communication and information technologies by companies, it had become more difficult to discover direct documentary evidence during unannounced inspections (the Commission continued to find direct evidence, but in smaller numbers). Therefore, the use of indirect evidence – in addition to direct evidence - had become indispensable[31].

29. In most cases the Commission will discover only a limited amount of direct evidence explicitly proving unlawful contact between traders, such as the minutes of a meeting, which will normally be only fragmentary and sparse. In these cases it is necessary to reconstitute certain details by deduction. To meet the burden of proof under these circumstances the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules[32].

30. In the Suiker Unie case the Advocate General pointed out that "the evidence of concerted practice may, in most cases, only consist of evidence or presumptions which the investigations of the Commission have brought to light. It is the combination of these presumptions - provided they are strong, precise and relevant - which more often than not alone enables the existence of a concerted action corroborated by the actual conduct of the undertakings concerned to be proved [...]"[33].

31. Consequently the assessment of an infringement can be based on circumstantial evidence if an overall pattern of guilt emerges and in absence of any other reasonable hypothesis that could be predicated on that evidence.

32. As the European Commission is free in choosing the evidence for the demonstration of infringing behaviour and as there is no enumerative list of admissible pieces of evidence, no complete list of indirect evidence can be compiled. However some kinds of indirect evidence are very typical for cartel cases, such as travel orders, travel expenses or diary entries (which can be used to confirm the attendance at a meeting), e-mail or telephone records (demonstrating the fact of contacts without showing the concrete context), meeting invitations, and the constitution of a trade association or economic evidence[34].

33. The past experience of the Commission has shown that it is very difficult to base a decision imposing fines on undertakings relying exclusively or in a large extent on economic evidence[35]. Until now the Commission's efforts to rely on economic data were not seen as sufficient by the European Courts, as the allegedly infringing parties can often come up with plausible alternative explanations for market movements, which were sufficient to render unsafe inferences that might be drawn to support the finding of a cartel.

34. Most essential for the use of indirect evidence is that it always has to be seen in conjunction with all the other direct and indirect evidence available in the concrete case. The picture of a cartel as a whole emerging in a case can be reason enough to interpret one piece of evidence in one way or another. Accordingly the CFI stated in the PVC II case: "*Moreover, items of evidence should be regarded not in*

isolation but in their entirety […] and individual items of evidence cannot be divorced from their context.[36]" This applies with regard to both the pieces of direct and indirect evidence.

35. Finally, it should be mentioned that the quality or the probative value of evidence do not have to be uniform throughout the entire life of a cartel. It is normal that there are gaps or period of lower activity. Evidence should be looked at as a whole.

36. The European Courts have repeatedly confirmed this argumentation, stating that "*an infringement of Article [81] of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. […] When the different actions form part of an overall plan, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole. […] In the context of an overall agreement extending over several years, a gap of several months between the manifestations of the agreement is immaterial. The fact that the various actions form part of an overall plan owing to their identical object, on the other hand, is decisive".*[37]

NOTES

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003 p. 1.

2. Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (the Implementing Regulation), OJ L 123, 27.4.2004, p. 18.

3. Commission notice on immunity from fines and reduction of fines in cartel cases. OJ C 45, 19.2.2002, p. 3.

4. Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ C 9, 14.1.1998, p. 3.

5. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 176.

6. Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

7. Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

8. Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

9. Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

10. Case T-7/89 *Hercules v Commission*, paragraph 264.

11. Judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T- 313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, para 696.

12. Opinion of Advocate General Sir Gordon Slynn in joined cases 100-103/80, SA Musique diffusion Française [1983] ECR 1825, 1931.

13. Judgment of the Court of 7 January 2004 in joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C- 213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and others v Commission*, Para. 132.

14. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 179, see also CfI *Limburgse Vinyl Maatschappij NV and others v Commission*, Para. 517, 518.

15. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 177.

16. CfI *Limburgse Vinyl Maatschappij NV and others v Commission*, Para. 519.

17. *Woodpulp* judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

18. Judgment of the Court of 27 September 1988, *Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz* Süllhöfer, ECR [1988], Page 05249.

19. Judgment of the Court of 15 July 1970, *ACF Chemiefarma NV v Commission*, Case 41-69, ECR [1970], p. 00661.

20. *Graphite electrodes* judgment of the Court of First Instance of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission.*

21. *Graphite electrodes* judgment of the Court of First Instance of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission*, para. 430 f.

22. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 130, 194.

23. Council Regulation (EC) No 1/2003, Art. 20 (2) e).

24. See also Article 3 of the Commission Regulation (EC) No 733/2004.

25. Judgment of the Court of First Instance of 14 May 1998 in case Case T-337/94, *Enso-Gutzeit Oy v Commission.*

26. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission.*

27. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para. 189 f, especially para. 210, 21.

28. CfI: *Limburgse Vinyl Maatschappij NV and others v Commission,* Para. 512.

29. The Judgement of the Court of Justice in Case 48/69 *ICI*, [1972] ECR 619, at paragraphs 66-68.

30. The only case which relied exclusively on indirect evidence (in form of economic studies) was annulled by the court, see Woodpulp Judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

31. CfI *Limburgse Vinyl Maatschappij NV and others v Commission,* Para. 529.

32. Judgment of the Court of 7 January 2004 in joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C- 213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and others v Commission*, Para. 57, 277.

33. Opinion of Mr Advocate General Mayras delivered on 16 June 1975 in *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission*, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, page 2061 - ECR [1975] page 01663; see also: Julian Mathic Joshua: Proof in Contested EEC Competition Cases – A Comparison with the Rules of Evidence in Common Law, European Law Review, Vol. 12, 1987, p. 330.

34. Woodpulp judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

35. Woodpulp judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

36. CfI *Limburgse Vinyl Maatschappij NV and others v Commission,* Para. 529.

37. Judgment of the Court of 7 January 2004 in joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and others v Commission*, Para. 258-260.

DAF/COMP/GF/WD(2006)41

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CONTRIBUTION FROM BIAC

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD at the OECD Global Forum on Competition

PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT*

1. BIAC welcomes the opportunity to provide the views of the business community to the sixth meeting of the Global Forum on Competition on the issue of prosecuting cartels without direct evidence of agreement.

2. The goal of efficient and effective prosecution of hard core cartels is embraced by the business community. Not only are hard core cartels, when they occur, a form of fraud, deception, and theft, but the most usual victims of bid rigging and price fixing cartels are businesses and governments. A significant percentage of cartel cases involve firms whose primary customers are business entities.

3. A failure to effectively enforce competition laws against cartels can often result in direct harm to the business community at several levels, extending to downstream business purchasers. In short, it is the business community as consumers that the antitrust enforcers are often seeking to protect. The business community appreciates and supports these enforcement efforts.

4. On the other hand, the business community can be an unintended victim of misdirected cartel prosecutions. There is also a substantial cost associated with defending an investigation into alleged conspiratorial action. In a typical governmental or agency investigation, parties will spend hundreds of thousands or millions of dollars in legal and administrative fees, and incur enormous expense of human resources – including senior business executives – in order to sort out the facts and comply with requests for information. These are resources which, if spent on innovation or investment, could result in a higher use and greater level of consumer welfare.

5. For every clear-cut cartel case, there are cases in which the evidence of an agreement is unclear. Business arrangements can be complex and their purpose and effect often must be inferred from an array of circumstantial evidence.

6. Given the substantial penalties and fines that can be levied on businesses during cartel prosecutions, BIAC believes that antitrust agencies should be very conservative in pursuing cartels absent direct evidence. Companies can also face great damage to their reputations during a cartel investigation. For a leading public company to be prosecuted by a regulatory authority comes close to "scandal" proportions and can make a very bad impression on investors which can then lead to a substantial fall in stock price. This then punishes the innocent investor. This sort of reputational damage should not be inflicted without very good grounds and a case which is solidly based on reliable evidence.

7. A crucial distinction must be drawn between the presence of parallel conduct in a market and the presence of collusion in a market. In the vast majority of markets, especially those involving undifferentiated products, the presence of parallel conduct is a sign of vigorous competition rather than collusion. This would be observed, for example, where competitors match every price discount of their competitors in order to maximize their sales opportunities. In such a situation, identical prices reflect the competitive process rather than the lack of competitive process.

8. The difficulty is that competitive parallel conduct can appear to be conspiratorial conduct. Therefore, it is vital that investigations of potential collusion not be based solely on parallel conduct in a market and that substantial evidence of actual collusion be adduced before forcing companies to endure such expenses, disruption and reputational damage.

9. The best form of substantial evidence of cartel behaviour will take the form of direct evidence of agreement between the parties. In the majority of cartel prosecutions, the agencies have had access to one or more of the participants in the conspiracy. The evolution of leniency programs in the North America, Europe and elsewhere has not only helped to uncover cartels that otherwise would have gone undetected, but also has helped to ensure that cartel prosecutions and investigations are based on direct evidence.

10. Direct evidence can take the form of either documentary evidence or testimonial evidence. Direct documentary evidence need not take the form of a formal contract or agreement, but may also properly include evidence of an understanding or mode of cooperation or conspiracy short of a formal agreement. BIAC would agree that such evidence should be deemed "direct" evidence sufficient to form the basis of a prosecution.

11. Direct testimonial evidence necessitates the cooperation of a participant or immediate witness to the conspiracy. Testimony of a current or former company employee that was not directly involved in the alleged cartel should be recognized as indirect evidence. While such testimony may have probative value and may, if corroborated, add to the cumulative amount of information on which a cartel prosecution is based, it should not be used as the sole basis for prosecuting a cartel. As U.S. courts have recognized, "a conviction may not be based solely on circumstantial evidence from which a trier of fact could infer facts tending to prove a defendant's guilt, or facts tending to prove his innocence."[1] Under Canadian law, proof of an agreement is a required element of the offence of conspiracy. While the Competition Act provides that the court may infer the existence of an agreement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties, the courts have been reluctant to find an agreement based on evidence of parallel conduct even where there has been communication about the conduct between parties unless it can be proven that the parties did in fact act in concert (*i.e.*, did not make independent business decisions).

12. Indirect evidence will usually take one of two forms: economic evidence suggesting that the defendants were not in fact competing; and non-economic evidence suggesting that the parties had agreed not to compete. Both forms of indirect evidence should be seen as necessary preconditions to form the basis of a cartel prosecution, but independently inadequate to form the basis of a cartel prosecution.

13. Economic evidence often is used to demonstrate that the structure of the market was conducive to making covert price fixing feasible. Typically, this involves analysis concluding that terms of agreement are easy to reach, detecting deviations from the agreement is possible, and punishing those deviations is rapid and meaningful. Economic evidence may also include analysis of the dynamics of the market intended to show that the market behaved in a non-competitive manner.[2]

14. Indirect non-economic evidence will often consist of documents or statements that are not conclusive on their face, but which could be interpreted to suggest that an illegal agreement may be present. These documents are frequently ambiguous and require additional testimonial or circumstantial evidence in order to properly interpret. Moreover, there is a risk that these documents will be used selectively, choosing to consider those which may suggest an illegal agreement while failing to credit those which suggest a competitive environment.

15. The most probative indirect evidence is that which suggests that an explicit agreement exists. Indirect evidence that suggests only the possibility of a tacit agreement is of particularly dubious value.

16. Indeed, basic game theory suggests that a company will anticipate the next move of its competitor and act in anticipation of that next move. Therefore, for example, documents projecting competitors' future actions and reflecting an effort to act similarly are forms of indirect evidence that could easily (but wrongly) be used as a basis for assuming an illegal agreement, but in fact may reflect aggressive competition.

17. In Europe, the Commission has acknowledged that the use of indirect evidence in European investigations has now become indispensable, as direct evidence becomes increasingly elusive from investigators' grasp. With the changing character of international cartels, which now are well aware of antitrust risks posed by their activities and so take increasingly sophisticated means to avoid leaving a paper trail, the Commission now generally relies on a combination of direct and indirect evidence in its antitrust decisions.

18. BIAC understands that indirect evidence may be used in cartel analysis but submits that it is imperative that such evidence only be used where there is also direct evidence of an agreement. Indirect evidence should not be relied upon in and of itself as proof of an agreement under Article 81 EC, Sherman Act §1, or similar regulations. The Commission must sustain its burden of producing sufficiently precise and consistent evidence to support its finding of an agreement and the existence of an agreement.

19. An interesting development in recent years in European cartel enforcement has been the move by the Commission to accept "oral only" leniency statements by companies – *i.e.*, statements offered by the corporate entity itself rather than by an individual employee or witness. BIAC recognizes that the increasing dearth of "smoking-gun" cartel documents, and a greater need to rely on corporate statements and indirect evidence to prove a cartel, not to mention fears over potential discovery in U.S. civil actions, may mean that the European Commission has to be able to accept corporate statements as evidence. However, unlike the U.S. Section 1 offence, an Article 81 EC infringement is not a *per se* violation and cannot be evidenced alone by an admission of an agreement by a corporation's employees. Moreover, corporate statements to the DOJ, as such, are not admissible evidence. If the case were to go to trial, the personnel giving statements may be required to testify on oath in court.

20. The European Court has urged caution in relying on corporate statements and has identified relevant factors that may influence their probative value as direct evidence of an agreement, given as they often are in furtherance of the company's application for potentially significant reduction or immunity from fines and given maybe years after the fact. Yet even within these parameters the Commission has relaxed its evidential standards and gone so far as to accept such un-sworn statements as proof of an agreement itself, rather than limiting them merely to triggers for further in-depth investigation and unannounced raids.

21. It is, in the view of BIAC, an unwelcome development that international cartels in Europe are increasingly being proved by corporate statements which, although technically "direct" evidence, still warrant the same corroboration by additional evidence that "indirect" evidence would, as a matter of course, require. Corporate statements are not put to test: the European Commission procedure is administrative, not judicial, and there is no mechanism for the Commission or other parties to cross-examine witnesses on statements given in furtherance of a leniency application. In BIAC's opinion, such statements should not be accepted, without verification of individual witnesses and corroboration of other evidence, ideally contemporaneous and direct evidence of cartel activities.

22. Finally, there should be a direct correlation drawn between the ability of a company to provide direct evidence of conspiracy and the willingness of the Commission to offer leniency. The Commission's current Leniency Notice[3] is still in relative infancy: it takes a number of years from when a company first starts to cooperate with the Commission to when the final decision is taken, so parties are only just starting

to see decisions under the present leniency program. Only time, and the experience of judicial review by the Courts in Luxembourg, will show how circumstantial evidence will be accepted as a basis for leniency decisions and as a means to prosecution of cartels. Any imbalance between the Commission's reliance on circumstantial evidence on the one hand, and credit given for companies providing such evidence, would be undesirable and could have the effect of chilling the Commission's leniency program.

23. The lack of transparency of the Commission's leniency program means that parties are more or less unaware of the Commission's evidence, not to mention wholly unable to gauge whether any indirect evidence that they produce will be sufficient to corroborate other direct evidence (whatever it may be) of an infringement.

24. In the U.S., the courts have held that mere interdependent parallelism does not establish the contract, combination or conspiracy required by Sherman Act §1.[4] The courts have gone on to hold that even obviously interdependent parallel pricing alone does not infer conspiracy absent certain "plus factors,"[5] or "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amount to a conspiracy."[6]

25. The leading U.S. treatise notes that parallelism, including interdependent parallelism or "tacit collusion" should not be used as the basis for a finding of conspiracy.[7] It is well accepted that mere parallelism, including parallel pricing, cannot form the basis for demonstrating a violation of Section 1 of the Sherman Act. Indirect evidence could be just as consistent with competition as with conspiracy, and if indirect evidence is used to prosecute a cartel and is interpreted incorrectly, it could harm competition, prohibiting practices which are pro-competitive. Instead, courts require proof of "plus factors" designed to demonstrate that express collusion is more than a mere possibility. Importantly, however, the treatise recognizes that while the absence of these plus factors tends to weigh against an inference of conspiracy, the presence of plus factors is not sufficient to allow an inference of conspiracy.[8]

26. BIAC would also like to note the essential difference between cartel proceedings in the U.S. and elsewhere which is that in the U.S. the case is determined by a Court operating under criminal standards of evidence with a higher burden of proof whilst in most other jurisdictions the proceedings are administrative with an ultimate right, albeit very difficult in EU cases, of appeal to a Court on a relatively narrow basis. In such administrative proceedings, it is even more important that reliance on "circumstantial" evidence should not be relied upon unduly given the relative lack of rigour of such administrative processes.

27. While BIAC recognizes the important adjunct role that indirect evidence plays in the proof of cartels, it is equally concerned about reliance on indirect evidence alone as a means of prosecution of cartel cases. While a substantial amount of indirect evidence may, in certain cases, justify the further investigation of facts to determine whether direct evidence exists, the prosecution of cartels in the absence of direct evidence of conspiracy creates a substantial risk of chilling pro-competitive, welfare-enhancing activity. This is particularly true in jurisdictions that allow for fines based on agency prosecution alone without recourse to full judicial process prior to the imposition of fines.

NOTES

* Paper prepared by John Taladay, Partner, and Sara Jordan, Associate, both of Howrey LLP with substantial contribution from BIAC Competition Committee members.

1. *United States v. General Elec. Co.*, 869 F. Supp. 1285, 1290 (S.D. Ohio 1994) (citing *United States v. Leon*, 534 F.2d 667, 676-77 (6th Cir. 1976)).

2. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002).

3. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ [2002] C 45/3.

4. *Brooke Group Ltd. v. Brown & Williams Tobacco Corp.,* 509 U.S. 209, 227 (1993) ("conscious parallelism . . . [is] not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.")

5. *Baby Food Antitrust Litig.,* 166 F.3d 112, 123 (3r Cir. 1999) ("Because the evidence of conscious parallelism is circumstantial in nature, courts are concerned that they do not punish unilateral, independent conduct of competitors. They therefore require that evidence of a defendant's parallel pricing be supplemented with 'plus factors.' . . . They are necessary conditions for the conspiracy inference.")

6. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1433(e) (2d ed. 2003).

7. *Id.* ¶ 1434.

8. *Id.* ¶ 1433-4.

SESSION III

CARTEL CASE STUDIES

DAF/COMP/GF(2006)4

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KEY ISSUES FOR DISCUSSION IN SUB-SESSIONS

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

KEY ISSUES FOR DISCUSSION IN SUB-SESSIONS

1. SUB-SESSION N°1

Japan: Paper Phenol Copper Clad Laminates

- Applicable legal standard: In Japan the legal standard is "liaison of legal intention." When there is no direct evidence of agreement, what evidence in addition to that showing parallel conduct is sufficient to satisfy this standard in Japan? Does the country employ something equivalent to the "plus factor" analysis? What is the experience in other countries?

- Evidence of price discussions in Association meetings: The case report states that evidence of these discussions was contained in records of statements by participants and in the list of participants in Committee meetings. How were the participants' statements obtained? Were they given voluntarily? Were there also relevant documents besides the lists of participants? How do other countries obtain indirect (circumstantial) evidence of this type?

- Economic evidence: Did the Tokyo High Court rely on economic evidence in addition to the parallel pricing (e.g., market structure, analysis of market conditions, possible "action against self interest") in support of its decision? How do competition agencies and courts in other countries evaluate economic evidence?

Latvia: Hens' Eggs

- Interviews with producers – naïve cartels: It seems that the producers willingly gave evidence that implicated them in an unlawful agreement. Why did they do this? Were they "naïve," in the sense that they did not understand that giving this evidence could result in sanctions against them? Have other countries that only recently began an anti-cartel enforcement programme been similarly successful in obtaining evidence voluntarily? Do you expect that obtaining evidence this way will become more difficult in the future?

- Economic evidence: In addition to having strong communication evidence implicating the producers, the Competition Council also developed a significant amount of economic evidence. What are your reactions to this evidence? To the Council's analysis of supply and demand? To the apparent willingness of the price leader (Omega) to permit its rivals to maintain their prices 2 centimes lower than its prices?

- Fines: What fines were assessed by the Council? Did the fact that there was little or no direct evidence of agreement affect the Council's ability to impose large fines? In other countries, has the lack of direct evidence inhibited the ability of the competition agency to impose large fines?

Peru: Mandatory Traffic Accident Insurance

- Parallel conduct: The evidence of parallel conduct was especially compelling in this case – the use of the same actuary; identical, detailed pricing terms. The insurance companies attempted to justify this conduct by claiming that it was necessary for them to share such detailed cost information. Indecopi overcame these claims by showing that other enterprises had calculated their premiums without using this shared information. What defences to parallel conduct have been offered by respondents in other countries? What evidence is considered sufficient to overcome these defences?

- Government mandates: The insurance companies were required to report their prices to a government body. Did this mandate contribute to or facilitate the unlawful agreement in any way? Could the companies lawfully price below the reported prices? We have observed other instances in which there was some aspect of government involvement or regulation. How have these cases been analysed in other countries?

- Industry associations: In all three of the cases in this session the unlawful conduct was carried out through an industry association, and we have observed similar situations in other cases. What are effective investigative strategies for conducting cartel investigations where an industry association is an important part of the violation?

2. SUB-SESSION N°2

Indonesia: Day Old Chick

- Parallel pricing: The case report states that companies concerned by the investigation at one point engaged in a parallel price reduction in relation to a certain customer group. The KPPU did not consider this to be sufficient evidence of a cartel agreement. Did the KPPU assess price movements of the companies under investigation in the period prior to the reduction? What defences to parallel conduct have been offered by respondents in other countries? What evidence is considered sufficient to overcome these defences?

- Subjects of parallel conduct: The report suggests that the companies under investigation entered into very similar exclusive dealing agreements with plasma breeders. Prices are not the only competitive factors which are agreed upon among cartel members. What experience do other countries have with non price fixing cartels? Can indirect evidence typically be obtained to support such cases?

- Retaliation mechanism: According to the report the KPPU would have considered evidence on a refusal to supply a cartel breaker as an important element to support the cartel theory.. What type of retaliation mechanisms have other countries observed in their cartel cases? What was the evidence that pointed to such mechanisms?

Italy: Baby milk

- Comparative pricing analysis: The Authority relied on a comparative analysis of price levels for baby milk in European countries as one of the evidential elements pointing to cartel activity in this sector. What type of justifications did the parties in the case provide for this fact? Which justifications would other countries consider as sufficient to eliminate the indicative value of significant pricing differences?

- Information sharing: Baby milk producers made recommended retail prices available to their competitors. What other types of information sharing practices have other countries encountered in their practice? What do countries see as the essential features in order to qualify the sharing of certain information as evidence for concerted action?

- Government intervention: The unlawful conduct apparently was partially triggered by a request by the government ministry for health to lower prices. How did this fact affect the Authority's analysis of the case? Have other countries encountered cases in which there was such government involvement? What was the result?

Romania: Cement

- Interface abuse – cartels: The investigating authority did initially consider the conduct as an abuse of a (collective) dominant position. Why did it pursue such a parallel theory? Do other countries have experience with cases at the interface or borderline between abuse and cartels?
- Cross-subsidising: The report states that one of the motivations of the price leader in the cartel to engage in concerted pricing was to cross-subsidise aggressive pricing on export markets. What kind of evidence did the authority consider on this issue? How did it obtain the relevant information? Do other countries have experience with similar driving factors for cartels?

- Economic factors: The authority developed a number of economic factors to support its finding of collective dominance. Did the Council take these into account in its finding of a price fixing cartel?

- Structural links: One of the market factors considered by the authority were structural links between the cartel members through Joint Ventures. To what extent have other countries used such links as circumstantial evidence in cartel cases?

3. SUB-SESSION N°3

European Commission: PVC II

- Direct evidence: A variety of direct evidence in the form of documents was obtained. Which piece of evidence is most compelling to you and why? How did the defendants explain the documents that were found? In what ways has direct evidence in your country been rebutted?

- Analysis of evidence: Should evidence be examined individually or in totality? What is the standard in your country?

- Circumstantial evidence: If no direct evidence had been obtained, do you think enough circumstantial evidence was obtained in this case in order to make a finding that a cartel existed? If not, what additional pieces of evidence would you look to obtain? If you think enough circumstantial evidence was amassed, what piece could you eliminate and still conclude that there was a cartel?

Chinese Taipei: Cable TV

- Parallel pricing: This case reports that prices were raised nearly simultaneously by the firms identified in the case. What defenses have been offered by respondents in other countries? What evidence would be sufficient to overcome these defenses?

- Government mandates: This case indicates that cable operators must report their prices to the appropriate authority within a specific period of time. Are such rules necessary and if they are what are the alternatives? Do these rules help or hurt collusive action by firms? If rates cannot be changed for a year what effect does that have on competition?

- Defendants: This case indicates that "certain major shareholders or managers" reached a consensus that they should no longer compete. Under what circumstances does liability extend to shareholders? Were shareholders fined in this case?

- Testimony: Exactly what testimony or other evidence was compiled indicating an admission of guilt in this case? Without such evidence was there enough evidence to find the defendants guilty of price fixing in your opinion? What defenses were raised?

Ukraine: Gasoline

- Economic evidence: This case indicates that a variety of economic evidence was compiled. In particular, price in the area of concern was higher than in other areas, price decreased after the intervention, and the retail price for gasoline was the same for the two defendants yet the two defendants had different purchasing prices for petroleum. What is the value of such evidence? Do you assess each individually or as a whole? What basis would you use to determine whether a piece of economic evidence is significant or not? What type of justifications did the parties use to explain the evidence? Which justifications would other countries consider as sufficient to eliminate the indicative value of significant pricing differences?

- Market price: From the case it is not clear what fraction of consumers bought the plastic cards. Does your opinion of this case hinge upon this fact? Exactly how does the card impact the market price for gasoline? Was the card only a method for monitoring sales of the two companies or was it the vehicle which lead to the higher price? How does knowing the extent of your rival's sales through the plastic card impact the ability of LTD A and B to raise price? Would a cartel have been alleged if LTD A and B's market share were much lower? What other types of information sharing practices have other countries encountered in their practice?

- Parallel pricing: The case indicates that LTD A and B typically set retail prices for light oil products almost simultaneously. How did the defendants explain this fact? What types of evidence in this case leads one to conclude the identical prices are not the result of vigorous competition but rather from collusion?

SUB-SESSION 1

JAPAN

LATVIA

PERU

DAF/COMP/GF/WD(2006)21

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CASE SUBMITTED BY JAPAN

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

PRICE CARTEL OF PAPER PHENOL COPPER CLAD LAMINATES

JAPAN

1. Description of practice or policy concerned

1. In this case, the Japan Fair Trade Commission (JFTC) found that the eight manufactures of paper phenol copper clad laminates, which supplied almost all the relevant products sold in Japan, colluded in a price cartel. Though three major companies out of eight companies expressed their intention of simultaneous price-raising at the meeting of the trade association, the JFTC found no direct evidence to show the cartel agreement made by eight companies.

2. Therefore, the central issue of this case was whether the JFTC could prove the eight companies' concerted act based on the "liaison of intention" to show the existence of cartel regarding the coordinated price-raising of the relevant products. In the lawsuit seeking to overturn the JFTC decision, the Tokyo High Court found that "tacit agreement" could be proved by showing (a) existence of previous exchange of their information and opinions, (b) information and opinions which had been exchanged was related to price-raising of the relevant products and (c) concerted act as a result. Accordingly, the Tokyo High Court concluded that there existed a cartel among eight companies in this case.

2. The factual and legal context including an explanation of why the practice poses a competition problem

2.1 Relevant market

3. The market of paper phenol copper clad laminates for domestic users (including paper polyester copper clad laminates, which is the equivalent of paper phenol copper clad laminates)

2.2 Act applied in this case

4. Section 3 of the Antimonopoly Act (Unreasonable Restraint of Trade[1])

2.3 Main backgrounds of this case

2.3.1 The Japan Thermosetting Plastics Industry Association

5. The cartel members in this case belonged to the "The Japan Thermosetting Plastics Industry Association" ("Association") consisted of manufacturers of thermosetting resin as well as the "Committee of Laminates" which was one of the Association's committees by item and organised by executive officers in charge of the item in each company. The Committee of Laminates had subordinate bodies called "Operations Committee" which consists of directors and section chiefs in each company, "Overseas Committee." The Committee of Laminates also had "Osaka Committee" and "Nagoya Committee," which consist of directors, section chiefs, and branch managers and so on.

2.3.2 Power of influence of price-raising by three major companies regarding the relevant product

6. The relevant product in this case was mainly used for base materials of printed-wiring boards for household electronic appliances such as televisions, tape recorders, etc. The sales amount of the related parties constituted a large share of the whole sales amount of copper clad laminates for printed-wiring

boards at the time of 1987. The total sales of the major three companies accounted for 70% of the relevant market and therefore, movements of these three companies could give a big influence to the market of the copper clad laminates for printed-wiring board.

2.3.3 Market trend and situation regarding the transaction prices of the relevant product on and after 1985 in Japan

7. In comparison with the other copper clad laminates for printed-wiring boards, paper phenol copper clad laminates were mass-produced and not largely product-differentiated. Because of those reasons, the price competition among the manufacturers and distributors was vigorous. Additionally, the manufactures which assembled electrical appliances and were ultimate customers of the relevant products had a significant buying power.

8. Furthermore, the sales price of the relevant product tended to decline for both exporting and domestic users. On the other hand, the material price of the relevant product tended to rise at the time. Considering this situation, the related parties needed not only prevention of price decline but also price-raising of the relevant product.

2.4 Relevant evidence and fact-findings (based on the Tokyo High Court ruling on September 25, 1995)

2.4.1 Existence of previous exchange of their information and opinions

9. Evidence which shows that the members exchanged their opinions regarding the price of paper phenol copper clad laminates, etc., at a committee of the Association and other opportunities since the beginning of 1987. (e.g.; in the "Usual Operations Committee" held on May 21, 1987, they exchanged their opinions regarding the raising of the sales price in Japan of the relevant product after the gradual raising of the export price of it, and then agreed to the policy.)

10. (The evidence can be found in the record of the statement of participants in the meetings and the Committee's participant list.)

11. This evidence proved that all of the eight companies were cartel members and had exchanged their information and opinions.

2.4.2 Information and opinions which had been exchanged were related to the price-raising of the relevant products

12. Evidence which shows that the situation raising the export price of paper phenol copper clad laminates was reported, then that the members exchanged their information and opinions concretely regarding the rate of the raising of the price for domestic users, the price and the time; that the three leading companies which expressed their intention to raise the price of the relevant product subsequently requested the other five companies to follow their decision and to raise the price of paper phenol copper clad laminates and that the other five companies did not object to the three companies' request at the "Temporary Committee," which began at around 1:30 p.m. on June 10, 1987. (This evidence can be found in the record of the statement of participants in the Committee meeting.)

13. This evidence proved that information and opinions which had been exchanged at the committee were related to the price-raising of paper phenol copper clad laminates.

2.4.3 Concerted act as a result

14. Evidence which shows that the eight companies after the said meeting gave instructions in their office to raise the price of paper phenol copper clad laminates and that the eight companies announced their price-raising to their users and requested the same price-raising.

15. This evidence showed that the eight companies concertedly carried out the price-raising of paper phenol copper clad laminate for the domestic users.

16. In accordance with the relevant evidence enumerated above, the Tokyo High Court found that Toshiba Chemical Corporation knew that the other seven companies intended and agreed to raise the price of paper phenol copper clad laminates, and based on the prediction that the other seven companies would raise the price of paper phenol copper clad laminate, Toshiba Chemical Corporation raised the price, which is equivalent to the decision at the committee on June 10, 1987. Therefore, the Tokyo High Court concluded that there existed a concerted action based on "liaison of intention" to raise the price of paper phenol copper clad laminate, Toshiba Chemical Corporation had an intention to follow the other seven companies' price-raising, and the other seven companies were also aware of Toshiba Chemical Corporation's intentions. In other words, even though the companies did not make an explicit agreement to bind upon the related parties, "tacit agreement" among related parties can be found by proving (a) existence of previous exchange of their information and opinions, (b) information and opinions which had been exchanged was related to price-raising of the relevant products and (c) concerted act as a result.

17. Here is the excerpt of the Tokyo High Court decision which noted that showing an explicit agreement is not necessary to prove the liaison of intention regarding a horizontal cartel, but showing a tacit agreement is sufficient to prove the liaison of intention.

18. Lawsuit brought by Toshiba Chemical Corporation seeking to overturn a JFTC decision (Decision issued on September 25, 1995) (tentative translation)

> *In order to prove that the act of the plaintiff corresponds to "concerted actions," which is prohibited by Section 3 of the Antimonopoly Act as Unreasonable Restraint of Trade ("business activities, by which any entrepreneur, with other entrepreneurs, by concerted actions, mutually restrict or conduct their business activities in such a manner as to fix prices, etc., thereby causing a substantial restraint of competition in any particular field of trade" (Section 2(6)), it is necessary to show that "liaison of intention" among entrepreneurs existed at the time of price-raising by these entrepreneurs.*
>
> *The said "liaison of intention" means that an entrepreneur recognizes or predicts implementation of the same or similar kind of price-raising among entrepreneurs and accordingly, intends to collaborate with such a price-raising. In order to prove "liaison of intention," it is not sufficient to show the recognition or acceptance of an entrepreneur's price-raising by another entrepreneur. However, explicit agreement to bind upon the related parties is not necessary to prove "liaison of intention." In other words, "liaison of intention" can be proved by showing mutual recognition of other entrepreneurs' price-raising and tacit acceptance of such a price-raising of another. (It is called "liaison of intention" by a tacit agreement.)*
>
> *By the nature of such an agreement, when companies make an agreement considered as "Unreasonable Restraint of Trade," they usually try to prevent them making such an agreement explicitly to the public. If we interpreted that explicit agreement is necessary to prove "Unreasonable Restraint of Trade," the entrepreneurs could easily slip through the meshes of the law and therefore, it is obvious that such an interpretation is not appropriate to the realities.*

We should consider recognition and intention of the entrepreneurs by examining various circumstances before and after the price-raising and then, evaluate whether there is a mutual recognition or acceptance among entrepreneurs regarding the price-raising or not.

In that point of view, if an entrepreneur exchanges information of price-raising among other entrepreneurs and accordingly, takes the same or similar act with others, it is unavoidable for us to presume that the parties had a relationship to expect the concerted act each other and therefore, the said "liaison of intention" exists unless there is a special occasion to show that the price-raising was implemented individually by a company's own decision that the price-raising is capable of meeting price competition in the relevant market and there is no relationship between that company's price-raising with other companies'.

3. Description of the specific actions taken to solve this problem

3.1 Elimination measures

19. The JFTC ordered seven companies the elimination measures of the context below. (Decision was issued on August 8, 1989.) Tokyo High Court also ordered the same elimination measures to Toshiba Chemical Corporation. (Decision was issued on September 25, 1995.)

3.1.1 The related parties shall abandon the agreement made on June 10, 1987, regarding the raising of the price for the domestic users of paper phenol copper clad laminates.

3.1.2 The related parties shall not take the concerted act to raise the price for the domestic users of paper phenol copper clad laminates in the future and shall decide the price of each party's own will.

3.1.3 The related parties shall notify their customers (distributors and consumers) of paper phenol copper clad laminates of the context of (a) and (b) above. (The way of notification shall be approved by the JFTC in advance.)

3.2 Surcharge[2]

20. The JFTC ordered the seven companies, which accepted the recommendation issued by the JFTC ahead of Toshiba Chemical Corporation, the surcharge payment of a total of 547,190,000 yen (on July 11, 1990). The JFTC also ordered Toshiba Chemical Corporation the surcharge payment of 54,160,000 yen (on August 5, 1996).

4. Final outcome of the case

21. On June 6, 1989, the JFTC issued a recommendation to eliminate the conduct of Unreasonable Restraint of Trade (Price Cartel) to eight companies, and seven companies accepted this recommendation. (Decision was issued on August 8, 1989.) The surcharge payment orders (total: 547.19 million yen) were issued against seven companies on July 11, 1990.

22. However, Toshiba Chemical Corporation did not accept the JFTC's recommendation and requested to initiate the Hearing Procedures. Subsequent to a series of Hearing Procedures, on September 16, 1992 the JFTC issued a decision to eliminate the conduct of Unreasonable Restraint of Trade of paper phenol copper clad laminates by Toshiba Chemical Corporation, as well as by the other seven companies. Toshiba Chemical Corporation filed a lawsuit seeking to overturn the JFTC decision on September 16,

1992 and the Tokyo High Court reversed the decision and remanded the JFTC on February 25, 1994 as the court found the JFTC in violation of due process of the Hearing Procedures.

23. Following this ruling by the Tokyo High Court, the JFTC corrected the Hearing Procedures process and on May 26, 1994 issued a decision which was the same as the decision made on September 16, 1992. Toshiba Chemical Corporation challenged this JFTC decision again and filed a lawsuit to the Tokyo High Court seeking to have the decision overturned, but that claim was dismissed on September 25, 1995. Furthermore, Toshiba Chemical Corporation challenged the surcharge payment order which was issued by the JFTC on August 2, 1993 and requested to initiate the Hearing Procedures. The JFTC issued a final decision with a surcharge payment order of 54.16 million yen on August 5, 1996.

NOTES

1. The term "Unreasonable Restraint of Trade" as used in the Antimonopoly Act shall mean such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or transaction counterparties, thereby causing, contrary to the public interests, a substantial restraint of competition in any particular field of trade. (Section 2(6) of the Antimonopoly Act)

2. When an entrepreneur carries out any Unreasonable Restraint of Trade, the JFTC shall order the entrepreneur concerned to pay a surcharge to the Treasury in the amount equivalent to the total arrived at by multiplying the sales amount of such goods or services, computed in accordance with the method prescribed by the Cabinet Office, for the period from the date on which the entrepreneur was engaged in the business activities considered as implementation of such conduct to the date on which the entrepreneur ceased to engage in said business activities (in a case in which such period exceeds three years, the period shall be for three years retroactively from the date on which the entrepreneur ceased to engage in the business activities considered as implementation of such conduct) by a certain percentage.

   At the time of this case (price cartel of paper phenol copper clad laminates), the said certain percentage was basically 1.5% (2% for a manufacturer, 1% for a retailer and 0.5% for a wholesaler). By the amendment of the Antimonopoly Act which was put into practice on January 4, 2006, the surcharge rate was raised to basically 10% (3% for a retailer and 2% for a wholesaler).

DAF/COMP/GF/WD(2006)22

OCDE

OECD

CASE SUBMITTED BY LATVIA

Organisation for Economic Co-operation and Development 2006
Organisation de Coopération et de Développement Economiques

CARTEL AGREEMENT AMONG HENS' EGG PRODUCERS

LATVIA

1. Summary

1. On December 20, 2002 the Latvian Competition Council established that a cartel agreement existed between Latvian hens' egg producers. The Competition Council based its decision on following evidence: information contained in explanations of suspected undertakings, a fax containing information that prices would be discussed in a meeting of the Association of Egg Producers (hereinafter - Association), invoices showing a trend of price increases after Association meetings, and information about the increased surplus of eggs during the periods of the cartel agreement.

2. The factual and legal context

2. On the 1st of April, 2003 the newspaper KOMMEPCAHT BALTIC DAILY published an article describing a decision of the joint stock company "Omega" to raise its prices by 1 centime (approx. 1,5 eurocents) for 10 eggs. The article also stated that the Association of Egg Producers had recommended that all its members increase egg prices. The abovementioned information was the basis for the Competition Council's decision to initiate an investigation of a potential cartel agreement. Twelve Latvian egg producers are members of the Association, and the Competition Council directed its investigation towards them. Although the price increase for eggs was not large, the Latvian competition legislation prohibits price fixing agreements between competitors regardless of their actual effect in the market.

3. Article 11 of the Latvian Competition Law provides that

> *„(1) Agreements between market participants which have as their object or effect the prevention, restriction or distortion of competition within the territory of Latvia are prohibited and they are null and void from the moment of being entered into, including agreements regarding:*
>
> *1) the direct or indirect fixing of prices and tariffs in any manner, or provisions of their formation, as well as regarding the exchange of information relating to prices or sale provisions;"*

4. Article 1 of the Latvian Competition Law provides the definition of agreement:

> "*11) agreement – a contract between two or more market participants or concerted practices in which market participants participate, as well as a decision taken by a registered or unregistered grouping (association, union and the like) of market participants or by an authorised official of such a grouping.*"

5. The relevant product market is hens' eggs, because there are no close substitutes for this product. The relevant geographic market is Latvia, because there are no substantial egg imports and exports. The share of imported eggs of total Latvian egg consumption is less than 5%.

6. The market share of "Omega" in 2002 was 50%; three other egg producers had market shares from 8 to 11% each, and eight other undertakings had market shares of 4% or less.

3. Investigation of the case

7. Under the Latvian Competition Law which was in force at the time of the investigation the Competition Council had no inspection powers, and the only means for investigating this case was to request that the information be provided.

8. Officials of the Competition Council on the same day and at the same moment visited the three egg producers and carried out interviews with each of the managers. The interviewed undertakings were informed of the purpose of the interviews -- that the Competition Council suspected a possible cartel agreement in the hens' egg market. Later the Competition Council carried out interviews with all egg producers.

9. The interviewees were asked about the problems that were solved within the Association, and several mentioned that discussions and decisions about raising egg prices were the most important issues taken up in these meetings. Some undertakings mentioned that they had received a recommendation not to sell eggs below the margin of 0,2 centimes per egg less than Omega's prices. The interviews disclosed that there were two time periods in which the potential cartel agreement may have had an effect: from June to August, 2002 and from March to April 2003. There were five Association meetings in time period of July-August 2002 and one meeting in March-April 2003. Regarding the July-August 2002 period, several undertakings said that there had been a decrease of egg prices in summer of 2002 and that they achieved an increase of prices with assistance of Association.

10. Regarding the March-April 2003 period, some egg producers said that in an Association meeting of March 14, 2003 they agreed to raise the prices of eggs before Easter. Easter in the year 2003 was on 20th of April for all three of the Christian confessions in Latvia. Some of the smaller producers said that they received a fax from Omega on March 5 inviting them to an Association meeting. They said that they regularly exchanged faxes with Omega containing information about their prices.

11. The Competition Council requested protocols of Association meetings and the Association submitted a copy of the abovementioned fax. The fax was signed by president of Omega in the capacity of president of Association. It listed issues for the agenda of the meeting, one of which was "price policy (the increase of prices is planned starting from April 1, 2003)." After the list of the agenda topics there was the following:

> . . . additionally we inform you that [Omega] is not planning any low price actions in April of this year which means that we will not participate in any actions offered by retailers. Refusing to support the actions offered by retailers, which mostly take place as low price actions, we ensure stable market and good income. Therefore, in order to ensure successful trade in Easter we invite you not to support the actions of retailers of above-mentioned nature.

12. The official protocols of Association meetings did not contain any information which would indicate that price issue was discussed.

13. The Competition Council checked all invoices for the supply of eggs during the relevant time periods, beginning one month before each period, for 3-8 randomly selected customers of every egg producer. These invoices confirmed that prices increased in the relevant periods, that they tended to increase after the Association meetings and that the smaller producers tended to maintain their prices 2 centimes lower than Omega's prices. The prices of one undertaking did not conform to these trends, however, causing the Competition Council to conclude that this firm did not participate in the cartel.

14. In the abovementioned interviews the producers claimed that the principal determinant of prices is demand. The Competition Council conducted the analysis of supply and demand trends relating to every producer of eggs in the two relevant periods. The Council established that almost all egg producers had surpluses of eggs in the period of July-August, 2002, casting doubt on the producers' economic justifications for their price increases. Similarly, there were surpluses of eggs and apparently no increase in demand in the March-April 2003 period, when the prices were increased, except that the demand increased shortly before Easter. In these periods there were no increases of prices of petrol, electricity, grain, or other inputs into egg production.

4. The outcome of the case

15. The Competition Council, considering all of the above evidence as a whole, took the decision that a concerted practice of price fixing and exchange of information existed between 11 Latvian egg producers in the periods of July-August 2002 and March–April 2003 and, therefore, that they violated Article 11, Section 1, Subsection 1 of the Latvian Competition Law. The Competition Council imposed a fine on each egg producer involved in the infringement.

16. The Council established that the object of the concerted practice was to prevent, restrict or distort competition in the territory of Latvia. As noted above, under Latvian law it was not necessary that the Council analyse the effect of the agreement on the Latvian market.

17. The Competition Council stated that every undertaking must determine its commercial policy independently. Although enterprises are not prohibited from adapting unilaterally to the conduct of competitors, any direct or indirect contact between undertakings, the object or effect of which is to co-ordinate or to influence their conduct in the market, is forbidden. The Competition Council established that the evidence shows that the increase of prices was discussed in Association meetings and that exchanges of information took place in the relevant periods. Therefore the egg producers had the ability to act in the market on the basis of their awareness of their competitors' future conduct. The undertakings acted in accordance with the information received in Association meetings and prices were increased.

18. The decision of the Competition Council was appealed in the courts and the appeal is pending.

DAF/COMP/GF/WD(2006)27

OCDE

OECD

CASE SUBMITTED BY PERU

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

FREE COMPETITION COMMISSION V. PERUVIAN ASSOCIATION OF INSURANCE COMPANIES AND INSURANCE COMPANIES

PRICE- FIXING IN MANDATORY TRAFFIC ACCIDENT INSURANCE (SOAT)

1. Antecedents

1. The requirement for Mandatory Traffic Accident Insurance -SOAT- was established by the General Law of Transport in October 8, 1999. However, the provisions related to SOAT did not enter in force until early 2000.

2. Investigation of the Case and the Commission ruling

2. The investigation was initiated ex-officio by the Free Competition Commission of Indecopi by Resolution N º 008-2002-INDECOPI/CLC of July 21, 2002, against the Peruvian Association of Insurance Companies – APESEG – and nine of its member insurance companies. The period of investigation comprised from July 28, 2001 to April 20, 2002.

3. Evidence

3. The investigation process comprised conducting some interviews and sending requests for information to the defendants. It also consisted of the gathering of price information that was advertised to the public. This process allowed the Commission to determine the following evidence, regarding prices advertised (in US dollars):

Vehicle	Pacifico	Sul America	Wiese Aetna	Generali	Mapfre	Rimac	Royal & SunAlliance	La Positiva
Private automobile	60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00
Truck	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00
Taxi	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00
Intercity bus	1250.00	1250.00	1250.00	1250.00	1250.00	1250.00	1250.00	1250.00
Van (collective transport)	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00
City bus	350.00	350.00	350.00	350.00	350.00	350.00	350.00	350.00

4. Other pieces of evidence:

- Record N° 15/2001 of the Committee of vehicles of the Peruvian Association of Insurance companies of December 4, 2001: The insurance companies entrusted the same actuary to calculate the risk premium of the insurance.

- Record N° 16/2001 of the Committee of vehicles of the Peruvian Association of Insurance companies of December 11, 2001: It showed that the insurance companies unanimously approved the technical note elaborated by the actuary, together with the percentages that would be used to calculate administrative expenses, issuance fees and utility.

- Notifications sent to the Superintendence of Banking and Insurance Companies for eight member companies of the Peruvian Association of Insurance companies, signed by the same actuary and with identical content: These notifications recorded for every classification of vehicles, equal surcharges for the expenses of external management (10%), internal management (12,5%), profit margin (5%), issuance fee (3%) and VAT (18%).

- Advertisements in which six member companies of the Peruvian Association of Insurance companies offered to the public the same prices as those that were notified to the Superintendence of Banking and Insurances Companies

- Record N° 02/2002 of the Committee of Vehicles of the Peruvian Association of Insurance companies of February 5, 2002, showing that the companies approved a reduction in price from US$ 60,00 to US$ 55,00.

5. The investigative phase of the proceedings ended with the issue of the report of the Technical Secretary of the Free Competition Commission on December 4, 2002. The report recommended that the Commission declare that the undertakings had engaged in price-fixing, resulting in a violation of article 6 of Legislative Decree Nº 701. In addition, it stated that per se rule should be considered applicable. The technical report was not notified to the defendants.

6. On December 11, 2002, the Commission issued Resolution Nº025-2002-INDECOPI, ruling that the defendants were responsible for price-fixing in the market of the Mandatory Traffic Accident Insurance, in the period between December, 2001 and February, 2002. The sanctions imposed by the Commission were the following:

Interseguros:	5 Tax Reference Units (TRU; 1TRU - US$ 1,000, approximately)
Wiese Aetna:	50 TRU
Pacifico	60 TRU
Mapfre	60 TRU
Royal & SunAlliance	80 TRU
Generali	100 TRU
Sul America	100 TRU
La Positiva	100 TRU
Rimac	100 TRU
Apeseg	20 TRU

4. Appeal and ruling of the competition Chamber of the Tribunal

7. The insurance companies filed an appeal against the Commission's resolution and requested that it be reversed due to the lack of notification of the Technical Secretary's report. This omission, they claimed, constituted a violation of due process, resulting in impairment of defendants' right to prepare a defence. In addition, they claimed that there was insufficient substantiation for the amount of the sanctions imposed by the Commission.

8. The defendants also denied that they had reached an agreement fixing prices. In their view, they had only shared information regarding the actual costs of a mandatory insurance with the characteristics of the SOAT. Finally, they questioned the application of the per se rule, which had been adopted in Peru in the year 1997 by the Chamber of Competition Defence of Indecopi´s Tribunal.

5. Final decision

9. The Competition Chamber of Indecopi´s Tribunal reversed the Commission's resolution on due process grounds, but it found responsibility in APESEG and in the majority of its members, and it established a new precedent of mandatory compliance related to the prohibition of agreements.

10. Regarding the evidence gathered and its sufficiency to prove a price-fixing agreement, the Chamber stated the following:

- The evidence showed that the insurance companies contracted for the preparation of a technical note with one actuary, at a meeting of the Automobile Committee of APESEG.

- Although the companies claimed that they did not have much experience in insurance with the characteristics of the SOAT, there was evidence that at least three of them (or their shareholders) had experience with similar products in other countries.

- There was no need to hire a single actuary. One of the defendants hired a Chilean firm to get advice in the calculation of the premium.

- Even though the companies had engaged a single actuary, the determination of a single premium for all of them should not necessarily follow from this. Again, one of the firms notified the regulator with different values for the risk premium and the commercial premium.

- The notifications the companies sent to the regulator showed an identical cost structure with respect to the risk premium, and the same percentage for administrative expenses, profit margin and issuance fee.

- The investigation proved that at least six of the defendants not only participated in the agreement, but also implemented it, by advertising the agreed price.

- The evidence also showed that the insurance companies later agreed to reduce the minimum premium they would charge by the same proportion (8.33%, for private cars).

11. The ruling of the Chamber applied sanctions to APESEG and only seven of the nine companies, since there was no evidence that the other two had participated in the agreement. It also revised, and reduced, the amount of the fines imposed. The final sanctions were the following:

Pacifico	40 TRU
Mapfre	35 TRU
Royal & SunAlliance	20 TRU
Generali	28 TRU
Sul America	26 TRU
La Positiva	40 TRU
Rimac	36 TRU
APESEG	10 TRU

SUB-SESSION 2

INDONESIA

ITALY

ROMANIA

DAF/COMP/GF/WD(2006)29

OCDE

OECD

CASE SUBMITTED BY INDONESIA

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques
2006

KPPU CARTEL CASE WITHOUT DIRECT EVIDENCE: CASE NO. 02/KPPU-I/2002

1. Allow me first of all to express our appreciation to the OECD Global Forum on Competition for your invitation to join in this Forum and also to give us this opportunity to make our presentation. I hope that you understand that our competition agency is relatively inexperienced, compared to other countries that have been enforcing competition laws for a longer period. On behalf of the Commission for the Supervision of Business Competition of the Republic of Indonesia I convey to you our good wishes for the success of this Forum.

2. This Forum is valuable as a means for exchanging experiences on the implementation of the functions of competition authorities in respective countries, particularly in handling business competition cases.

3. In our country, pursuant to our Law No. 5/1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, a case can begin on the basis of a report, or complaint, by a party who knows or suspects that a violation of the Law has taken place. The report should be clear and complete concerning the violation and should state the reporter's identity.

4. In addition, the Commission can conduct an examination of business actors if there is an allegation of a violation of the Law No. 5/1999 without any report. The information of potential business practices in violation of Law No. 5/1999 could be obtained from reports in the news media or as a result of the Commission's research.

1. Case Reported

5. The case basically concerned an allegation of a price fixing cartel involving Day Old Chicks (DOC) final stock. A report was received from a business association alleging that the cartel participants were JCI Ltd (Reported party I), CPI Ltd (Reported party II), SP Ltd (Reported party III), LASP Ltd (Reported party IV) and WJC Ltd (Reported party V).

6. The report alleged that:

- Each of the five reported parties was vertically integrated poultry businesses. Their operations included breeding farms, grand parent stock and DOC final stock farms, poultry vitamins and medicines, poultry feed and feed raw materials, slaughter houses and chicken meat processing. The organisation of these businesses is shown in Figure 2 below.

- The price of DOC final stock was set collectively by the reported parties.

- Independent, small and medium sized breeding farms could not set their own prices, since the supply of parent stock was dominated by the reported parties, and it was reported that supply of parent stock would be terminated if the small and medium breeding farms sold their DOCs at other than at the decided price.

2. KPPU Clarification

7. The Secretariat of the KPPU conducted an in initial assessment on the basis of the report. In the assessment, the Commission Council did not obtain any letter or document confirming the price fixing agreement alleged in the report. There was one document that the Commission hoped to find, which would

have indicated the existence of a cartel. It would have confirmed that the reported parties refused to supply parent stock to a breeding farm that failed to observe the agreed upon selling price. Unfortunately, the Commission did not find such evidence.

8. Having failed to obtain such direct evidence of agreement, the Commission declared the report to be incomplete. The investigation was cancelled and placed into the List of Reports Book (Book II).

9. The Commission nonetheless pays close attention to the poultry industry, which it considers to be a strategic one. Therefore the Secretariat of the Commission recommended organising a public hearing into the issues raised by the report. Based on the information obtained in the public hearing, the Commission determined that it was necessary to conduct monitoring and evaluation of the DOC livestock market.

3. KPPU Monitoring

10. In performing the monitoring activities, the Monitoring Team found the existence of a violation of Article 11 of the Law no. 5/1999. Based on that finding, the Monitoring Team recommended to the Commission to continue an examination of the market in DOC final stock. The Commission agreed with the recommendation of the Monitoring Team.

11. The following is a summary of the evidence considered by the Commission Council in its examination:

- Figure 1 below describes the process by which DOC livestock is produced. Grand parent stock is used to produce parent stock, which is then sold to DOC breeding farms. The breeding farms produce DOCs, which are sold to independent breeding farmers. These farmers fatten the chickens and sell them in the market.

- JCI Ltd (Reported party I), CPI Ltd (Reported party II), SP Ltd (Reported party III), LASP Ltd (Reported party IV) and WJC Ltd (Reported party V) dominate the production of grand parent stock and parent stock. There exist some small and medium sized breeding farms in addition to those operated by the reported parties, but these independent breeding farms purchase their parent stock from the reported parties.

- As shown in Figure 2, the reported parties are integrated vertically, to the level of the breeding farms. The breeding farms sell their DOCs both to independent breeding farmers and to plasma breeding farmers (the equivalent of independent breeding farmers in figure 1). The plasma breeders enter into a written core-plasma agreement with the integrated (core) producer. This agreement is an exclusive dealing arrangement, whereby the core company will provide all production inputs and the plasma in turns sells all of its output to the core. The profit margin of the plasma will be calculated and paid by the core after all outputs are sold and the revenue determined.

- Exclusive dealing is prohibited by Law No. 5/1999.

- The reported companies differentiate their DOC final stock price selling between plasma breeders and independent breeders.

- DOC final stock prices from breeding farms were in some instances different and in others, similar.

- DOC final stock prices are influenced by demand and supply; it is difficult to determine the companies that are either price leaders or price followers.

- The reported companies could not control DOC final stock production in the short run because it could not be predicted. The supply of DOC final stock is relatively constant in the medium term (one month or longer), however.

- In 1999, the breeder cooperative in Bogor requested the Director General of Breeder Production Cultivation, a government agency, to appeal to the integrated breeders to lower their DOC prices. After discussions between the Director General and the breeders, the prices were reduced.

4. Conclusion of the Monitoring

12. Based on the evidences above, the Commission Council come to the conclusion that:

- The agreements between JCI Ltd (Reported party I), CPI Ltd (Reported party II), SP Ltd (Reported party III), LASP Ltd (Reported party IV) and WJC Ltd (Reported party V) and plasma breeders were in violation of the provision of Law no. 5/1999 prohibiting exclusive dealing.

- The Commission Council did not conclude that the reported parties had engaged in a cartel in violation of Law No. 5/1999.

- The Commission Council recommended that the Commission (KPPU) conduct an examination focusing on the exclusive dealing between the Core Companies and their plasma breeders.

4.1 KPPU Examination

13. The decision of the Commission was based on the consideration of all the facts discovered during the examination, including the agreement between the breeders resulting in reductions in the prices of DOC final stock to livestock cooperatives in Bogor. However, the Commission Council concluded that this agreement was incidental, that it occurred at the end of 1999 and that it did not extend after that period. Thus, this agreement, considered together with the other evidence developed in the examination, was not sufficient proof that there had been a cartel agreement in violation of Article 11 of the Law No. 5/1999

4.2 Closing Statement

14. The KPPU failed to develop evidence sufficient to prove that there had been a cartel in the DOC livestock supply. The KPPU did recommend to the Ministry of Agriculture to revise its regulation on industry partnership between core companies and their plasma breeders in order to avoid the negative impact of exclusive dealing business relationships. It was noted that the existence of the core-plasma partnerships increased the market power of DOC producers.

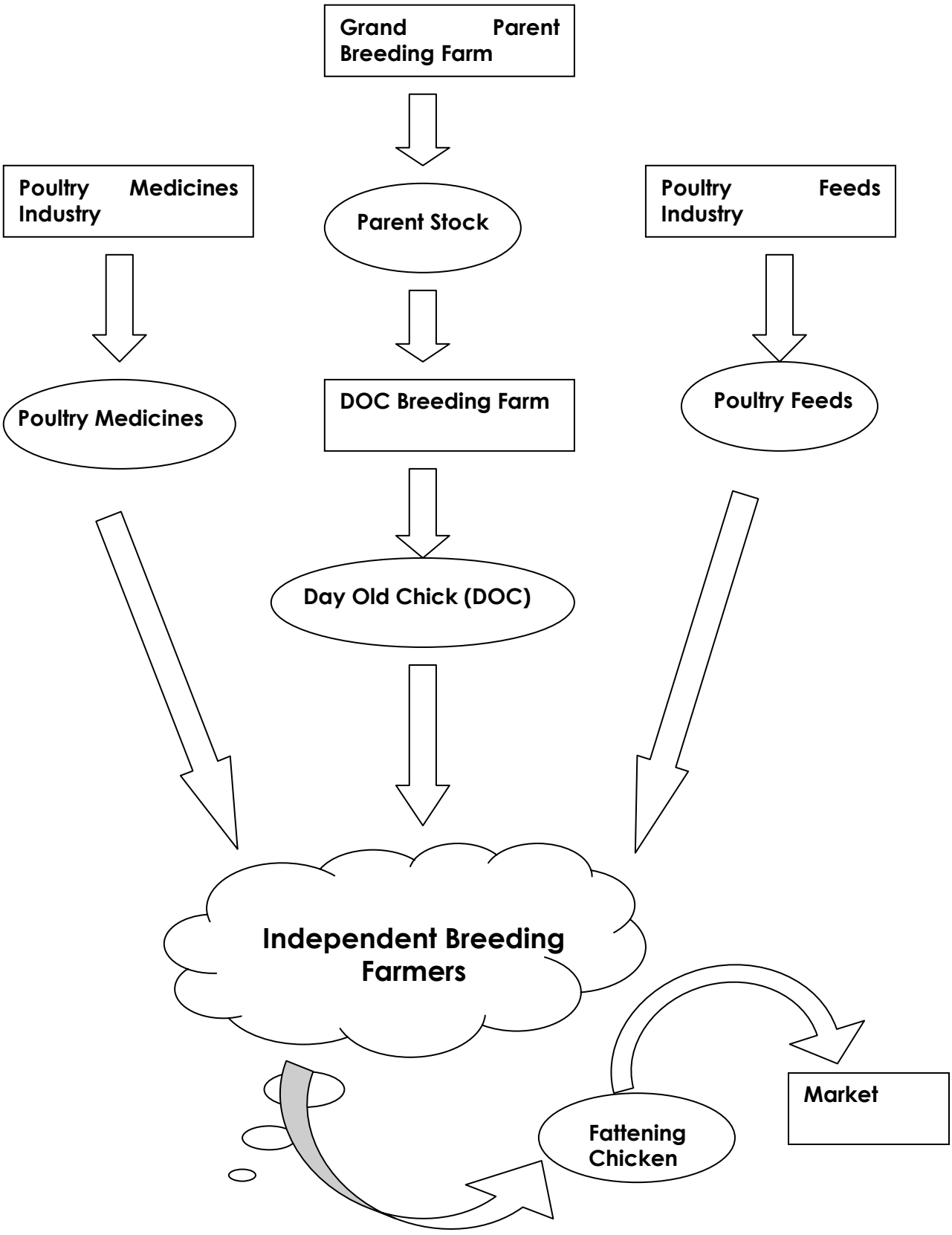


Fig 1. Supply Chain of Independent Breeding Farmers

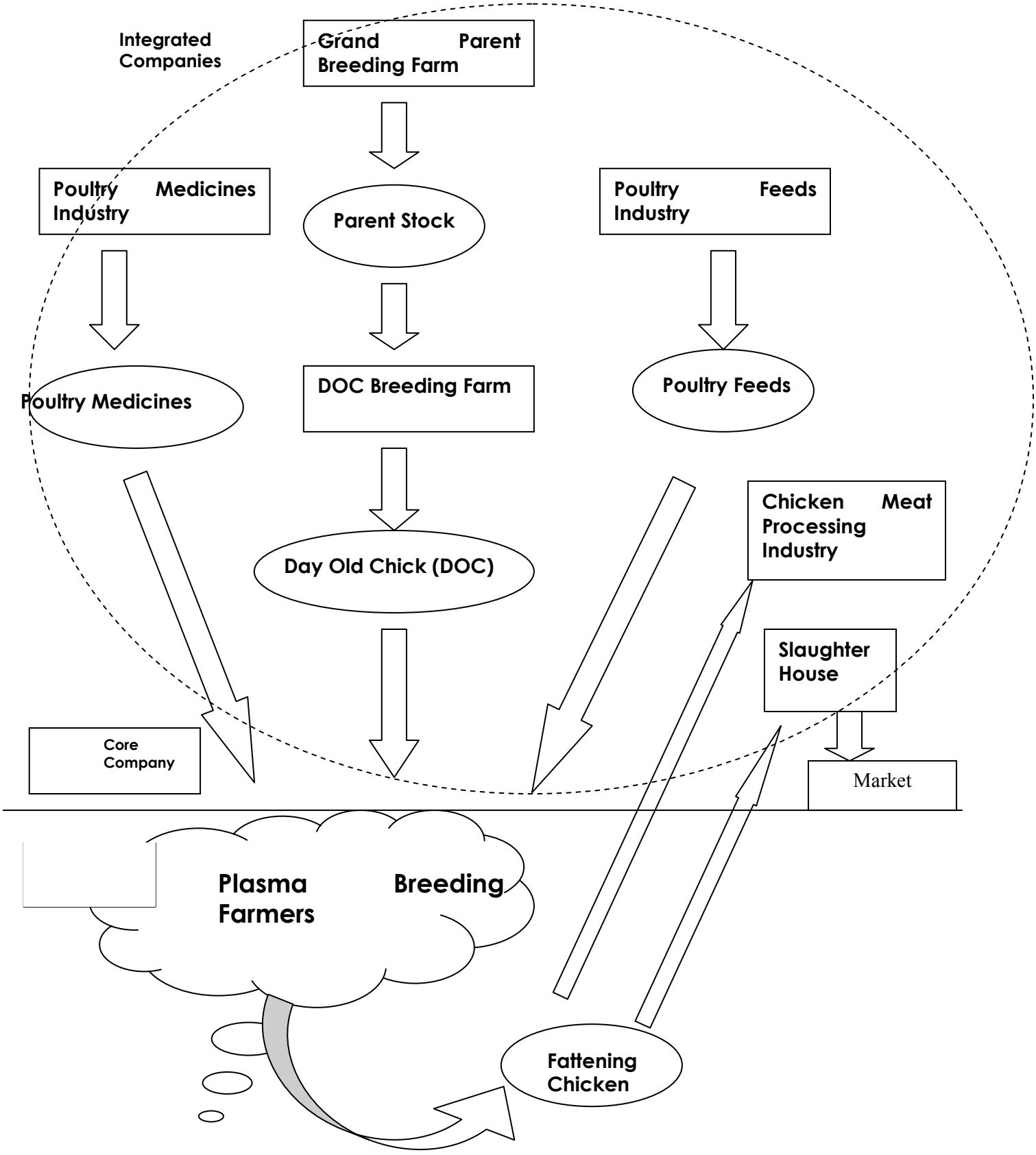


Fig 2. Supply Chain of Plasma Breeding Farmers

DAF/COMP/GF/WD(2006)5

OCDE

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CASE SUBMITTED BY ITALY

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

BABY MILK CASE

1. General introduction

1. In October 2005 the Italian Competition Authority closed proceedings against seven suppliers of baby milk in Italy (Heinz Italy, Plada, Nestlé Italy, Nutricia, Milupa, Humana Italy and Milte Italy) concluding that they had put in place a price agreement contrary to Art. 81 EC Treaty.

2. This was not the first anticompetitive agreement that the Authority sanctioned in the baby milk market. Already in March 2000 Nestlè, Heinz, Nutricia, Milupa, Humana and Abbott were found to have agreed not to sell baby milk outside of the pharmacy sector, a sector characterized in Italy by widely regulated retail margins and by a very low degree of price competition. By distributing only through pharmacies this baby milk producers were able to better control each other and to maintain high prices, in the face of very inelastic demand.

3. In May 2003 and March 2004 the Authority received several complaints by single consumers and by a number of their associations that prices of baby milk were very high in Italy if compared to the prices in other European countries and in particular to those in the Euro area. A preliminary market investigation by the Authority confirmed those complaints. In May 2004, at the same time as this preliminary investigation was carried out, the Ministry of Health made a public announcement that, after an invitation by the Minister, baby milk suppliers had agreed to reduce retail prices by 10%. Consequently, in July 2004 the Authority decided to start a formal investigation in order to assess whether the high prices and the subsequent reductions originated from a restrictive agreement under the meaning of art. 81 EC.

4. In particular the Authority noticed: 1) a significant difference in the prices for baby milk in Italy and those observed in other European countries (for the same brand/quantity); 2) the absence of a valid justification for such high prices; 3) the use by all producers of recommended prices for pharmacies and the wide availability of these lists on the web; 4) that all suppliers had agreed all together to reduce prices at the invitation of the Health Minister; 5) the very limited amount of sales by large-scale distributors; 6) the total absence of parallel imports from low price EU countries.

5. The absence of parallel imports led the Authority to suspect that there was a wider coordination between the national affiliates of the companies involved aimed at impeding the opportunities of price arbitrage. As a consequence the Authority considered it useful to ask for the cooperation of the Member States' Competition Authorities as provided by EC Regulation 1/2003. This Regulation, while making it mandatory for Member State Authorities to bring cases under Community antitrust law whenever applicable, promotes a stricter cooperation among national competition authorities and the Commission, both vertically and horizontally. In particular Regulation 1/2003 provides the possibility for an authority to request the cooperation of another authority in the carrying out of its proceedings. Article 22 '*Investigations by competition authorities of Member States*' provides that '*The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12. 2*'.

6. Applying this provision the Italian Authority asked the French, German and Spanish antitrust authorities to inspect the premises of some of the firms against whom the proceeding had been opened, in order than to share the relevant documents that were to be found.

7. Although the cooperating authorities were very efficient in their inspection activities and solved many problems related to the delivery of the documents seized (the baby milk case was the first case of cooperation among the authorities concerned), a documentary proof of the existence of a general agreement to impede parallel imports was not found.

2. The relevant market

8. Three relevant product markets were defined in the case: the newborn infant formula market, the follow-on milk market and the special baby milks market. Newborn infant formula and follow-on milks address the needs of un-weaned babies at different age, the newborn infant formula being used up until a baby is four months old, while follow-on milk until they switch to regular animal milk. Therefore they cannot be substituted one for the other. Special milks address the needs of babies in pathological situations both in the first months and after the 4th month of life.

9. From a geographic point of view, these markets have a national dimension because distribution is local, internet sales are not developed, baby milk producers follow a national pricing policy (the extent of the relevant market is not smaller than national), baby milk boxes need to have explanations in Italian.

3. The market structure

10. The baby milk sector is characterized in Italy by the presence of a few big operators and a fringe.

11. The largest firms in the marker, Heinz, Plada, Humana, Mellin, Milte, Nestlè, Nutricia and Milupa, hold together more than 90% of all the three markets. Their individual shares are quite stable in time. In terms of market participants, all these firms operate in most other EU member States and there are no other potential entrants. As already mentioned parallel imports from other member States are absent, even though the differences in price are high. Specifically, the prices of baby milk in Italy were in most cases 150% higher than those in other EU member States. In the case of new born formula prices were three times as high with respect to the lowest price country while for follow-on products they were twice as high (see Tables 1-7).

12. The degree of competition in the market was weakened by a number of features. First of all according to Italian law advertising of baby milk is prohibited, even though only for new born formula milk. Producers have autonomously extended this prohibition on all baby milks. Furthermore, a 1994 law allows hospitals to ask baby milk producers to supply them for free. Hospitals have to a large extent benefited from this opportunity and have usually organized a system of shifts where each (major) producer had a two-week exclusivity. Finally the demand of consumers is mainly driven by their paediatricians and it is quite insensible to price savings considerations. As a consequence, producers do not have many incentives to compete aggressively.

4. The results of the investigation

13. The investigation showed that Heinz Italy, Plada, Nestlé Italy, Nutricia, Milupa, Humana Italy and Milte Italy had set up an anti-competitive arrangement, which has had a number of features.

14. First of all, throughout the whole period under investigation, suppliers recommended their retail prices to pharmacists (who all followed) and maintained these price lists on the web sites of pharmaceutical wholesalers, making them available to all suppliers. Furthermore, in 2004, following a request by the Minister of Health to reduce baby milk prices, baby milk producers acted in concert and adopted a common approach aimed at maintaining as far as possible the pre-existing high price regime, making sure that price reductions were coordinated. Indeed during March and April 2004 in special meetings at the heard-quarters of the manufacturers' Association, following the Health Minister's first

invitation to reduce prices, each manufacturer informed everyone else on what they thought of doing. They then evaluated together the best way to reduce prices, but on condition that this would not have disrupted the 'stability' of the market. As regard the individual answer to give to the Minister, the investigation proved that producers agreed that nobody would reduce prices by more than 10%.

15. As already mentioned, the absence of parallel imports from other EU member States could not be attributed to a wider collusionary strategy among baby milk producers. In any case the consumer benefits from parallel imports would have been marginal: the exclusive use of pharmacies as baby milk distributors would not have allowed low price imports to reach directly consumers, leaving final prices more or less unchanged.

5. The evaluation of the Authority

16. The Authority considered that the direct contacts among producers in the case of the Health Minister's invitation to reduce prices and the fact that they agreed not to reduce prices by more than 10% was a direct proof of collusion. Furthermore the fact that in their meetings to discuss how to reduce prices baby milk producers referred to the notion of market disruption convinced the Authority that the wide availability of retail prices information on the web was an important instrument for checking on everybody else's conduct, lending to these high price practices their 'concerted' character.

17. The parties defended themselves by underlying some specific characteristics of the Italian market (low demand, high cost of distribution, high promotional costs) but were not able to explain the relatively high profits they nonetheless had gained on the Italian market.

18. Finally, since the Authority started its proceedings in July 2004, and following several interventions by the Minister, prices in the baby milk market fell by about 25%, while firms continued to be profitable. Along with these price reductions, the decision by some supermarket chains to introduce their own brand low price baby milk and a larger presence of branded baby milk in the large supermarket chains contributed to further reductions.

6. Sanctions

19. The concerted practices by all major baby milk producers had the effect to maintain Italian prices at very high levels. Furthermore producers were able to maintain stable their market shares all throughout the 2003-2004 period. Consumers suffered extensively from this artificial restriction of competition. The Authority issued a cease and desist order and decided to fine the companies concerned around 10 million Euros in total. The appeal to the case is pending.

APPENDIX

Tab. 1 Retail prices for newborn infant formula (euro/kg) in Europe - 2004

	France	Spain	Belgium	Germany	Austrian	Holland	UK
Abbott*		25,19				10,17	
Chiesi**		25,65					
Heinz-Plada							*[5-10%]*
Humana				n.a. (9,32)	n.a. (9,32)		
Mellin***	*[15-20] ([15-20])*						
Milte		*[20-25]*					
Milupa		*[15-20] ([15-20])*	*[15-20]* (n.a.)	n.a. *([10-15])*	*[15-20] ([10-15])*		
Nestlé	23,89 (19,81)	17,22 (14,17)	11,24Beba 14,36 Nan (n.a.)	n.a. (11,13)	19,40 (10,60)	n.a. (9,86)	
Nutricia			*[10-15]* (n.a.)			*[10-15] ([5-10]*)	

Tab. 2 Retail prices for follow-on milk (euro/kg) in Europe - 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott*		18,97				10,17	
Chiesi**		24,05					
Heinz-Plada							*[5-10]*
Humana				n.a. (9,28)	n.a. (9,28)		
Mellin***	*[10-15] ([10-15])*						
Milte		*[15-20]*					
Milupa		*[10-15] ([10-15])*	*[10-15]* (n.a.)	n.a. *([10-15])*	*[15-20] ([10-15])*		
Nestlé	21,26 (16,46)	14,07 (12,95)	11,24 Beba 10,7 Nan (9,99 Beba e Nan)	n.a. (11,03)	19,40 (10,60)	n.a. (9,72)	
Nutricia			*[10-15] ([10-15])*			*[10-15] ([5-10])*	

Tab. 3 Retail prices for special milks (euro/kg) in Europe - 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott*		33,61				n.a.	
Chiesi**		33,04					
Heinz-Plada							*[10-15]*
Humana				17,0 (14,61)			
MJ	*[40-45]*	*[65-70]*	*[35-40]*	*[55-60]*		*[45-50]*	
Mellin***	*[15-20] ([15-20])*						
Milupa	*[15-20]* (n.a.)	*[20-25] ([15-20])*	*[15-20]* (n.a.)				
Nestlé	24,96 (n.a.)	22,36 (21,13)	13,42 (n.a.)	n.a. (16,51)	26,20 (18,30)	n.a. (16,91)	
Nutricia				n.a. *([15-20])*	*[15-20]* (n.a.)		

Tab. 4 Newborn infant formula: % difference in pharmacy retail prices with respect to Italy – 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott (i)		*+[40-50%]*				*+[250-270%]*	
Chiesi		*+[40-50%]*					
Heinz Plada (ii)							*+[320-350%]*
Humana (iii)				*+[320-350%]*			
Mellin (iv)	*+[130-150%]*						
Milte (v)		*+[60-70%]*					
Milupa (vi)		*+[130-150%]*	*+[150-170%]*	*+[200-220%]*	*+[150-170%]*		
Nestlé (vii)	*+[40-50%]*	*+[100-120%]*	*+[150-170%]*	*+[200-220%]*	*+[70-80%]*	*+[230-250%]*	
Nutricia (viii)			*+[150-170%]*			*+[200-220%]*	

Tab. 5 Follow on milk: % difference in pharmacy retail prices with respect to Italy – 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott (i)		*+[80-90%]*				*+[230-250%]*	
Chiesi		*+[30-40%]*					
Heinz Plada (ii)							*+[230-250%]*
Humana				*+[200-220%]*	*+[200-220%]*		
Mellin (iii)	*+[100-120%]*						
Milte (iv)		*+[80-90%]*					
Milupa (v)		*+[80-90%]*	*+[100-120%]*	*+[100-120%]*	*+[60-70%]*		
Nestlé (vi)	*+[5-10%]*	*+[50-60%]*	*+[100-120%]*	*+[100-120%]*	*+[10-20%]*	*+[130-150%]*	
Nutricia (vii)			*+[100-120%]*			*+[120-140%]*	

Tab. 6 Special milks: % difference in pharmacy retail prices with respect to Italy – 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Nestlé	*+[80-90%]*	*+[100-120%]*	*+[250-270%]*	*+[180-200%]*	*+[80-90%]*	*+[180-200%]*	*+[80-90%]*
Nutricia				*+[230-250%]*	*+[150-170%]*		
Milupa (ii)	*+[130-150%]*	*+[100-120%]*	*+[130-150%]*				*+[130-150%]*
Plada							
Star Mellin*	*+[120-140%]*						*+[120-140%]*
Humana				*+[150-170%]*			
Abbott**		*+ [30-40%]*					
Chiesi		*+[40-50%]*					
MJ	*+[20-30%]*	*-[10-20%]*	*+[40-50%]*	*-[1-5%]*		*+[15-20%]*	*+[20-30%]*

Tab. 7 Median price for newborn infant formula 2002

	Italy	Portugal	France	Belgium	Germany	Spain	Austria	Holland	UK
Price	33,4	14,4	14	13,1	12,2	11,4	10,1	9,5	8,8

DAF/COMP/GF/WD(2006)30

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CASE SUBMITTED BY ROMANIA

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

THE INVESTIGATION INITIATED ON THE ROMANIAN CEMENT MARKET

1. The investigation was initiated *ex officio* on March 19, 2001 by the Romanian competition authority, upon observing significant and simultaneous increases of the price of cement by local cement producers, beginning on January 1, 2001.

1. The involved parties

2. The involved parties are: Alfa, Beta and Gamma (member of a German group).

2. The cement sector configuration

3. In Romania, three companies, Alfa, Beta and Gamma, currently control the cement market. Together they own 9 cement plants (three plants each), uniformly spread throughout the country. The three enterprises are each vertically integrated. Until the end of 2002 there was a fourth enterprise operating in the market, Delta, which operated one cement plant, Epsilon. In 2002, however, Delta sold Epsilon to Gamma.

3. The relevant Market

3.1 The product Market was defined as the gray cement market.

4. Cement is a homogenous product used to manufacture concrete, capping and mortar, and prefabricated concrete products for civil and industrial public works, roads, railways, bridges, dams and hydro-electric power stations. Cement is used in some fashion in virtually all types of construction projects.

3.2 The geographic Market

5. In order to establish the geographic market it must be taken into account that because of the geographic dispersion of the plants of each of the three enterprises, each company could serve the entire country. The Competition Council considered that the relevant geographic market for each cement producer was the combined market of the all cement plants that they operated.

6. Thus, the relevant geographic market is the entire territory of Romania.

4. Market analysis

7. The Romanian cement market is oligopolistic. There are only three producers, each operating three cement plants, having roughly the same capacity and uniformly situated throughout the country. Their product is homogeneous. This structure is one that lends itself to various anticompetitive practices forbidden by the Romanian Competition Law.

5. Barriers to the entry on the Market

- The investments required for constructing a new plant are significant (over Euro 200 million).

- The incumbents possess a significant amount of excess production capacity. In Alfa's case, only approximately 33% of the utilised capacity is sold on the Romanian market. The remainder is exported. The other two producers produced only for the domestic market. This explains the fact that imports of cement did not exceed 2% of total consumption during the relevant period.

5.1 The findings of the Report: The investigative report contained the following findings and conclusions:

- Alfa, Beta, Gamma and Delta, which held control over Epsilon plant undertaking acquired in 2002 by Gamma, had infringed the provisions of art. 5(1)(a) and art. 6(a) from Romanian Competition Law (equivalent of art. 81 and 82 from EC Treaty), by participating in a price fixing cartel and by abusing their collective dominant position, imposing resale prices.

- Alfa also infringed the provisions of art. 6 (f) of law, regarding the "selling on the export market below production costs, recovering the losses by imposing increased prices to domestic consumers."

- Beta infringed the provisions of the Romanian Competition Law by failing to observe the conditions that Competition Council imposed in a conditional decision in 2000, when the Council authorised the acquisition by Beta of the Sigma plant from Alfa. The acquisition increased the number of cement plants owned by Beta from 2 to 3.

5.1.1 Collective Dominance

8. The following criteria, among others, indicate the existence of collective dominance in a market, according to decisions by the European Commission and European courts:

- Homogeneous product
  - As noted above, cement is homogenous product.
- Similarities in competitors' costs structures and in their production technologies
  - The production processes employed by the three cement producers are identical as result of standardisation imposed during the period of economic centralisation.
  - Their costs structures are consequently alike.
- Market transparency (regarding prices and sales volumes)
  - Transparency was facilitated by:
    - the exchange of information conducted within the CEMENT Committee of Romanian Cement Professional Association;
    - periodic publication of price lists and other economic and commercial data in industry journals.
- The existence of excess production capacity

- All of the three undertakings possessed a significant amount of excess production capacity. Following are the percentages of installed capacity that the three actually utilised: Alfa-61%, Beta-39%, Gamma-59%. Moreover, as noted above, approximately 2/3 of the production from utilised capacity was exported, in Alfa's case.

- The symmetry of competitors' market shares

  - Alfa-34%, Beta-29%, Gamma-35%, imports–2%.

- The existence of professional associations through which competitors regularly exchange information

  - Within the Romanian Cement Professional Association (CIROM), a Committee entitled the Cement Committee was formed, having as main member's representatives of the three producers.

- Ongoing familiarity among competitors regarding one another's operations

  - information exchanges through the Cement Committee of CIROM, noted above;

  - identical production techniques across the three competitors, noted above;

  - the fact that working meetings of CIROM took place at headquarters of one of the three producers;

  - there were organised "Open Gates Days," when one of the three producers invited the other two to visit one of its plants.

- The existence of structural links between rivals

  - In 2000, Alfa sold to Beta the Sigma cement plant, resulting in both companies owning three plants. In 2002, Gamma bought the Epsilon cement plant from Delta, which also gave it three plants. Thus, the 9 Romanian cement plants were equally divided between Alfa, Beta and Gamma.

  - The three cement producers collectively owned the joint venture X company (described below).

  - Company is the president of CIROM.

- Previous unlawful conduct by the market participants

  - Case IV/33.126 and 33.322- cement (94/815/EC) finalised by the decision of November 30, 1994 (referring to participation in a cartel on the European cement market).

9. Thus, all of the above criteria were met, permitting a finding that the three cement producers were collectively dominant on the Romanian market.

5.1.2 Abuse of Collective Dominance

10. According to the co-ordinated effects theory, collective dominance is manifested by the emergence of a price leader, whose actions are closely followed by its rivals. In this case, the role of price leader role was initially played by Alfa, which, because it sold cement on the export market below cost, was compelled to recover its losses on the domestic market by means of increasing prices above competitive levels. In this way it infringed the provisions of art. 6(f) of the Competition Law no. 21/1996.

11. Alfa could not have sustained its prices on the domestic market without having reached an agreement with the other two producers which, if they had not raised their prices, would have won business from Alfa's customers and increased their market shares. Thus, the three cement producers infringed the provisions of art. 5(1) (a) of the Competition Law no 21/1996 by the concerted fixing of selling prices.

12. An important piece of evidence proving the co-ordination between the three producers was a holographic document written by the president of Beta in June 2001, in which he described the steps to be taken by each producer in order to comply with the arrangement.

13. If the customers of the three enterprises did not accept a price increase, the contracts were unilaterally annulled by the producers. In this event, the customers turned to other producers, but they were not able to negotiate better prices, since the price and discount policies of all of the producers were the same. Moreover, if customers chose to do business with a more distant plant they were faced with higher transport costs. This situation proved that cement customers were dependant upon the producers and were exploited by them, a result forbidden by the art. 6(g) of the Competition Law no. 21/1996.

14. There were additional acts by the three producers which supported the findings of collective dominance and anticompetitive agreements:

- **X** Case:
  - Company, through which they intended to further their control of the Romanian cement market.
- **Y** Case:
  - In December 2002, X company acquired control over Y Company, the sole harbour operator in Romania specialising in cement. Company could control the import of bulk cement into Romania.
- **Z** Case:
  - In January 2003, Alfa, Beta and Gamma jointly entered into an agreement with Z Company for the purchase of slag, a raw material used in cement output.

15. Thus, in all three cases, Alfa, Beta and Gamma engaged in collective activity which had as its object the restriction, prevention or distortion of competition on the Romanian cement market, to the consumer's detriment, conduct forbidden by art. 5 of the Competition Law no. 21/1996.

16. This abuse of collective dominant position, including coordination of prices, began before the initiation of the investigation by the Competition Council (the simultaneous and significant increase of the cement prices in January 2001) and continued during the proceeding.

17. Regarding Alfa, during the entire period of the proceeding, the prices on the domestic market increased, while the export prices diminished. This continuous drop of export prices occurred even under the conditions when relevant fixed costs were not covered, having been supported by prices on the domestic market.

6. The Competition Council Plenum decision

18. The Competition Council Plenum **did not uphold** the following violations alleged in the report:

- The accusation regarding the abuse of collective dominance position by means of imposing resale prices: first, because it is difficult to quantify the effect of such conduct, and second, in this case the report did not present a detailed economic analysis regarding the alleged violation.

- The accusation regarding Alfa's abuse of dominant position by "selling on the export below production costs, recovering differences by imposing increased prices to the domestic consumers." The market shares held by the three cement producers were almost equal, so, in consequence, Alfa did not have a dominant position on the Romanian cement market;

19. The Competition Council Plenum **decided** that:

- Alfa, Beta and Gamma infringed the provisions of art. 5 of the Romanian Competition Law, during 2000 - first quarter of 2004, by participating in a price fixing cartel on the Romanian cement market. The Council determined that Delta, the enterprise that sold its Epsilon plant to Gamma in 2002, lowered its prices after the initiation of the investigation by the Council in 2001, and kept them below the prices of the others until it sold the Epsilon plant. The Council therefore determined that it would not prosecute Delta for participation in the cartel.

20. The three firms were sanctioned with the following fines:

- Alfa - approximately 10,500,000 Euros;

- Beta - approximately 8,000,000 Euros;

- Gamma - approximately 8,600,000 Euros.

21. The Council also annulled the creation of X Company, its acquisition of Y Company and the joint purchasing agreement relating to slag (Z case above), requiring the three producers to sign individual agreements with Z-company, in order to purchase slag

- Beta infringed the provisions of art **56(1)(d) by failing to meet an obligation or condition imposed by the Council** in a Decision authorising the acquisition by Beta of the Sigma cement plant from Alfa in 2000. Beta was sanctioned with a fine of 1% of its total turnover achieved in the financial year preceding the year of the sanctioning, amounting to approximately 1,500,000 Euros. Beta’s sanctioning for the above mentioned infringement was the subject of another Decision.

SUB-SESSION 3

CHINESE TAIPEI

EUROPEAN COMMISSION

UKRAINE

DAF/COMP/GF/WD(2006)20

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CASE SUBMITTED BY CHINESE TAIPEI

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques
2006

CONCERTED ACTIONS IN THE CABLE TV SECTOR

CHINESE TAIPEI

1. The Practice and Policy Concerned

1. In Chinese Taipei, the Government Information Office (hereinafter the GIO) is the competent authority for the cable television market and many related industries, including upstream cable television channel providers and downstream cable television broadcasting system operators. Article 27 of the Cable Television Act of 1993 stipulated that the number of cable television broadcasting system operators in the same service area shall be limited to five. The drawing up and modification of the boundaries for such service areas were publicly announced by the GIO after it had consulted with the Ministry of Transportation and Communications, and in 1994, the GIO announced that there would be 51 service areas nationwide.

2. In February 1999, with its name changed to the Cable Radio and Television Act, the former Cable Television Act was amended and went into effect. This revised law lifted the restrictions that had limited the number of cable television broadcasting system operators in the same service area to five. Even today, most of the existing 51 cable television service areas have only one, or perhaps two, cable television broadcasting system operators, which continues to substantiate an earlier claim that cable TV subscribers do not have many options in terms of cable TV broadcasting system operators. In addition, the revised Cable Radio and Television Act still stipulated that cable TV system operators can only operate (their businesses) in their respective service areas, as originally approved by the GIO.

3. Although price caps were set by the GIO, there has always been room for competing cable TV system operators to engage in price competition. The use of contracts, agreements, or other forms of mutual understanding by competing cable TV system operators to jointly decide on cable TV programming subscription fees has always been governed by the Fair Trade Act which prohibits concerted actions. This is the case even when the subscription fees set by cable TV system operators are below the price caps set by the GIO. Thus, if cable TV system operators were to engage in conspiracy practices in their service areas, it is well understood that such concerted actions would have the effect of limiting market competition, impeding the adjustment of subscription fees, and harming consumer benefits.

2. The Factual Context and the Competition Problem

4. Paragraph 1, Article 51 of the Cable Radio and Television Act states, “system operators shall report the subscription fees to the special municipal or county/city government within one month as of August 1 of each year. The fees shall be announced by the special municipal or county/city government after they have been approved according to the subscription fee standards set by the review committee.” Besides that, Article 13 of the Provisional Measures Governing Cable TV Programming Broadcasting System states, “system operators shall report the next year’s subscription fees to the GIO within one month as of July 1 of each year, and charge subscribers the subscription fees pursuant to the subscription fee standards approved by the GIO.” Accordingly, based on the above Provisional Measures Governing Cable TV Programming Broadcasting System, in December 1998, the GIO formulated the “Standards on Subscription Fees for Cable TV Programming in 1999” to regulate the cable TV programming provided by cable TV system operators. It requires that the subscription fees charged by cable TV system operators be in complete compliance with the standards. Based on the standards, the GIO set the maximum allowable

monthly subscription fees within the range of NT$541 to NT$600. More specifically, if cable TV system operators provide at least 35 channel programming from among 50 popular channels which had been previously investigated by relevant institutions, then the system operators have the right to charge subscribers the maximum allowable subscriptions fees which range from NT$541 to NT$600.

5. Starting in January 1999, the Fair Trade Commission (hereinafter the FTC) was repeatedly receiving complaints that some cable TV system operators had greatly increased their subscription fees to NT$600 per month at the beginning of that month; similarly, other cable TV system operators within the other area had allegedly raised their fees at the same time. The FTC therefore dispatched personnel to conduct questionnaire surveys and undertook investigations in the following cable TV service areas: Taipei city's Neihu and Chungshan districts, Keelung, Hsinchu, Taichung, and Kaohsiung County's Fengshan district. The scope of the investigations covered the alleged changes in the subscription fees, the factors taken into consideration for the increase in the subscription fees, the decision-making process involved and any changes in the cost structure of the relevant operators in 1998 and 1999. The detailed findings uncovered by the FTC, especially in Taipei city's Neihu and Chungshan districts, are discussed in the followings.

6. Cable TV system operators Hsin Yi Huan Le Corporation (H Corporation), Fu Shih Corporation (F Corporation), and Lung Chih Corporation (L Corporation) were operating their businesses in Neihu district, while Chin Pin Tao Corporation (CPT Corporation) and Chang Te Corporation (CT Corporation) were operating in Chungshan district, and all of them had originally used their own different methods to determine the subscription fees they collected on a monthly, semi-annual, or annual basis in 1998. These 1998 fees are shown in the following table.

Corporation	Monthly Fees	Semi-annual Fees	Annual Fees	Other
H	NT$600	NT$3,000	NT$6,000	NT$100-250[1]
F	NT$600	NT$3,000	NT$6,000	NT$100-250[1]
L	NT$300	NT$1,800	NT$3,600	NT$150[1]
CPT	NT$600	NT$3,000	NT$5,000	NT$4,500[2]
CT	NT$300	NT$1,800	NT$3,600	NT$200-500[1]

Note: 1: The monthly charges for each individual subscriber within the same residential building
2: The annual charges for each individual subscriber within the same residential building

7. However, regardless of the previous varying amounts of payment, in January 1999, the 5 cable TV system operators began to collect subscription fees at the uniform rate of NT$600 per month, NT$1,800 per quarter, NT$3,300 for 6 months, and NT$6,500 per year, and NT$450 to NT$500 per month for each individual subscriber within the same residential building. The detailed adjustments to the subscription fees are shown in the following table:

Corporation	Monthly Fees	Quarterly Fees	Semi-annual Fees	Annual Fees	Other
H	NT$600	NT$1,800	NT$3,300	NT$6,500	NT$450-500[1]
F	NT$600	NT$1,800	NT$3,300	NT$6,500	NT$450-500[1]
L	NT$600	NT$1,800	NT$3,300	NT$6,500	NT$500[1]
CPT	NT$600	NT$1,800	NT$3,300	NT$6,500	NT$5,500[2]
CT	NT$600	NT$1,800	NT$3,300	NT$6,500	NT$400-500[1]

Note: 1: The monthly charges for each individual subscriber within the same residential building
2: The annual charges for each individual subscriber within the same residential building

8. As for the changes in the number of subscribers in Neihu district, L Corporation had approximately 5,000 subscribers in January 1998, but this increased six-fold to 31,000 by December of the same year. H and F Corporations had approximately 70,000 and 46,000 subscribers in January 1998, respectively, but these numbers decreased considerably to 60,000 and 40,000 by the end of that year. In Chungshan district, CT Corporation had approximately 10,000 subscribers in January 1998, but this more than tripled to 35,000 in January 1999. CPT Corporation had approximately 72,000 subscribers in January 1998, but this dropped to 61,000 in January 1999. In 1999, the market share of H, F, and L Corporations in the relevant market Taipei city's Neihu district was 46%, 30% and 23%, respectively. Furthermore, CPT, CT, and another company's market share in Chungshan district was 48%, 28%, and 24%, respectively. Since January 1999, however, there have been no apparent changes in terms of the number of subscribers or the market share that the cable TV system operators have had reason to be concerned about.

9. In 1998, the cable TV system operators individually conducted different promotional campaigns to compete for customers. L Corporation employed a lower price strategy to lure customers, and this resulted in some of the original subscribers to H and F Corporations transferring to L Corporation. In response, H and F Corporations conducted give-away promotional campaigns, such as "pay NTD$3,000 for semi-annual fees, and get one electric fan for free", "pay NTD$17,500 for semi-annual fees, and get one air conditioner for free", "pay semi-annual fees, and get the following six-month subscription at no charge", and so on. During the same period in Chungshan district, CT Corporation also conducted a lower price strategy to lure customers, and this resulted in some of the original subscribers to CPT Corporation transferring to CT Corporation. There is no question that the two companies were competing by conducting different promotional campaigns. CT Corporation provided a favourable price "NTD$1,800 for annual fees". Against this, CPT Corporation competed by providing subscribers with give-away gifts, such as "new subscribers can get a free two-month subscription to the China Times newspaper", "original subscribers continuing the service for over a half year are offered one radio or a couple of pens free of charge". After January 1999, the previous price competition and promotional campaigns that had widely prevailed in 1998 had virtually disappeared. Aside from this, group subscribers in residential buildings were given even less room for price negotiation, with their subscription fees being raised shortly thereafter.

10. Until 1999, the cable TV system operators had been engaged in price competition, which unfortunately resulted in huge financial losses. H, F, and L Corporations encountered a financial loss of approximately NTD$98 million, NTD$53 million, and NTD$68 million, respectively. CPT and CT Corporations suffered a financial loss of roughly NTD$100 million and NTD$43 million, respectively. The FTC investigation showed that different costs were incurred for the channel programming purchased by the different system operators. Yet, if we consider the changes in the number of subscribers, no significant differences were found in the average cost of the channel programming for each of the subscribers.

11. Also important to note, many of the same players were involved in different corporations at more-or-less the same time. To cite a few examples, some shareholders in L Corporation were also shareholders in H Corporation. One former manager of L Corporation was also a shareholder in H Corporation. A former general manager of CPT Corporation became general manager of CT Corporation. Moreover, two-thirds of all employees of CT Corporation were from CPT Corporation. The two companies' employees and sales representatives were in fact all acquainted with each other. Even worse, all 5 cable TV system operators admitted that certain major shareholders or managers of some cable TV system operators had attended various non-formal meetings to exchange greetings, have small talk, and in so doing, they reached the consensus that they should no longer compete by lowering prices starting in 1999; they subsequently disclosed information regarding adjustments to their subscription fees. This information was relayed to the decision-makers of the different cable operators and was then used as the basis for the increases in their subscription fees effective January 1999.

12. After completing its investigation, the FTC concluded that the degree of competitiveness in the market had definitively declined in Taipei city's Neihu and Chungshan districts since January 1999. H, F, and L Corporations had approximately 60,000, 40,000, and 31,000 subscribers at the end of December 1998, for a total of more than 130,000. And CPT and CT Corporations had approximately 61,000 and 35,000 subscribers in January 1999, for a total of 96,000. If the cable TV system operators had jointly decided on the subscription fees or coordinated their price increases, then in light of the large number of subscribers and the fact there were no other cable TV system operators in the said service areas, such alleged concerted actions to increase the subscription fees may very well have adversely influenced the function of supply and demand of cable TV programming in those particular markets; hence, this would have been harmful to consumers' benefits.

3. Actions Taken to Solve the Problem

13. Article 7 of the Fair Trade Act defines concerted actions as "by means of contract, agreement or any other form of mutual understanding", where the phrase "any other form of mutual understanding" means other than contract or agreement--that is, a meeting of minds whether legally binding or not which would, in effect, lead to joint actions. "Any other form of mutual understanding" also covers "consistent action" which is so-called tacit understanding, thus referring to cases where the parties enter into conscious communication and expression of intent but do not mean to be legally bound.

14. "Any other form of mutual understanding", as in Article 7, is an extremely uncertain concept, and there remain practical difficulties in acquiring concrete evidence to support invoking the phrase. Therefore, during its investigations, the FTC is always particularly cautious in this regard. As a general rule, whenever it is unable to obtain direct evidence of such non-contractual agreements, the FTC makes every attempt to obtain as much indirect evidence as possible from its observation of competitors with the same or similar conducts in order to support the notion of a "mutual understanding of a cartel" among competitors; with the same evidence, it also attempts to substantiate a "meeting of minds", such as through the public exchange of sensitive market information related to competition, communication of operation strategy, and direct exchange of business information. The FTC contends that such a "meeting of minds" is generally much more than an act of conscious parallelism on the part of oligopolistic enterprises. In addition, the FTC further makes inferences based on its observations of the "inducement, economic benefits, the timing of a price increase, the possibility of substituting different actions, the frequency, the duration of the acts which are deemed harmful to market order, plus the concentration and concordant degree of the conduct."

15. The FTC investigated the 5 cable TV system operators in Taipei city, namely H, F, L, CPT, and CT Corporations in 1998, and it found they had noticeably different subscription fees in 1988; what's more, the system operators had individually been conducting their own different promotional campaigns to compete for customers. In January 1999, however, even though the domestic economy was not conducive to even a marginal increase in subscription fees, the above operators significantly raised their subscription fees, resulting in uniform subscription fees. In essence, as of January 1999, the previous competitiveness in price or preferential activities in the respective service areas had also disappeared. It was determined that because there had been few changes in the numbers of subscribers after January 1999, the degree of competitiveness had decreased. Taking into consideration the uniformity in the subscription fees as of January 1999, the parallel timing of the price increases, the degree of market competition before and after the price increases, and the domestic state of economy, the FTC came to the conclusion that there were no reasonable economic factors to validate the uniform pricing.

16. The 5 cable system operators defended themselves claiming that they had not been engaged in coordinating price increases through formal meeting consultations. They argued that the uniform pricing reached in January 1999 was solely based on the fact they had all sustained a huge financial loss in 1998. For this reason, they went on, they adjusted their subscription fees in accordance with the price caps set in

the subscription fee standards announced by the GIO. In addition, they contended that the uniform pricing was actually the natural outcome of market information circulating fast and that they had not violated the Fair Trade Act. Yet, it could not be ignored that concerted actions had actually occurred because of the in-formal contacts among the major shareholders, managers, sales representatives and employees, among others. Furthermore, there was the issue of "overlap" when it came to hiring managers and shareholders. On these grounds, the alleged acts were deemed to be a form of "mutual understanding" with regard to the raising of subscription fees after January 1999.this was decidedly brought about by both the exchange of market information and a "meeting of minds" to prevent price competition, even though the 5 cable system operators contended that they had individually decided on their respective 1999 subscription fees.

4. Final Outcome of the Case

17. At its 397th Commissioners' Meeting on 16 June 1999, the FTC made the decision that the actions of the 5 cable TV system operators were concerted actions, as defined in Article 7 of the Fair Trade Act, wherein "the conduct of any enterprise, by means of contract, agreement, or any other form of mutual understanding, with any other competing enterprise, acted jointly to determine the price of goods and services." Such actions constituted a "meeting of minds" and, as a consequence, represented prohibited "concerted actions" in violation of Article 14 of the Fair Trade Act.

18. In view of this, the FTC ordered the cable TV system operators to cease such actions pursuant to Article 41 of the Fair Trade Act. In addition, the FTC imposed administrative fines of NT$5 million, NT$2.5 million, NT$2.5million, NT$5million, and NT$2.5million on cable TV system operators H, F, L, CPT, and CT Corporations, respectively. The amount of the fines was determined after taking into account the respective changes in the subscription fees, the number of subscribers, the general business conditions, and the duration of the violations of the different system operators.

19. Besides the disposition on the abovementioned operators serving Taipei city's Neihu and Chungshan districts, the FTC observed and investigated other service areas in question, namely Keelung, Hsinchu, Taichung, and Kaohshung County's Fengshan districts. The FTC found that there was a certain kind of competition in the geographic areas in question and that there were also different subscription fees among competing enterprises. This meant that, there was no concrete evidence to deem a "meeting of minds" had taken place among the competing enterprises, despite the fact there had been a simultaneous raising of subscription fees in the service areas in question. To avoid any decrease in the degree of competitiveness which would have disadvantaged market competition order, the FTC issued warning letters to the cable TV system operators in question and required that they inform the FTC if they were to proceed with promotional activities or adjust their subscription fees for cable TV programming during the warning period which was in effect until 1 September 2000.

20. The FTC is the sole competent authority of the Fair Trade Act. The Act is the general competition law and can be applied to all sectors in Chinese Taipei. However, given that the subscription fee caps for cable TV programming were regulated by the GIO and that conformity in terms of pricing within the subscription fee standards in no way exempts concerted action from the applicability of the Fair Trade Act, the FTC further recommended the GIO urge all system operators, even those charging less than the price caps set by the GIO, not to engage in jointly setting prices or simultaneously raising prices in violation of the Fair Trade Act, if the GIO announces the subscription fee caps for cable TV programming in the future.

DAF/COMP/GF/WD(2006)23

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CASE SUBMITTED BY
THE EUROPEAN COMMISSION

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

DIRECT AND INDIRECT EVIDENCE: THE PVC II CASE

EUROPEAN COMMISSION

1. Introduction

1. The purpose of the present paper is to provide by means of a concrete case example an insight of the European Commission's practice to use indirect evidence in antitrust decisions in order to establish infringements of European competition rules. The analysis will therefore concentrate on a cartel decision issued by the Commission in July 1994 against 12 producers of Polyvinylchloride (PVC), imposing a total fine of 19.25 Million ECU[1]. This decision is commonly known as the PVC II decision as it was based on an earlier decision adopted by the Commission in December 1988, imposing fines on 14 PVC producers, which had been annulled by the European Court of Justice in 1994 on technical grounds[2]. The PVC II decision, read in conjunction with the subsequent judgements of the Court of First Instance and the Court of Justice, gives a good example of the combined use of direct and indirect evidence.

2. Summary of the PVC II case

2.1 The Commission's decision

2.1.1 The product

2. PVC was one of the first bulk thermoplastic products to be developed. It is produced from vinyl chloride monomer (VCM), itself obtained from ethylene and chlorine feedstock. PVC has many important uses in heavy industry and construction as well as varied consumer applications. It can be converted into hard material or - compounded with plasticizers - made into flexible articles, including film. PVC is converted into the various end products by a variety of processes including extrusion, continuous coating, blow moulding and injection. Rigid PVC is mainly used for making pipes and construction materials. Four different types of PVC are produced by various technologies and plant processes.

2.1.2 The Commission's investigations

3. The existence of a possible infringement first came to light in late 1983 during investigations concerning another thermoplastic product, polypropylene. Following inspections conducted in the polypropylene sector in October 1983 further investigation visits were made in November 1983 to ICI and Shell, this time on the basis of authorisations specifically relating to a suspected cartel in the PVC sector. Subsequently during 1984 the Commission was obliged to adopt a decision under Article 11(5) of Regulation No 17[3] requiring ICI to provide information relating to documents discovered at its premises.

4. In January 1987 the Commission carried out investigations without prior warning at Atochem, Enichem and Solvay. More investigation visits were made later in 1987 to Hüls, Wacker and LVM. The Commission was also obliged to adopt a series of decisions under Article 11(5) following the refusal or failure of a large number of undertakings to provide information. In most cases the undertakings maintained their initial refusal.

5. In March 1988 the Commission initiated a proceeding under Article 3(1) of Regulation No 17 against 14 PVC producers. In April 1988 it sent each of those undertakings a statement of objections. All of the undertakings concerned submitted observations on the statement of objections in June 1988. At the

end of the proceeding the Commission adopted the first PVC Decision in December 1988 finding that an infringement had been committed by 14 undertakings and imposing fines.

6. Following the annulment of this decision by the Court of Justice in June 1994[4], the Commission adopted a new decision on 27 July 1994 (the "PVC II" decision) in relation to the producers who had been the subject of the original decision, with the exception of Solvay and Norsk Hydro AS[5].

2.1.3 The Commission's findings

7. The Commission came to the conclusion that from about the end of 1980 until the end of 1984 the producers of PVC supplying the European Community had been involved in a hard core cartel, which was contrary to Article 85(1) of the EC Treaty (now Article 81(1) of the Treaty), in pursuance of which they held regular secret meetings in order to coordinate their commercial behaviour, plan concerted price initiatives, fix target and/or minimum prices, agree target sales quotas for each producer and monitor the progress of the said collusive arrangements. The infringement extended to all EU Member States and covered virtually all trade in the Community.

8. This decision was addressed to Elf Atochem SA, BASF AG, DSM NV, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Montedison SpA, Société Artésienne de Vinyl SA, Shell International Chemical Company Ltd and Wacker-Chemie GmbH.

2.2 The Courts' findings

2.2.1 The Court of First Instance (CFI)

9. Following the appeal of the decision by the addressees of the Commission decision, the Court of First Instance upheld most of the Commission's findings[6]. In its judgement of 20 April 1999 the CFI reduced duration of involvement of one party to the infringement and reduced the fines imposed on three cartel members by between 265.000 and 950.000 euros. The remainder of the applications were dismissed.

2.2.2 The European Court of Justice (ECJ)

10. Finally, in the judgement of 15 October 2002[7], the ECJ confirmed the line followed by the Commission in its decision of 27 July 1994 and also clarified a number of procedural questions relating to the re-adoption of decisions annulled on formal grounds. The judgment of the ECJ annulled the CFI judgement in two points. Firstly the ECJ judged that the CFI wrongly dismissed a new plea raised by one party claiming an infringement of its right of access to the Commission file, secondly it found that the CFI failed to respond to a plea raised by the same party concerning the question of power to impose penalties following the Commission's decision. In all other points the Court of Justice dismissed the appeals.

2.3 Evidence used in the PVC II case

11. In the PVC II decision the Commission based its line of argumentation on a combination of direct and indirect evidence. Consequently not only hard factual evidence was used to prove the existence of a hardcore cartel but also deductions and circumstantial evidence played a decisive role in the argumentation.

2.3.1 Direct evidence

12. In the first place the Commission established an infringement of Article 81 of the EC Treaty relying on direct evidence which had been found in the premises of the involved undertakings. Direct

evidence in this context is understood as any documentary or oral evidence which directly implicates the participants of the cartel.

13. The proofs with the highest direct evidential value in the PVC II case were the following:

- The Commission found two planning documents amounting to a blueprint for the cartel. The first document proposed a new framework of meetings to administer a revised quota system and price fixing scheme, and the second recorded the generally favourable reaction of other producers to this proposal[8].

- Furthermore various documents found referred to a compensation system for PVC in 1981. For example according to a memorandum found at one undertaking headed “Sharing the Pain” the PVC producers “where able to work on agreed market share for 1981”. The PVC compensation scheme however “only allowed for adjustments if a company's or group of companies” sales fell below 95 % of the "target"[9].

- Other documentation showed the exchange of information between the PVC producers on their individual sales in each national market between 1980 and 1984[10]. This exchange was based on the 1980 planning document, which proposed that the meetings of the producers should cover the exchange of monthly data on sales by each producer in each country. Annual reports for the PVC sector found at one undertaking showed that during the whole period covered by the decision the home producers in certain major national markets had informed each other of the tonnages they had sold in that market.

- Finally a document headed “PVC - First quarter” and relating to 1984 was discovered at the premises of one enterprise. It listed the detailed monthly sales of the individual PVC producers for each of the first four months of the year and compared the achieved percentage market shares of each producer in the first quarter of 1984 with a target share[11]. This document allowed the producers a comparison with actual performances

2.3.2 Indirect evidence

14. To strengthen the decision the Commission relied in some extent on indirect or circumstantial evidence. In this context indirect evidence will be referred to as evidence corroborating the proof of the existence of a cartel by way of deduction, common sense, economic analysis or logic operation. Indirect evidence gains its evidential value only if it is seen in conjunction with other (provable) facts.

15. In this context the Commission’s PVC II decision reads as follows:

- Recital 23: “It is inherent in the nature of the infringement with which the present case is concerned that any decision will to a large extent have to be based upon circumstantial evidence: the existence of the facts constituting the infringement of Article 85 [now Article 81] may in part at least have to be proved by logical deduction from other proven facts.

  In the present case besides circumstantial evidence the Commission has also obtained a substantial body of direct documentary proof relating to the facts in issue.”

- Recital 24: “The undertakings have during the administrative procedure attempted to treat each single item of evidence in isolation from the rest; they argue (for example) that there is no evidence that the 1980 plan was ever implemented; that it is not proved that the meetings were concerned with collusive discussions; that price initiatives are not shown to have any

connection with meetings. Allegedly plausible hypotheses are advanced for each item of evidence which (it is argued) is consistent with the non-existence of a cartel or the non-participation of the particular producer concerned. In most cases however the arguments advanced by the undertakings in relation to a particular document find no support in the express terms of the document itself.

The Commission considers that the various items of direct and circumstantial evidence in the present case must be considered together. In particular, the system of regular meetings cannot be divorced from the overall plan proposed in 1980; nor can the price initiatives be isolated from the existence of the meetings, given the clear statement of their purpose in the 1980 ICI plan. Taken in this light, each element of proof reinforces the others with respect to the facts in issue and leads to the conclusion that a market sharing and price fixing cartel was being operated in PVC."

16. In light of the above the Commission used inter alia the following elements of indirect evidence:

- To prove the operation of a system of regular meetings, conclusions of participation in such meetings were drawn from diary entries of the suspected participants at such meetings.

- Industry-wide price initiatives were used to deduce concerted price schemes. In this regard, the decision reads: *"Price initiatives by the industry are frequently described in the producers' internal documentation. […] Given the express intention in the 1980 plan found at ICI to set up meetings to administer such schemes, the Commission is led to the conclusion that the regular meetings were in fact concerned with these subjects.*[12]*"*

- To further prove the exchange of information and the implementation of concerted pricing actions, the decision refers, one the one hand, to *"the phenomenon of uniform industry price initiatives over the period when the undertakings were regularly meeting.*[13]*"*

- One the other hand a logical deduction is made from *"the identical price targets introduced by certain producers due to come into effect on the same day.*[14]*"*

- Finally the decision also relied on rumours in the specialist press reports of "a particular price push or initiative" and about "rumours that a meeting of PVC producers had been held in Paris to discuss market discipline, volume control and set new price targets[15]."

3. The Court's findings regarding the use of indirect evidence

17. In the appeal to the CFI the parties challenged, on the one hand, the probative value of certain types of document used against them by the Commission and, on the other hand, they accused the Commission of infringing the principles concerning the adducing of evidence[16]. More precisely two parties raised the argument that the proof of incriminating facts may not be exclusively based on statements of the accused, or on the statements of other accused undertakings. Concerning this argument the Court laid down in its findings that *"there is no general principle of Community law which prohibits the Commission from using information and documents such as those referred to by the applicants. Secondly, if the applicants' argument were to be accepted, the Commission's burden of proving conduct contrary to Articles 85 and 86 of the Treaty* [now Articles 81 and 82] *would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaty.*[17]"

18. Further to that some parties argued that the Commission had infringed the principle of the presumption of innocence and the burden of proof to which it is subject. These parties submitted that

"whatever practical difficulties the Commission might encounter in adducing evidence, the burden of proving an alleged infringement rests with it, as the counterpart to the wide powers of inquiry which are granted to it. […] For that purpose, the Commission cannot restrict itself to assertions, suppositions or inferences. It must refer to serious, precise and consistent evidence. […] Moreover, there must be a direct causal link between the facts and the conclusions that are drawn from them, which must be reasonably and objectively free of doubt.[18]"

19. Consequently the parties argued that "the undertakings accused of an infringement of Article 85 of the Treaty must be given the benefit of the doubt. In addition, they do not necessarily have to go so far as to show that the Commission's assertions are wrong, but merely have to show that they are unsafe or insufficiently proven.[19]"

20. Regarding the extracts from the trade press the parties submitted that these "could constitute neither evidence nor even an indication of infringement. They were therefore not sufficient to support the Commission's argument.[20]"

21. In reaction to this, the Commission argued that "the use of indirect evidence is permissible. […] That was in any case indispensable bearing in mind the growing awareness in European business circles of the scope of competition law. Moreover, items of evidence should be regarded not in isolation but in their entirety […] and individual items of evidence cannot be divorced from their context.[21]"

22. The CFI rejected the arguments of the parties concerning the adducing of evidence and subscribed to the view of the Commission. Consequently the CFI followed a two step approach in order to scrutinise the use of direct and indirect evidence. In the first step it analysed the reasoning of the Commission, regarding both direct and indirect evidence in conjunction, and concluded if the interpretation of the Commission in the single aspects was convincing. In the second step it put itself in the position of the appealing party and replaced the Commission's interpretation of the evidence with the interpretation presented by the parties.

23. The CFI did not give an opinion on the use of indirect evidence per se and followed, without explicitly mentioning, the view of the Commission, that indirect evidence is an important factor to establish and to corroborate the facts of a cartel case. In all aspects the CFI came to the conclusion, that the interpretations drawn by the Commission were convincing[22]. The alternative interpretations given by the parties did not convince the CFI, as it followed the Commission's approach to read the indirect and direct evidence in conjunction, which often did not leave any space for an alternative interpretation[23].

24. In paragraph 653 of the judgement, for example, the CFI spells out the following principle: "In the light of a meticulous examination of the numerous documents relating to PVC prices produced by the Commission as appendices to the statement of objections, […], the Court considers that it has been established, on the evidence adduced by the Commission, that the 'price increases', 'price initiatives' or 'target prices' to which those documents refer did not constitute mere individual decisions taken by each of the producers independently, but were the result of collusion between them."

25. Regarding the press releases to which the Commission had referred, the CFI states: "Moreover, the excerpts from the trade press annexed by the Commission to the statement of objections confirm those increases on the dates identified by the Commission[24]".

26. The judgement also affirms the Commission's view regarding that "for the purposes of assessing the facts in relation to Article 85 of the Treaty, it is not essential for the date, and a fortiori the place, of the meetings between the producers to be established by the Commission.[25]"

27. The Court of Justice in the PVC II case did not further comment on the questions related to indirect or indirect evidence, stating that "*such an appraisal cannot be reviewed by the Court of Justice, unless the evidence has been distorted*.[26]"

4. Conclusions

28. PVC II shows that the Commission has a significant discretion to use various kinds of indirect evidence in its cartel decision in order to establish infringements of competition rules. However the use of indirect evidence remains subject to scrutiny by the European Courts. Both indirect and direct evidence must always be read in conjunction and the benchmark for using indirect evidence should be the exclusion of any logical convincing alternative scenario disproving the interpretation given by the Commission.

NOTES

1. Commission Decision of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 - PVC), Official Journal L 239, 14.09.1994, p. 0014 – 0035

2. Court of Justice, judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

3. Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21.02.1962, p. 0204 – 0211.

4. The ground for the annulment was that the Commission had not complied with a specific article in its own rules of procedure which requires the Decision of the European Commission to be authenticated in the authentic language versions by the signatures of the President and the Secretary-General.

5. The Commission decision of April 1988 in this case remained valid as regards to these two undertakings, because Solvay had not appealed on that decision and the appeal of Norsk Hydro was dismissed by the Court as it had been filed out of time.

6. Judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931.

7. Judgment of the Court of Justice of 15 October 2002 in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV (LVM) and Others v*

   Commission [2002] ECR I-8618.

8. Commission Decision of 27 July 1994 (IV/31.865 - PVC), Official Journal L 239, 14.09.1994, recital 7.

9. Idem, recital 11.

   Idem, recitals 15, 16.

11. Idem, recital 12.

12. Idem, recital 9.

13. Idem, recital 23 d).

14. Idem, recital 23 e).

15. Idem, recitals 18, 19.

16. Court of First Instance, judgment of 20 April 1999 in joined cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others v Commission,* [1999] ECR Page II-00931.

17. *Idem,* Para. 512.

18. Idem. 517, 518.

19. *Idem,* Para. 519.

20. *Idem,* Para. 581.

21. *Idem,* Para. 529.

22. *Idem,* Para. 605, 609, 653, 661.

23 *Idem,* Para. 598, 612, 633, 668.

24. *Idem,* Para. 643.

25. *Idem,* Para. 675.

26. *Idem,* Para. 441.

DAF/COMP/GF/WD(2006)26

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CASE SUBMITTED BY UKRAINE

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

DESCRIPTION OF THE CASE № 28-26.13/88-03

1. Summary

1. The bodies of the Antimonopoly Committee of Ukraine (AMCU) conduct weekly monitoring of retail prices of petroleum and diesel fuel in the regions. It was found during this monitoring that during a period of about one year the prices of fuel in Dnipropetrovs'k had considerably exceeded prices in all other areas. It became a matter of close attention for the Committee. It was found during the Committee's research that about 15 economic entities operated on the Dnipropetrovs'k market, and that the highest market shares belonged to two economic entities, LTD A and LTD B.

2. After a careful analysis of the contractual relationship between these two operators, the Committee came to the conclusion that they operated concertedly, resulting in a monopolisation of the petroleum retail trading market. In addition, an analysis of their economic activity led to the conclusion that these two economic entities abused their dominant position through the establishment of monopolistic high prices. These conclusions of the Committee were based on economic analysis and on indirect evidence.

3. The decision of the Committee has been appealed during the past two years in courts of different instances. The decision of the Higher Economic Court acknowledged the legitimacy of the decision of the Committee.

2. Legal and factual context

4. In accordance with Parts 1 – 4, Article 12 of the Law of Ukraine "On the Protection of Economic Competition":

- An economic entity occupies a monopolistic (dominant) position on a commodity market, if:
  - there is no competitor on this market;
  - there exist high barriers to entry, such as limited possibilities of access for other economic entities to necessary raw materials, or the presence of privileges or other circumstances favouring the incumbent.
- A monopolistic (dominant) position is defined as the position of an economic entity with a commodity market share exceeding 35 percent, unless the entity proves that it is subject to significant competition.
- An economic entity can also be considered dominant if its market share is 35 percent or less but it is not exposed to substantial competition in the relevant market, in particular as a result of the comparatively small size of its competitors.
- It is considered that two or more economic entities together occupy a monopolistic (dominant) position on a product market if there is no competition between them in a market or together they face insignificant competition.

2.1 Relevant markets

5. Retail trading of low-octane and high-antiknock petroleum within Dnipropetrovs'k city borders.

2.2 Relevant law which is broken

6. Articles 6 and 13 of the Law of Ukraine, "On the Protection of Economic Competition."

2.3 Basic Facts

7. LTD A and LTD B are competitors on the markets of retail trading of high-antiknock and low-octane petroleum on the territory of Dnipropetrovs'k. In 2002 their combined market share on these two markets was approximately 47 and 50 percent, respectively.

8. For a substantial period of time, the prices for oil products established by the above-mentioned economic entities exceeded the price levels in other regions of Ukraine. In particular, LTD A and LTD B raised prices for oil products by taking advantage of a crisis situation that occurred at the beginning of June 2002. At that time, Russia increased the duty for exported oil from 9,2$ to 20,4$ per ton and also took advantage of other objective factors, which caused an increase in prices for all oil products throughout the territory of Ukraine. At the same time, beginning in June 2002, the price level in the Dnipropetrovs'k region and in Dnipropetrovs'k city exceeded the price level elsewhere in Ukraine and in neighbouring regions.

2.4 Relevant facts found by the Committee

2.4.1 Co-operative agreement in the oil products markets

9. The filling stations through which LTD A and LTD B were selling petroleum operated under the trademark of «TNK». These enterprises licenced the use of this brand from the enterprises «TD» and «TNK-Ukraine».

10. Further, the parties signed a formal agreement providing for the following: LTD A and LTD B each sold plastic cards to customers entitling them to purchase a specific amount of fuel at a price established at the time of the purchase of the card. (This arrangement was considered advantageous for the customer because fuel prices were rising quickly at the time.) The fuel could be purchased at the filling stations of both enterprises. Because the agreement effectively provided for the parties to sell one another's fuel, it also provided for the parties to monitor each others sales periodically.

2.4.2 Exchange of information on setting the prices, and documents confirming the simultaneity of prices changes

11. The implementation of this agreement gave to these economic entities the opportunity to monitor the activities of one another, allowing them to predict volumes of production and sale of oil products, the prices at which they would be sold, one another's business strategies, and so forth. It was apparent from the results of the Committee's monitoring of their retail prices and by the fact, noted below, that prices became more competitive following the Committee's decision in this case, that LTD A and LTD B took advantage of these opportunities. The Committee's investigation determined that the filling stations of LTD A and LTD B typically set identical retail prices for light oil products almost simultaneously (within one hour). Thus, the filling stations operated by these two entities had identical and synchronous prices for light oil products during the period 2001 – 2003.

2.4.3 Other proof of concerted action

12. The anticompetitive character of the concerted actions between LTD A and LTD B was confirmed by the following:

- LTD A and LTD B, upon the request of the Dnipropetrovs'k regional territorial branch of the Committee, could not provide any economic or market-based explanations of their pricing behaviour.

- The two enterprises had different purchasing prices for petroleum, but maintained identical selling prices.

- There were interlocking positions occupied by officials in the two enterprises: for example, the director of LTD B A.M. Taranets' took up a position in LTD A as Chief of the Department of Exploitation and of the building of this filling station;

- Under the agreement described above, each entity was effectively selling fuel belonging to the other. Periodically, each enterprise would pay the other for the amount of its fuel that the other sold. This arrangement required that the enterprises periodically "control" one another, or verify that the sums paid corresponded to the actual volumes of fuel sold. Inspections carried out by the Committee confirmed that these verifications had occurred.

13. Also, officials of other economic entities operating in the relevant market stated in responses to questions and protocols from the Committee that their prices of the relevant oil products were based on the prices of LTD B and LTD A.

3. Decision of the Committee

14. The simultaneous competitive behaviour of these economic entities resulted in the elimination of competition between them. This resulted in the monopolisation of the markets of retail trading of low-octane and high-antiknock petroleum in Dnipropetrovs'k.

15. LTD A and LTD B accepted the Committee decision regarding the violation of the competition law. After their acceptance, these agreements were terminated. Within a year from their acceptance of the decision, LTD A and LTD B sold almost all of the filling stations that they owned to other economic entities and exited this market. As a result, since 2003 the markets of retail trading of petroleum in Dnipropetrovs'k have been competitive. Moreover, the retail prices of petroleum correspond to those elsewhere in Ukraine.

4. Decision of the Court

16. By decision of the Economic Court of Kyev, the decision of the Committee of October 14, 2003 № 345-p was ruled to be invalid. In the opinion of the Court, the Committee did not prove the concerted anticompetitive conduct that allegedly resulted in limitation of competition on the market. This decision, however, was abolished by the Kyev Economic Court of Appeal. The Appeal Court's decision was motivated by the fact that the Court of the First Instance did not investigate properly and comprehensively the facts established by the Committee showing co-ordination of conduct by LTD B and LTD A. A Higher Economic Court concluded that there was an absence of grounds satisfying the appeal of LTD B and LTD A. The decree of the Kyev Appeal Court of Ukraine made no changes to the Higher Economic Court's decision, and the appeals of LTD B and LTD A to the Supreme Court of Ukraine were denied. This decision was final, and the decision of the Committee of October 14, 2003 № 345-p came into force.

5. Description of remedies

5.1 Measures

17. By decision of the Committee of October 14, 2003 № 345-p, the actions of LTD A and LTD B were acknowledged as a violation of the competition law and these enterprises were placed under the following obligations:

- Regarding anticompetitive concerted actions: to suspend their agreement of 01.07.01 № 01-08/пр and to resume competitive behaviour.

- Regarding abuse of dominant position: to establish their prices for petroleum solely on the basis of competition on the market.

5.2 Fines

18. By decision of the Committee of October 14, 2003 № 345-p, LTD A and LTD B together were fined the sum about 80 million UAH for these violations.

6. Final resolution of the case

19. The violations were halted; competition on the market is restored. LTD A and LTD B have not yet paid their fines, however. That issue is still contested in the courts.

SESSION IV

PEER REVIEW OF CHINESE TAIPEI'S COMPETITION LAW AND POLICY

DAF/COMP/GF(2006)1/FINAL

OCDE

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PEER REVIEW OF CHINESE TAIPEI'S COMPETITION LAW AND POLICY

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

COMPETITION LAW AND POLICY IN CHINESE TAIPEI

Box 1. Summary

Competition law in Chinese Taipei was an important element of the program of economic reforms that moved the economy from centrally directed emphasis on manufacturing and exports to a market-driven emphasis on services and high technology. The competition legislation, the Fair Trade Law (FTL), follows mainstream practice to cover the basic competition problems of restrictive agreements, monopolies and anti-competitive mergers. The clear statutory basis for concentrating enforcement attention on horizontal collusion is particularly notable.

Including rules about market deception and unfair practices connects the competition law to consumer interests, while also embodying an approach to competition that acknowledges the importance of fair treatment. Respecting that cultural tradition might facilitate the use of rules that are based on a conception of competition in terms of efficiency. But there is a risk that concern about fairness can lead to interventions to correct differences in bargaining power, which could dampen competition rather than promote it.

The Fair Trade Commission (FTC), although formally a part of the Executive Yuan, operates with substantial independence in fact. Its decisions are not subject to revision or reversal based on effects on other policy interests. Some general reforms are in process that would clarify the independence of the FTC and of some other bodies, such as the new communications regulator and the central bank, that should be clearly outside the government decision process.

Much of the FTC's workload is about deceptive and unfair marketing practices. In overseeing competition, the FTC has concentrated on horizontal restraints. Its strongest enforcement action to date was a 2003 decision against cartels in the LPG industry that resulted in fines of TWD 344 million (about USD 10 million). To improve enforcement still further against hard-core cartels, the FTC should implement a leniency programme. The special treatment for price fixing and other agreements among small and medium sized businesses, which sends a confusing signal about the importance of preventing price-fixing, should be eliminated. Sanctions must be sufficient to deter; the cap on fines is low by international comparison. Some other aspects of the enforcement tool-kit should be revised. Most importantly, the merger notification obligation should depend only on reasonably objective criteria, and not on market share. Rights of private action could be strengthened by employing the competition area some procedural innovations that are already used in Chinese Taipei for dealing with consumer claims.

The FTC has been cautious in applying the FTL to problems of monopoly, which are most often due to enterprises with some connection to the government. The FTC has typically preferred negotiation over enforcement, although it has taken stronger measures about the former petroleum monopoly, imposing a fine of TWD 5 million for refusing to supply a new distributor of jet fuel. The FTC's effort to fine a patent licensing pool that refused to negotiate lower royalties was reversed on appeal, though, and the case is still pending.

The most visible regulatory reforms have been in telecoms, particularly in establishing a competitive market for mobile service; however, an independent regulator is just now being set up. The government retains more of a direct interest in the economy than would be implied by the extent of "privatisation", since that label simply means the government shareholding is below 50%. Government holdings can still be substantial enough to affect strategies and policies in ways that could have implications for market competition. FTC vigilance about the risk of cross-subsidy or other distortion remains warranted.

1. Foundations

1. The institutions that support enterprise-based competition in the economy of Chinese Taipei share values of Confucian traditions of governance. Thus the legal tools and approaches of the competition policy system show some parallels with those of Japan and Korea, as well as the influence of other

competition law traditions, especially Germany. And they offer a contrast with others in the region that share these traditions but that have been slower to adopt comprehensive competition laws.

1.1 Context and history

2. The economy of Chinese Taipei is comparatively prosperous, resilient and outward-looking. Measured in terms of overall GDP on PPP basis, it is smaller than South Korea and Indonesia and somewhat smaller than Australia, but somewhat larger than Thailand and substantially larger than Malaysia. The population of 22.5 million is less than half that of South Korea. Chinese Taipei is now relatively well-off, with GDP per capita in 2004 estimated at USD 25 300 (in PPP terms). Chinese Taipei is a major investor throughout Southeast Asia. Its trade surplus is substantial, and foreign reserves are the world's third largest. Financial conservativism and entrepreneurial strength shielded Chinese Taipei from the Asian financial crisis in 1998. The economy did go into recession in 2001, the first year of negative growth it ever recorded, due to a combination of global economic downturn, problems in policy coordination and bad debts in the banking system. Unemployment also reached record levels. But output recovered in 2002 and strong growth resumed in 2003-04. The economy is concentrated now in services (66%). Manufacturing (32%) is mostly high-tech computer hardware, where Chinese Taipei ranks third in the world (after the US and Japan). Agriculture accounts for only 2% of GDP, down from 32% in the early 1950s. Manufacturing is stagnating, as production moves elsewhere, including to the mainland. One exception to that trend is the manufacture of machinery and equipment that is destined for those offshore manufacturing facilities. Another exception is TFT/LCD screens, where Chinese Taipei remains the leading producer (followed closely by Korea); this sector gets government technological support.

3. Development has moved toward technology and services. The pre-1990 economy was characterised by export promotion and domestic protection. Domestic heavy industries were dominated by government enterprises and firms owned by business groups. The system of "authoritarian capitalism" had produced one of the largest government-owned sectors in a market economy. Government-owned enterprises accounted for 57% of industrial production in 1952; in 1986, that was down to 20%. The oil shocks of the 1970s led to some restructuring, while the government retained monopolies in petroleum, electricity, gas, water, steel, railways, shipbuilding, postal service, telecoms, tobacco, liquor and banking. Two investment houses connected to the governing Nationalist (KMT) party controlled some 50 enterprises. About 100 conglomerates, with about 700-800 firms, accounted for 34% of GNP but less than 5% of the workforce, being concentrated in high tech and manufacturing generally. Although Chinese Taipei suppressed domestic competition early in its development history, its market has been more open than many of its neighbours. Chinese Taipei was liberalising trade in goods by the 1980s, and in services by the 1990s.

4. The economy of Chinese Taipei is increasingly integrating with the mainland. Chinese Taipei has made substantial investments in mainland China, despite the lack of direct trade links. China has overtaken the United States to become Chinese Taipei's largest export market. Chinese Taipei joined the WTO in 2002 as a separate customs territory, shortly after mainland China. With services now dominating its economy, Chinese Taipei has supported WTO moves to liberalise trade in services, principally telecommunications, transport, finance and computer services.

5. Approaches to law and regulation draw from several sources. In the Chinese tradition, law is understood principally as an instrument for control, and the courts were part of the bureaucracy. Chinese reformers in the first part of the 20th century drafted a constitution and adopted statutes and codes that borrowed from European models, principally German. The link to German civil code traditions remains strong. Many legal scholars in Chinese Taipei studied in Germany, and the laws tend to follow the German approach. The academics who were commissioned to draft the competition law included some from the

Law Faculty of National Taiwan University who followed German legal concepts. By contrast, most academic economists have studied in the United States.

6. Policy attention to market competition has a long lineage, although the usual tendency was to suppress it. Rules against monopolisation and price-fixing can be found as far back as the code of the Tang dynasty. But central control has also been prominent. Cultural distrust of traders led readily to reliance on price controls and state regulation or ownership of resources and production. The private sector joined in anti-competitive restraints. Guilds were enforcing price fixing agreements at the turn of the 20th century. As late as the mid-1980s, courts in Chinese Taipei were entertaining private competition suits in the form of complaints that competitors were cheating on cartel agreements. Meanwhile the government commonly intervened to protect the interests of enterprises.

7. Liberalisation was a product of the 1980s, and competition law was part of that project. The president's policy address in 1984 announced a new economic policy approach, of internationalisation, liberalisation and institutionalisation. This came during a period of economic crisis, which included a run on a financial institution and the resignations of the Ministers of Finance and of Economic Affairs. A Committee for Economic Reform, convened by Premier Yu, recommended in 1985 a collection of fundamental changes which would lead to liberalizing the domestic economy, privatizing many government owned firms, reducing tariffs and non-tariff barriers, permitting foreign banks and liberalizing capital flows. One of the changes would be a modern, comprehensive competition to replace the Price Supervisory Board, which had tried to co-ordinate supply and demand by fiat.

8. A draft Fair Trade Law was sent to the legislature in 1986. The Ministry of Economic Affairs had enlisted a group of academics to prepare it. The government said the law was needed to constrain monopolies and cartels that had been unleashed by liberalization and to control unfair practices. In addition, there was international pressure about intellectual property issues, particularly from the United States. Trading partners wanted Chinese Taipei to adopt laws about unfair competition problems such as misappropriation or misuse of trademarks. They were less concerned about whether Chinese Taipei adopted an antitrust law.

9. The controversial competition law was enacted only after years of debate. One reason for the delay was that momentum for economic reforms stalled in 1985, when attention turned to political reform. Although the competition law was proposed by the government, the new approach would threaten monopolies, public and private, that were connected with patronage. The opposition welcomed the proposal as a tool to break up channels of incumbent power. Issues in the debate were the need for a competition law at all, the effect of merger control on efficiency and the accountability of an independent enforcer. Proponents stressed that enforcement against unfair practices such as misrepresentation and pyramid sales schemes would be much more aggressive than against anticompetitive restraints. To encourage passage, the government agreed to a one-year moratorium on enforcement.

10. The treatment of the enforcer's independence evolved as the political situation changed. The law was drafted while martial law was still in force. Following the style of legislation from that era, it grants broad discretion to the enforcement body. Originally, that was to have been a unit within the Ministry of Economic Affairs, so application would have been subject to government control. But the law was enacted after the martial law decree was lifted. In the new circumstances, it was necessary to elevate the enforcer to an independent status. The enforcer would report to the Executive Yuan directly, not to the Ministry of Economic Affairs that had sponsored it. The Fair Trade Law (FTL) was finally enacted in 1991. The Organic Statute providing for the organization of the Fair Trade Commission (FTC) to administer the law was passed 13 January 1992, and the FTL became effective a month later, 4 February 1992.

11. The FTL has been amended several times since then, to improve efficiency and strengthen enforcement. Amendments in 1999 replaced criminal penalties for monopolization and concerted action with administrative fines, and eliminated the register of dominant enterprises. Amendments in 2000 dealt with administrative practices. Amendments in 2002 revised the merger notification system and improved procedural transparency. Further changes are likely, as the FTC is developing a leniency program, which will require a legislative basis. The FTC is also preparing a clarification of the law about horizontal agreements to remove restrictions that might reduce the incentive for innovation of research and development joint ventures.

1.2 Policy goals

12. The law prescribes multiple goals for competition policy. These are to maintain trading order, protect consumers' interests, ensure fair competition and promote economic stability and prosperity. (Article 1)[1] Unusually, the term "competition" is specifically defined, in terms of rivalry for transaction opportunities by enterprises offering better prices or superior quantities, quality, service and other conditions. (Article 5) Official statements about enforcement policies and legislative objectives generally repeat these same elements, without further explanation of their relationship or priority. For example, the objectives given for revising the merger control regime do not indicate a policy direction, other than enabling firms to remain competitive and efficient while preserving market competition.

13. Fair competition appears to be the dominant objective. The definition of competition implies that the law is more concerned about process and fairness than about welfare effects. The prominence of process issues, of order and stability, in the statement of goals reinforces that impression. Emphasis on fairness would be consistent with tradition. In the trade-off between efficiency and fairness, Chinese culture has favoured fairness. A century ago, the reforming vision of Sun Yat-sen was a fair and affluent society based on moderate socialism. General policy goals in basic law, which were drafted in the 1940s, sound sceptical of the benefits of economic competition, calling for "equalisation of land ownership and restriction of private capital in order to attain well-balanced efficiency in national wealth and people's livelihood."[2] In modern practice, the FTC's decisions and its attention to guidelines about the conduct of large distributors show a concern about fairness in bargaining relationships.

14. The law's reference to protecting consumers' interests was added in the legislature. In explaining what this is taken to mean, the FTC again emphasises process over welfare measures. It is not understood in terms of the personal interests of individual consumers. Rather, consumers' interests are protected to the extent that consumers have an opportunity to deal in open and free markets, benefiting from increased efficiency and innovation.

15. Economic stability and prosperity are seen as the ultimate objectives of competition policy. This suggests that considerations of overall economic performance would be unlikely to determine a decision in a particular case, but that in setting overall priorities and assessing the impact of applying the law, these would be the most important criteria.

2. Substantive issues: content of the competition law

16. The law's different tools represent several jurisprudential approaches. Some practices are prohibited, subject to defined exemptions. Other practices are prohibited only when they are "improper," implying that the law is concerned about controlling abuse. Criminal prosecution is still possible, although this is now a backup rather than the primary means of redressing infringements. And the FTC has issued extensive guidelines, which resemble regulatory codes of practice.

17. "Enterprise" is a defined term that determines the scope of the law's application. It refers to a company, partnership, sole proprietor, trade association, or in general "any other person or organization engaging in transactions through the provision of goods or services." (Article 2) The first part of the definition, based on form, sweeps in conventional forms of commercial business operation. The specific mention of "trade associations" ensures that these common occasions for misconduct do not escape coverage because of technicalities. The second part of the definition, based more on function, could extend coverage to some government commercial operations if they can be treated as an organisation or a legal person. This coverage would only apply to their activity as providers of goods and services, most likely in competition with non-government entities.

18. Separate parts of the law address monopolistic practices, merger control, horizontal agreements and unfair competition. The substantive sections conclude with a general catch-all provision, which prohibits "any deceptive or obviously unfair conduct" that could "affect trading order". (Article 24) The structural distinction between the treatment of horizontal and vertical practices is not perfect, because some of the rules appearing under the heading of unfair competition, which are mostly about vertical restraints, also cover conduct with horizontal effects.

2.1 Horizontal agreements

19. Horizontal co-ordination is prohibited unless the FTC grants a specific exemption. (Article 14) The term "concerted action", which is the statutory basis for the prohibition, is defined as conduct through contract, agreement or any other form of mutual understanding to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading and thereby restrict each other's business activities. (Article 7) Amendments to the law in 2002 made it clear that the ban applies only to horizontal arrangements, "at the same production and/or marketing stage," and they formalised the criteria and process for exemption.

20. A *per se* rule is not applied to horizontal price fixing.[3] Instead, the FTC's decisions accept some burden of showing that the prohibited conduct had, or could have had, a market effect. The definition of concerted action supports a *de minimis* interpretation, by requiring that it "would affect the market function of production or trade in goods or supply and demand of services".[4] (Article 7) This characterisation in terms of the scale of the impact does not necessarily imply a requirement that the FTC show an effect that was anti-competitive, although in practice that appears to be what the FTC's decisions try to do.

21. The definition's reference to "any other form of mutual understanding" is intended to be sure that the prohibition is not limited by contract law technicalities. It means a meeting of minds, whether legally binding or not, which would in effect lead to joint actions. Typical examples include resolutions of trade associations and so-called gentlemen's agreements, to the extent that they have only have moral, economic or societal binding force. It could also cover tacit understandings reached by conscious communication and expression of intent. Inconsistency between this characterisation and the civil code's understandings about the formalities of contract, as well as the economic ambiguity of tacit collusion, make this difficult to apply. It is not supposed to cover pure oligopoly interdependence or conscious parallelism. The FTC is usually cautious here, proceeding under Article 19 or Article 24 where the evidence about the strength and nature of the agreement is unclear. But the FTC fined the two petroleum firms under Article 14 for co-ordinating price changes through public announcements about their intentions, in what looks like oligopoly price leadership.

Box 2. Concerted action or conscious parallelism?

The FTC opened an investigation against the only two gasoline suppliers in Chinese Taipei, to examine their pattern of simultaneously adjusting their wholesale prices of 92 and 95 unleaded gas and premium diesel oil. Chinese Petroleum Corp. ("CPC") had long been the monopoly provider. Formosa Petrochemical Corp. ("FPCC") entered the market in September 2000. (Esso tried to enter, but exited after less than two years.) CPC and FPCC account for about 70% and 30%, respectively, of the market for gasoline and diesel fuels.

CPC and FPCC simultaneously adjusted the wholesale price within the same range at least 20 times. Typically, the initiating party would announce in the media a decision to change prices. If the rival announced it would follow, then the two competitors would make the same changes, at the same time. If the rival announced it would not, then the initiating party would withdraw or amend its earlier announcement.

The FTC contended (among other things) that this public exchange of views and intentions was more than parallel action, but instead constituted a "meeting of minds" and thus a prohibited "concerted action." The FTC argues that disclosing sensitive market information, exchanging business strategies or directly communicating business intelligence can be construed as reaching a "meeting of minds." Here, this was inferred from indirect evidence, which the FTC describes as inducement, economic benefits, the timing or the degree of price increase, the possibility of substituting different actions, the frequency, duration and concentration of the actions and unanimity. The FTC admits that simple uniform pricing would not necessarily be unlawful. But it contends that here the two enterprises did not just reach the same price levels, but they communicated their intent in advance and their actions led to simultaneous moves, which retail operators typically followed too.

The FTC had sent a letter to the two firms warning them not to use advance announcements to change wholesale prices jointly, but instead to make price decisions in accordance with their own operating conditions. For disregarding the warning and for concerted action in violation of Article 14(1), the FTC in October 2004 imposed an administrative fine of TWD 6.5 million on each firm. The parties appealed, and the matter was returned to the FTC for a justification of the fine. In July 2005, the FTC imposed the identical fines again, reciting the considerations that are set out in its sentencing guides, of motive, objective, expected improper benefits, degree of damage to trading order, duration, benefits obtained, scale of business, business operations, revenue and market position, previously correction of or warning against the conduct, type and number of previous violations, interval of violations, punishments incurred, conduct after the violation, cooperation during the investigation and other factors. The decision is again on appeal.

Source : FTC

22. Trade associations are defined as "enterprises" and thus they are fully subject to the FTL. (Article 2(3)) The FTC Policy Statement about trade associations identifies conduct that is likely to violate the law and lists several specific infractions, most of them taken from rules about unfair competition. Trade associations are warned against restricting firms from entry or exit, encouraging discrimination or other unfair acts and international agreements or contracts including improper or unfair terms or restrictions, as well as imposing excessive standardisation, dividing markets, denying needed approvals, limiting capacity, setting quotas, co-ordinating down-time, joint purchasing, setting common terms, and outright price fixing. The Policy Statement notes that associations may collect and disseminate information and support their members' capacity building. But for self-regulatory codes about standards or unfair competition and certainly for anything listed in the prohibited practices, they should apply first to the FTC for approval.

23. The FTL lists exceptions that can be permitted, by the FTC after prior application, if they are found in the particular case to be beneficial to the economy as a whole and are in the interests of the public at large. These seven categories of exemption include uniform specifications (to reduce costs, improve quality or increase efficiency), joint research and development, specialisation and rationalisation of operations, export cartels, import agreements, crisis cartels and agreements among SMEs to improve efficiency and strengthen competitiveness. (Article 14) The FTC can impose conditions and time limits when it approves an exemption, and it can revoke or amend its approval if conditions change or the parties

violate the conditions of the approval. Exemptions are generally limited to 3 years. The FTC does not issue negative clearances, and the FTL does not authorise block exemption regulations.

24. The FTC spends comparatively little time or resources processing applications for exemption, which only involve horizontal co-operation. There have only been about 10 applications per year on average, and only 2 in 2004. Most applications have been approved. In October 2005, there were only 11 approved agreements in effect. The largest single category of approved agreements is for importation. Others involve credit card processing and airline ticket voucher exchange. In total, about 10 applications have been rejected and 11 were partially approved. The FTC has revoked approval where the parties to a permitted import agreement had also agreed on limiting domestic competition. Decisions about applications for exemption must be reached within 3 months; this deadline can be extended once. (Article 14) The FTC is considering how to define a clearer safe harbour for joint ventures for research and development.

25. Crisis cartel applications are rare. Joint action to limit output or stem price cuts in an economic downturn would be permitted only if conditions in the market have driven the market price below "average production cost" and firms are threatened with exit or overproduction. It is not clear whether "production cost" means variable cost or total cost. In any event, there have been few requests for exemption on this basis. The FTC rejected an application for a capacity-reduction agreement among fibre manufacturers in 1998, on the grounds that conditions were not irretrievable and the market was likely to recover.

26. Some prominent enforcement actions have been taken against formally organised cartels. The most important cases involved market division and price fixing for liquefied petroleum gas (LPG), which is the principal household fuel in Chinese Taipei. Production and wholesale distribution had been separate legal monopolies until the 1990s, and retail distribution and pricing were also tightly controlled. When the market was liberalised and new producers and importers entered, some levels of the industry evidently tried to maintain old habits. The FTC investigated retailer complaints about refusals to supply and found two cartels at work, in the historically separate northern and southern markets. The cartels met occasionally to reach agreements to control competition between regions, assign bottlers to distributors, set retail prices, manage "stabilisation" funds to pay off potential defectors and implement price-cutting or refusal-to-deal punishment against those who violated the assignments. The FTC estimates the cartel's overcharges in the northern market to have totalled over TWD 1 billion. The FTC's 2003 decision imposed fines totalling TWD 344 million. In December 2005, the FTC fined 21 cement manufacturers and distributors a total of TWD 210 million, after a 4-year investigation into industry agreements to fix prices, divide markets, limit capacity and discourage imports. The industry had adopted these strategies to counter the threat that new suppliers would enter the region after the 1997 Asian financial crisis.

27. The FTC has uncovered and sanctioned other, smaller-scale agreements about price and market division. Enforcement against classic price fixing cartels had been limited at first. Early cases involved the price of eggs and interest rates among credit co-operatives. A study of the early experience by FTC staff found that sanctions had been imposed more frequently than expected in seemingly competitive markets, and that SMEs and less sophisticated businesses were more likely to draw sanctions. There is more pressure on profits in such markets, so the participants have a greater incentive to limit competition. In addition, where there are many participants there is a greater need for a formal structure to reach and police an agreement. Smaller and less sophisticated businesses are less likely to get legal advice about compliance with the FTL, and thus they reach explicit agreements which make is easier for the FTC to prove the violations. Regional markets and those with oligopoly features were also more likely to draw enforcement attention.

28. Few FTC actions have challenged construction industry bid-rigging, although this is a common setting for competition law enforcement elsewhere. Bid rigging in government procurement is a crime

under other legislation, and the prosecutors have actively pursued collusion that involved government projects.

29. Sanctions against horizontal collusion are modest by international comparison. They are nonetheless the highest provided by any administratively-enforced law in Chinese Taipei. Fines under the FTL are subject to a statutory ceiling, of TWD 25 million (which can be doubled for repeat offences). Below that ceiling, the FTC has some discretion to make the fine proportionate to the magnitude of the violation and other factors. The FTC has not used all of the discretion the law makes available to it. The total fines in the LPG cartel case, by far the highest that the FTC had ever imposed, were below the maximum that the statute would have authorised.

2.2 Vertical agreements

30. Rules about vertical restraints are in the section of the FTL dealing with unfair competition. Resale price maintenance, whether of maximum or minimum levels, is prohibited *per se*. (Article 18) The ban applies only to setting resale prices of goods, not of services. An explicit agreement or order setting the resale price would obviously violate the law. In addition, FTC decisions show that resale price maintenance can be inferred from a practice of penalising discounters.[5]

31. Other vertical restraints, which receive rule-of-reason treatment, are catalogued separately. (Article 19) The practices listed there are prohibited where they lessen competition or impede fair competition. The sub-parts use different terms to describe the "rule of reason" showing. Inducing a refusal to deal depends on a "purpose" to injure the firm that is cut off (Article 19(1)), discrimination is prohibited where it is "without justification" (Article 19(2)) and other conduct is forbidden when done "improperly" or through "improper means". Showing a net anti-competitive effect is a prerequisite to finding liability for tying, exclusive dealing, territory and customer restraints, discrimination and refusal to deal. The FTC considers intent, purpose, the parties' position in the market, market structure, product characteristics and the impact on competition. A market power screen of 10% is used as an internal rule of thumb in determining whether a vertical restraint is likely to impede competition. The 10% test is neither a safe harbour nor a positive presumption. The FTC will also consider whether competition is actually reduced, whether inter-brand competition is sufficient, and whether there are barriers to entry and hence potential competition.

32. The FTC has issued only a few decisions about vertical restraints. The FTC has struck down protection clauses that barred vendors to a major department store, which had a market share of just under 30% in the greater Taipei area, from selling the same products to other stores within 2 kilometres. In 2004, it applied similar reasoning against a department store with a local market share of about 33% that threatened to cut off boutique tenants if they also set up in a competitor 600 meters away. An exclusive dealing case about licensing *karaoke* tunes apparently turned on the fact that the outlets involved accounted for about 60% of the licensing in the market – and that the respondent had been warned after a previous similar violation. Guidelines are used heavily to explain the legal treatment of vertical relationships and thus to encourage compliance without formal enforcement action. There are general guidelines about the "likelihood of impeding fair competition" under Article 19 and about trade associations and distribution, as well as specific guidelines about trade practices between department stores and suppliers of branded products, among other topics.

2.3 Dominance-monopolisation

33. Entities that are "monopolistic enterprises" may not prevent others from competing "by unfair means," may not set, maintain or change prices "improperly," may not demand preferential treatment "without justification" and may not otherwise abuse their market power. (Article 10) A "monopolistic

enterprise" is defined as one that faces no competition or that has a dominant position to enable it to exclude competition in a relevant market. (Article 5). The market share criteria defining a safe harbour are now in the statute. An enterprise is not considered "monopolistic" if its market share is below 50%, the top two firms together have a share below 67%, and the top three firms, below 75%. No firm with a share under 10% or annual sales below TWD 1 billion is considered a monopolistic enterprise. But these thresholds might not apply if there are legal or other constraints on establishing such enterprises or on trade in their products such that the ability of others to compete is impeded. (Article 5-1) That is, in the presence of regulatory entry barriers, the FTC can ignore these statutory safe-harbours. These thresholds, which had been in the FTC's enforcement regulation, were put into the statute because the Administrative Procedure Act required that important, legally binding standards should be in statutes rather than enforcement rules. In form, the criteria are negative presumptions, but in practice they are also applied as positive presumptions, so a firm with a share over 50% would have the burden of showing that because of market factors such as lack of entry barriers it nonetheless did not enjoy a dominant position.[6]

34. Two or more firms can be monopolistic enterprises if they do not compete on price and otherwise meet the definition's terms. (Article 5) The statute appears to permit this finding to be based simply on the fact that firms are not competing, that is, in situations of oligopoly co-ordination and interdependence. The FTC has not applied this part of the law to such a situation. Decisions applying Article 10 have generally involved situations of single-firm dominance.

35. There are no provisions for exemption to defer to other policies or to balance anti-competitive effects against claims of efficiency. Industrial policies could not justify infringing conduct, since statutory monopolies are no longer considered an appropriate vehicle for promoting development. Actual or likely market effect determines liability, not formal classification, and assessing effects necessarily requires making judgments. Some balancing of restrictive effects against ordinary commercial considerations is implied by the qualifiers that appear in each of the defined items in Article 10, that the allegedly abusive conduct be "improper," "without justification" or "unfair".

36. The FTC has rarely applied the general prohibition against abuse. In enforcement, it more often uses the specific prohibitions in Article 10 and the rules about unfair conduct from Article 19. Particularly when the law was relatively new, the FTC often resorted to negotiation rather than confrontation. The FTC relied on negotiation to get the water company to change its rules about liability of new customers for old customers' unpaid bills and to stop monopolising meter installation, to get the stock exchange to open up its contract for data transmission and to get the telecoms directorate to improve its billing and call verification. The first enforcement actions against dominant firm abuse came after the change of administration in 2000. The FTC imposed a fine of TWD 5 million on the historic monopoly petroleum company for refusing to supply a new distributor of jet fuel. The FTC had also warned against trying to enter long-term contracts to supply retail service stations just before the import market was opened to competition.

37. Claims of predatory exclusion are treated cautiously. The FTC describes this as a sacrifice of short-term profit to drive equally efficient competitors from the market or block their entry into it, protected by an entry barrier that would enable the predator to gain excessive profits in the long term. Setting price below average variable cost is normally taken to show predatory intent, since that is the point at which a rational profit-maximising firm without predatory designs would shut down. But when fixed or common costs are major portion of the total cost, another reference might be used, such as long run incremental cost. It is necessary to show both the intent to impede or exclude competitors and the capacity to recover losses by raising prices after that effort succeeds. Several different markets might be relevant, because cross-subsidy among operations could support a predatory strategy. The FTC does not treat limit pricing or loss-leader strategies as predatory. The FTC has not yet found liability for predatory exclusion under Article 10. A claim of predatory pricing in mobile telecoms was rejected because the dominant

firm's prices were above fully allocated costs and hence above long run incremental cost; moreover, the pricing strategy did not incur a profit sacrifice in the short run. The FTC has invoked other parts of the FTL in analogous situations, though. For example, it treated a bid of virtually 0 for a contract to supply vaccine to the Department of Health as an "improper incentive" prohibited by Article 19(3).

38. Abuse of a monopolist's control over an essential facility can violate Article 10. The FTC endorses and explains the elements of this doctrine in its guidelines about business practices for the "4C" industries (telecommunications, cable TV, computer networks and e-commerce). The "facility" must be controlled by a monopolist, so there is no alternative provider. Actual or would-be competitors in the markets that depend on it must be unable to duplicate it in an "economically reasonable way" in a "short period of time", yet they must have access to it in order to compete with the monopoly that controls it. In some aspects of telecommunications, sector regulation assures access to such bottlenecks. The FTL has been applied to claims in industries where there is no such sector regulation in place. An example is electronic data interchange about cargo clearance, which was originally set up as a government monopoly and later corporatised. The historic monopolist refused to share its standard with a new entrant, refused to interconnect with it, set its fees too high, interrupted service and used deterrents such as loyalty discounts. The FTC levied a fine of TWD 1.5 million against the loyalty discount scheme.

39. Exploitative high prices have not yet been found to violate Article 10. But when the FTC sanctioned the gas company for using a meter that produced excessive minimum-usage fees, this was in effect a finding that the monopoly was charging excessive prices. Moreover, concern about high prices motivated two controversial FTC actions involving intellectual property. The 2003 administrative settlement with Microsoft implies that the basis for the FTC action was prices. The settlement agreement simply commits Microsoft to comply with the FTL, to provide that its licence contracts will be subject to the law of Chinese Taipei, to withdraw corporate guidelines about exclusive distribution outlets, to engage in steps to promote customer relations and to discuss and consider sharing source code. There was no complaint and there is little indication in the settlement itself of a particular theory of liability. But the FTC's announcement highlights the side agreement, that Microsoft would reduce its prices by an average of 27%.

40. The FTC's important decision about CD-R patents also reacted to high prices. In 2002, the FTC imposed fines totalling TWD 14 million on a patent-licensing pool set up by Philips, Sony and Taiyo Yunden, covering over 100 patents for making CD-R products. Chinese Taipei was the major manufacturer of CD-R products, with a 70% world market share. As demand for the product multiplied and prices dropped, local makers were losing profit because the minimum per-unit license fee remained fixed. In 1996, the effective license rate was 3% of net sales, but as the price of the product dropped by more than 90%, the alternative fixed minimum (of JPY .10) meant that the effective rate was about 18%. The manufacturers refused to pay the licence fee, the licensor took them to court to collect and the manufacturers then approached the FTC to investigate. The FTC found that the pool amounted to a restrictive agreement that should have been notified and approved, thus violating Article 14, that the refusal to reconsider the royalty rate was abuse of a joint monopolistic position and that including non-essential, invalid and substitute patents in the licence constituted tying.[7] The crux of the FTC concern appears to be licensor's refusal to renegotiate a lower royalty rate, despite its greatly increased total licensing revenues due to growth in demand for the discs. In August 2005 the High Administrative Court reversed the FTC decision, finding that the pool was not a horizontal agreement because its members' technology contributions did not compete with each other; the FTC has appealed further.[8]

2.4 Mergers

41. Merger control has rarely been applied. The substantive criterion is in effect a public interest standard: whether overall economic benefit of the merger outweighs the disadvantages resulted from

competition restraint. (Article 12) Setting a notification requirement based on market share implies that merger control is concerned with dominance, although the generality of the language would also support a "substantial lessening of competition" standard. In assessing the overall economic benefit, the FTC considers scale economies of production, management or finance, technological improvements and other factors such as reduced prices, benefits from integration and failing-firm issues. Effect on competition is an important element in the balance. In determining whether there is a restraint on competition, the FTC is concerned about creation of a monopoly, imposition of entry barriers, change in concentration, decrease in the number of competitors, similarities in the products and degree of market openness.

42. The technical definition of "merger" is based on function as well as legal formality. It includes a true merger-combination and a partial holding (or acquiring) of more than one-third of the shares or capital of another firm. But the definition and thus the law's control and notification requirements also apply to joint operation, assignment or lease and even to direct or indirect control or appointment or discharge of personnel.[9] (Article 6) Establishing a new joint venture is also covered now by merger control, since the FTC in August 2002 revoked an explanation letter that had evidently tried to correct for the over-breadth of the pre-2002 reporting burden.

43. The amendments in 2002 changed merger control to a pre-notification regime, eliminating the need to await formal FTC approval. If the FTC takes no action within 30 days after notification, the parties can proceed. The FTC can extend that period for 30 days, by written decision. If parties merge without notifying or fail to comply with conditions, the FTC can impose a number of sanctions, from removing individuals to divestiture or dissolution. Revising the thresholds in 2002 sharply reduced the number of notifications. Between 2002 and 2005, 177 transactions were notified, and only one received a further investigation. The 2002 amendments also extended the merger control system to the Financial Holding Company Act, which was administered then by the Bureau of Monetary Affairs and is now enforced by the independent Financial Supervisory Commission. If the establishment of a financial holding company meets the definition of a merger under the FTL, then a notification for a merger of enterprises is to be made with the FTC.

44. Both market share and turnover are criteria in the notification thresholds. The FTC sets the turnover thresholds. The threshold that generally applies now is annual sales over TWD 10 billion for one party and over TWD 1 billion for the other party; for financial enterprises, those figures are TWD 20 billion and TWD 1 billion.[10] Regardless of these turnover thresholds, a transaction must be notified if it will lead to a post-merger share over 33% or if one of the parties already has a share over 25%. The FTC has fined companies for not filing because they had mistaken their market shares. The FTC considers the market share threshold to be useful, despite its admitted conceptual and practical difficulties, because it enables the FTC to prevent formation of monopolies in the cable TV market.

45. With the FTC taking very few decisions against mergers, the costs of its merger control regime appeared disproportionate. The original system requiring review and approval of thousands of transactions created a serious resource drain as well as a burden on reporting businesses. After the shift in 2002 to a notification regime with higher thresholds, the resource commitment is now low. The FTC receives and reviews about 25 filings per year. Of the 6 135 merger notifications to the FTC from 1992 to 2004, the FTC only rejected 4, each involving proposed combinations that would have threatened dominance in local markets on Chinese Taipei. Three of them were in the cable TV industry. In addition, the FTC advised the monopoly petroleum supplier during the run-up to liberalisation in 1997 that it would reject any effort to acquire retail facilities or sites or any enter any joint ventures or new companies to set up gas stations. The firm wanted to anticipate the imminent loss of its supply monopoly by expanding its 50% retail market share. The FTC announced draft Merger Guidelines in December 2005, planning to hold hearings on them in April 2006 and to issue them in final form by the end of the year.

2.5 Unfair competition

46. Unfair competition claims, particularly about false advertising, are a major part of the FTC workload. The section of the FTL about unfair competition also includes antitrust subjects such as resale price maintenance, boycotts and discrimination, as well as prohibitions against coercion, inducement or other means of forcing others to do business or refrain from price competition, acquiring confidential information about production or sales or other trade secrets and limiting counterparts' trading activities. Separate sections deal with passing-off and related trademark issues, such as counterfeiting distinctive characteristics, false advertising, harming reputation, multi-level sales schemes and other deceptive or obviously unfair conduct. The FTC separates responsibilities for the subjects by assigning cases about trademark, misrepresentation and multi-level sales to the "unfair competition" Department 3, while most other issues under this part of the law are dealt with by the antitrust sections.

47. The FTC shares jurisdiction over aspects of advertising and labelling with other laws and agencies. The Trademark Act also deals with passing off; however, because it is not clear how the Trademark Act covers product appearance, the FTC often handles this issue. Other authorities that also regulate advertising include the Ministry of Education for supplementary education, the Council of Labour Affairs for employment, the Financial Supervisory Commission for securities firms and insurance, the Ministry of Finance for wine and spirits, the Council of Agriculture for pesticides and the Department of Health for food and dairy, pharmaceutical, cosmetic and health food products. An upcoming change would require applying the strongest administrative sanction where more than one was potentially available.[11] Because the FTL contains the strongest sanction, this change could increase the FTC's workload.

48. Injured competitors can bring civil suits about unfair competitive practices. The FTC encourages resort to other avenues for resolving disputes. These methods include industry-sponsored mediation through trade associations. Where the FTC detects widespread abuse in an industry, its first step is often to contact the relevant trade association with a "disposition letter", requesting it to notify its members about the problem and admonish them to self-discipline. On some occasions, the associations have adopted the FTC's position in their own rules (which may in turn be approved by their regulatory overseers). Consumer protection complaints go to local officers, while advertising issues come to the FTC.

49. Other aspects of unfair competition deal with bargaining power and economic dependence. This borderline area between concepts of competition and fairness remains controversial, in Chinese Taipei as elsewhere. The FTC guideline on large scale distribution businesses demonstrates this concern. This guideline applies to hypermarkets, convenience stores, department stores, supermarkets and consumer cooperatives. It calls on them to "correct" such actions as taking advantage of their superior market positions, collecting improper surcharges from suppliers and requiring suppliers to offer them their most favourable prices. Other issues in this guideline are transparent terms for removing products from display, methods for determining responsibility for warehouse out-of-stock, calculation of penalties for shortage of supply and verification of "membership" for large-volume retailers with "defined customers." The FTC's department store-supplier guides are another example of attention to economic dependence. They neither require nor even mention any showing of market power. Rather, these are rules about fair treatment within a contract relationship, in which the outlet store or supplier evidently has developed a relationship of reliance on the department store's policies.

50. The catch-all general provision, Article 24, has been used extensively, often with a consumer-protection emphasis. The FTC relies upon this Article where the evidence is not sufficient to demonstrate a violation of more specific statutory prohibitions. It has been applied to conduct that appears to fit within more specific prohibitions, such as demands for shelf-space payments and most-favoured customer treatment and refusal to deal. Applications to unfair competition include passing off, plagiarism, intimidation over IP rights, free riding and operating without necessary licences. Information asymmetry is

the basis for its applications to sales promotions, consumer contracts, real estate commissions and financial contracts. The FTC has used Article 24 in nearly 800 cases. The only provision that has been used more often is Article 21, about misleading advertising, with over 900. Courts are challenging excessive reliance on Article 24 on the grounds that it is too vague and thus leaves too much to FTC discretion.

51. The FTC's 2002 *Principles Governing the Application of Article 24* do not limit FTC discretion very much. They try to emphasise the separate significance of the requirement in Article 24 that a practice be sufficient to "affect trading order". The *Principles* imply that this requirement could mean that the practice must "affect competition". The requirement is evidently intended to limit the application of this catch-all provision so that it does not duplicate other laws. It serves as a kind of "public interest" or *de minimis* test, to steer private disputes toward resolution by other means such as contract law or consumer protection rules. Separate sections of the *Principles* explain how Article 24 would apply to some conduct that other laws or other parts of the FTL itself would not control or prohibit. The FTC would invoke Article 24 against an enterprise whose "relatively advantageous market position vis-a-vis its consumers is so endemic to the industry that consumers' interest is harmed due to over-reliance or the lack of alternatives". The FTC would apply it to abuses of claims about intellectual property rights that amount to unfair competition but not abuse of monopoly power. According to the *Principles*, the term "trading order" has moral as well as economic dimensions, referring to market conditions that conform with "social ethics" of society as well as with efficient "business competition ethics" and the "spirit of free and fair competition." Although "sufficient to affect" implies a *de minimis* limit based on the number of victims and the magnitude of the threatened or actual harm, it appears to set a sliding scale. The FTC would apply Article 24 to conduct aimed at a single organisation or group if it is sufficiently deceptive or patently unfair. Examples given to suggest what would be unfair include free riding on others' work or reputation, comparative advertising intended to create an unfair overall impression, claims of intellectual property infringement made without sufficient confirmation and notification and coercion of trading counterparts. Taking advantage of information asymmetry or relative "trading advantage" can also violate Article 24. A notable example given is conduct that is "contrary to business ethics or public order and good morals" when "market supply and demand are not in equilibrium" because "market mechanisms failed." This may be intended to describe taking advantage of consumer vulnerability in *force majeure* shortages, but the language can be read to support intervention against any alleged market failure.

2.6 Consumer protection

52. A separate law and agency are responsible for consumer protection. The Consumer Protection Law, adopted in 1994, was promoted by the legislature and the Consumer Protection Foundation, an NGO. It was not an initiative of the Executive Yuan. The law provides for strict liability for defective goods and services, regulates unconscionable contract terms and provides for punitive damages and class action procedures. The principal remedy for individual complaints is through a civil lawsuit. The Consumer Protection Commission can intervene and make collective or class litigation processes available where the parties are on an unequal footing.

53. The Consumer Protection Commission is responsible for policy co-ordination, not enforcement. It thus has a small staff. It is chaired by the vice premier, and the FTC Chair is a member. There has been discussion since the late 1990s about combining the Consumer Protection Commission with the FTC, an idea that the ruling party, the Democratic Progressive Party (DPP) revived in 2002. But combining the two bodies is no longer under consideration. The FTC believes that their enforcement methods and policy goals are too dissimilar, and it evidently does not want to take on responsibility for small-scale complaints. There is no formal co-operation procedure between the FTC and consumer NGOs, although the FTC may be in contact with them about particular issues.

54. Nonetheless, the FTC applies the FTL with a consumer-policy purpose to provide general solutions to market situations of asymmetric information. Examples are the FTC guidelines about terms in consumer bank loan contracts and its "policy requirements" for the banking industry specifying consumer disclosures about minimum balance rules. These guidelines are motivated by Article 24 and a principle of transparency.

3. Institutional issues: enforcement structure and practices

55. Competition law is applied though an administrative process. The FTC relies upon guidance and education as much as on formal litigation. Indeed, the intensity of formal enforcement action appears to be declining in recent years. The FTC is formally within the executive, although it is considered independent. Pending reforms would make its independence clearer.

3.1 Competition policy institutions

56. The FTC is a ministerial level agency, responsible for policy and legislation as well as enforcement. (Article 9) There are nine full-time Commissioners, including the chair and vice-chair. They are nominated by the premier and appointed by the president for 3 year, renewable terms. The terms of the Commissioners are simultaneous. Thus, the literature refers to the "first" and "second" Commissions and so on; the current Commission is the fifth. Reappointments are not uncommon.

57. The FTC staff is organised both by sector and by function. The separate departments deal with trade, services and agriculture, manufacturing and network industries, unfair competition, planning, legal affairs and administrative support. Nearly all of the staff is in Taipei, but some are stationed in the Cabinet Southern Region Associated Services Centre, to deal with regional competition matters. The Commissioners may also have responsibilities and assignments about topics such as international affairs and legal issues.

58. Commissioners are assigned to supervise cases by random selection. The staff takes the initiative, though, in responding to complaints and developing investigations. The Commissioners' involvement in developing cases varies. The assigned Commissioner will review the staff report before it goes to the Commission for decision. The Commissioner may in effect exercise a veto by declining to move the staff recommendation. For a big case, more than one Commissioner may be assigned to prepare it and present it to the Commissioners' meeting. Commissioners meet weekly to decide matters. Action is by majority vote of a quorum of the membership, which in turn is one more than half of the total. Thus in theory a decision could be reached by the vote of 3 Commissioners. But Commission meetings and decisions involve the whole membership, and Commission does not reach decisions in panels or committees.

59. Whether the competition agency should be organic part of the Ministry of Economic Affairs or an independent body was a key issue in the original debate. Ultimately, the legislature decided to create an independent body of experts, although the Ministry's Price Supervisory Board supplied the first FTC staff. By law, Commissioners must be well experienced in law, economics, finance, tax, accounting or management. Most of the appointees in the FTC's first decade had doctorates in law, economics or management and academic or professional experience. Professors who move to the FTC do not change their status very much, because the national universities are close to being civil service units. Staying away too long, however, may force a career choice, because faculty slots may not be held open. The FTC may not be partisan. The Commissioners "shall be beyond party affiliations", and no more than half of them may be members of the same political party. (Organic Statute, Article 11, 13) Still, when the former opposition took control of the government, changes in the appointment pattern were noted.

60. The FTL and the Organic Statute contain recitals supporting the FTC's independence. FTC actions are not to be scrutinised by the Executive Yuan or other agencies. The FTC chair and other officials appear before the legislators to explain their programs and proposals, and the FTC budget is reviewed and approved by Parliament. The FTC has no fee income and does not retain fines. Providing for the FTC to act as a body reduces pressure on any individual Commissioner. But to recognise the value of independent consideration, the FTC has kept track of dissents. Since 2002, dissenting opinions have been published, at first in the official gazette and now posted on the FTC's website.[12]

61. The FTC has direct access to policy-making, since it is part of the Executive Yuan, which is the highest administrative organisation provided by the constitution. Constitutionally, all agencies are subordinate to the Executive Yuan. The Executive Yuan is headed by the Premier, who is the chairman of the Ministers' meeting. The FTC chairman, who has ministerial status, attends that meeting to present the FTC's views on matters affecting competition and regulation. The position does not compromise the FTC's decision independence, because the Executive Yuan does not vote.

62. The FTC's independent status may be clarified by a pending reform, which would also affect other agencies. The Legislative Yuan has passed a new organic law providing for the possibility that agencies could be outside the Executive Yuan reporting structure. In addition to the FTC, bodies that might become more independent could include the new communications regulator, the central bank, the central elections committee and the Financial Supervisory Commission. Legislation has not yet been adopted that would implement these principles for the FTC, though. In this new status, appeals from FTC decisions would be taken directly to the Administrative Court, rather than an appeals committee responsible to the Executive Yuan. The FTC chairman would no longer participate in Executive Yuan meetings. Commissioner appointments would be subject to consent by the legislature. The Commission would probably shrink, to 5-7 members, and terms would be staggered rather than consecutive. The proposed changes would probably not significantly affect the FTC's budget process.

63. Public explanation of the FTL and the FTC's decisions is a high priority. Announcements of case decisions in Chinese are posted on the FTC website, and some significant case decisions are posted in English as well. Decisions are also published in English in the FTC's *Cases and Materials* series; however, these volumes appear with a 2-year delay. At the outset, the FTC made it a priority to educate the business community and the public about the new competition regime. By 2001, it had convened over 1000 workshops with trade associations and other groups. A series of 36- or 72-hour lecture programs graduated 38 "classes" totalling over 2 033 managerial-level employees by November 2005.

64. The FTC relies heavily on "soft law" instruments such as statements about its methods and guidance to particular industries. Not only does the FTC use "administrative guidance," it even has a Guideline about it. This Guideline is principally intended as an instruction to the FTC staff, but it suggests best practices about informal guidance that other agencies might consider. It provides that "guidance shall be conducted only within the statutory powers" of the FTC and that "the power to conduct administrative guidance may not be abused". Where conduct is likely to violate the FTL, or "may affect the trading order" even though it is not in violation of the law, the FTC may issue a warning to the industry or the firm involved. The purpose of that guidance is to assist and admonish, in order to encourage correct conduct or discourage misconduct. Guidance has no compulsory legal effect, and thus guidance should avoid using the kind of compulsory or restrictive language that is typically used in laws or orders. Instead, guidance should use phrases such as "it is suggested", "please note", "please be sure to" and "it is advisable". It must be written and specific, giving reasons. A warning to an industry is to be sent to the relevant trade association and posted on the FTC's website. The FTC will not undertake enforcement action based solely on a party's rejection of administrative guidance.

Box 3. Guidelines and Guidance from the Fair Trade Commission

FTC guidance often takes the form of a bulletin aimed at a particular industry, collecting the parts of the law that are likely to come up there and pointing out how they apply to situations or practices in that industry. The principal examples of guidance targeted to industries involve large-scale distribution, banking, computer training programs, gas safety equipment and construction. Such guidance does not by itself have mandatory force. Guidelines, by contrast, may establish rules and procedures that are binding on the FTC itself.

The scope of the FTC's use of such instruments is suggested by subjects of the items posted on the FTC's website:

Additional Fees Charged by Distribution Business
Application of Article 24 of the Fair Trade Act [deceptive or unfair conduct in general]
Business Practices of Financial Industry
Business Practices, Cross-Ownership and Joint Provision among 4C Enterprises [cable TV, communications, computers and e-commerce]
Cable Television-Related Industry
Cases Governed by Article 20 of the Fair Trade Act [trademark misuse]
Cases Governed by Article 21 of the Fair Trade Act [misrepresentation]
Cases Handled by Administrative Guidance
Cases Involving Foreign Elements
Consideration of the Likelihood of Impeding Fair Competition
Criteria for Applying the Fair Trade Act to Private Law Acts by the Executive Government Entities
Directions for Enterprises Filing for Approval of Concerted Action
Directions for Enterprises Filing for Merger
Disclosure of Information by Franchisers
Distribution Industry
Extraterritorial Mergers
Foreign Resort Membership Card Sales Practices
Guidelines for Oral Arguments Before the Fair Trade Commission
Illegal Commissioning of Household Production
Information Transparency and Improper Marketing Practices by Weight Loss and Body Care Businesses
Multi-level Sales
Penalty fees for Prepayment of Housing Loans
Principles for Approving Exemptions for Concerted Pricing by Small or Medium-sized Enterprises
Promotion by Means of Gifts and Prizes
Public Hearings
Real Estate Sales Practices Regulations - Regulations Governing Housing Advertisements
Technology Licensing Arrangements
Trade Associations
Trade Practices Between Department Stores and Branded Products Suppliers
Warning Letters for Infringement on Copyright, Trademark and Patent Rights

Source: FTC website

3.2 Enforcement processes and powers

65. The FTC can initiate investigations in response to complaints from enterprises, customers or consumers about alleged violations of the FTL. It can open an investigation *ex officio* for a matter that involves the "public interest". In addition, the FTC decides about some restrictive agreements in response to applications by the parties for approval of exemptions. Although the FTC has the authority to look into competitive conditions in an industry, it cannot use compulsory process to get information in such investigations, and thus the FTC has not yet used this power. A complaint must be accompanied by a detailed explanation and supporting evidence.

66. The FTC's principal tool to investigate and obtain further information is requiring submission of documents and information by the parties, third parties and other individuals and agencies. The FTC also has powers to perform on-site inspections of respondent enterprises and to obtain statements from respondents and related third parties. The sanction for refusal to comply with the FTC's investigative processes is an administrative fine of between TWD 20 000 and TWD 250 000. Repeated refusal or failure is subject to further fines, double those amounts, for each refusal. (Article 43) Only the prosecutor has truly coercive powers of investigation, though, and those powers are available only in criminal cases against repeat offenders.

67. Parties and related persons have the right to review and copy the FTC's files and materials in order to make claims and defences. (Article 27-1) An FTC regulation governs access to materials and files, setting out qualifications and rules about time, method, fees and scope. The law and the regulation do not permit access to the FTC's internal working drafts and documents. Access is also denied to material that is protected by law and material for which the provider has justifiably claimed confidentiality, or where access is likely to infringe third-party rights or seriously obstruct performance of official duties.

68. The FTC meetings at which matters are decided have not usually been fully public. Attendees could include industry experts, competitors, consumer groups, government agencies with related jurisdiction and academics. The Commissioner in charge of the matter chaired what amounted to a roundtable discussion. Complainants and respondents would not necessarily be present, although they might be invited in order to provide further explanations. In this setting, enterprises may not have felt the opportunity for defence was adequate.

69. The hearing and decision process is changing to conform to the Administrative Procedure Act, which now provides for formal public hearings at administrative bodies. The FTC issued its guidelines for implementing the Administrative Procedure Act in 2002 and amended them in 2005. The FTC used the new formal hearing process for the first time in an October 2005 cement cartel proceeding. No other agency has used this formal process yet. If the FTC holds such a public hearing, disappointed parties do not need to petition the Appeal and Petition Committee of the Executive Yuan, but may appeal against the FTC action directly in the administrative court.

70. The FTC may enter an administrative settlement, rather than impose sanctions, in the event that the administrative authority is unable to ascertain complete factual or legal information during an investigation, and in order to achieve its administrative objectives and resolve a dispute. This procedure too is novel and somewhat controversial. The FTC's settlement with Microsoft in 2003 was a precedent-setting action.

71. Remedies for substantive infringement include fines and orders to cease and correct conduct. The basic administrative fine ranges from a minimum of TWD 50 000 up to TWD 25 million. The fine can be doubled against repeat offences. (Article 41) The same remedies and fines could apply to all kinds of substantive violations. Notably, the statute makes no distinction between the treatment of hard-core cartels and other violations of specific prohibitions or "deceptive or obviously unfair conduct" under Article 24. The FTC enforcement regulation specifies factors to be considered in assessing the fine. These include the violator's motive, purpose and expected gain from the violation, the harm to market order, the duration of the harm, the violator's actual benefit from the violation, the size and market position of the violator, any previous enforcement or warnings about the type of violation, the violator's previous record of compliance with the law, and the violator's "remorse" and co-operation with the FTC investigation. (Enforcement Rules, Article 36)

72. Implementing a leniency program will require amending the FTL. The FTC has prepared amendments that would establish the basic legal authority for the FTC to negotiate with parties about fines

and to reduce a fine to 0 in exchange for providing sufficiently useful information. The details of a leniency program would be contained in FTC regulations after that legislation is adopted. There is precedent for leniency in the criminal law of Chinese Taipei, which provides for clemency in exchange for co-operation with the prosecution. The issue is still under discussion in the FTC, and the proposed amendments have not yet been forwarded for consideration.

3.3 Appeal and judicial review

73. FTC decisions can be appealed on the merits to the Appeal and Petition Committee of the Executive Yuan. This body is the usual avenue of appeal from administrative decisions. Its chair is the general counsel of the Executive Yuan, but most of its members are outside experts and academics in administrative and constitutional law. Its role is not to provide a means for overriding agency decisions on policy grounds, but to assure compliance with administrative standards. Its decisions can be appealed further to the Administrative Court. The Appeal and Petition Committee has tended to support the FTC more than the courts have. Since 2000, the FTC lost only 32 out of 785 appeals to the Committee, about 4%, while in the Administrative Court and Higher Administrative Court, the FTC lost 23 out of 251, about 9%. Most appeals are by respondents seeking reversal of the FTC's decision finding liability, but about one-fourth are objections to the FTC's decision not to take action.

74. Recent legislation about administrative processes created new appeal possibilities. Under the Administrative Procedure Act, an appeal from an agency adjudication following a formal public hearing may not be taken to the Appeal and Petition Committee. Instead, the appeal must be taken to the Superior Administrative Court, a new first-instance court that was created by the Administrative Litigation Law of 2000 as an avenue for judicial review. This court, which began with about 19 judges and now has 28, has gone through a challenging adjustment phase, receiving about 20 000 filings in its first year of operation. Adding this new level and the opportunity for review led to substantial delays just in getting a judge assigned to a matter. That time required to get a case started is down now to about a month. Administrative courts have the power to enter judgments, but they rarely do so. Instead, if they disagree with the administrative agency's decision they remand for further proceedings. The greater prospect of sceptical judicial review has reportedly made a difference to agency practices, encouraging agencies to produce more detailed reasoning to support their findings and decisions.

3.4 Other means of applying competition law

75. Criminal prosecution is possible, but only for failure to comply with FTC cease and desist orders. (Articles 35, 36) Potential sanctions are imprisonment for up to 3 years and a fine of up to TWD 100 million for violating orders about monopolisation, concerted action or trademark violations, and up to 2 years and TWD 50 million for violating orders about unfair practices.[13] The 1999 amendments to the FTL relegated the criminal sanction to this back-up role, in order to make enforcement more credible. The threat of criminal penalties against a wide range of violations of the FTL was obviously overbroad. The previous two-track enforcement system exposed some differences in approach and evidentiary standards among the FTC, the prosecutors and the courts. Courts would sometimes impose a 6 month sentence, but this could be commuted by paying a fine. The threat nonetheless had some deterrent effect; at least, the FTC reports that early prosecutions taught trade associations to eliminate the post of "president," who would be the obvious target of criminal prosecution. Limiting criminal actions to violations of FTC orders also responded to business concerns about abuse of private individuals' right to bring criminal prosecutions, which are possible under Chinese Taipei's criminal procedures.

76. Criminal enforcement power has been used often, despite the complications, but mostly against misrepresentations. Early on, the FTC recommended some prosecutions against egregious price fixing and bid rigging. There were several criminal cases before 2000, many resulting in convictions (about 20 out of

25). Even after the law was revised in 1999, there have been 170 cases. This total covers includes enforcement of FTL orders of all kinds.[14] In the most recent reporting periods, imprisonment and criminal fines have been imposed only against multi-level sales frauds. Since 1999, there have been no FTL prosecutions against cartel recidivists.

77. Prosecutors often target bid rigging with another law, the Government Procurement Act. A contract, agreement or other meeting of the minds that causes a supplier not to tender or compete over price, with the intent to adversely affect the price of an award or gain illegal benefits, can be punished by imprisonment from 6 months up to 5 years and a fine of up to TWD 1 million.[15] Since 1999, the public prosecutors have brought 89 cases against anti-competitive bid rigging for public projects, or nearly 15 cases per year.[16]

78. The FTL provides several kinds of privately-initiated relief. Private litigants can sue in court to obtain a cease and desist order or preventive injunction against the threat of a violation (Article 30) and to recover damages (Article 31). Depending on the nature of the violation, the court may award multiple damages for intentional violations, up to treble damages. Where the violator profits from the violation, the damages can be assessed based on that gain. Private actions are said to be less attractive than complaints to the FTC, because of costs. But the statute of limitations for private suits is generous. Suit must be filed within 2 years after the plaintiff learns of the claim, but no more than 10 years after the infringing conduct. Despite the costs, and the fact that the FTC generally will respond to all complaints (even though it claims to have discretion not to pursue claims that raise no public interest issues), over 100 private suits have been filed since 1999, including over 50 seeking multiple damages. Because all parts of the FTL can be the subject of a private suit, these cases are at least as likely to deal with unfair competition claims, such as passing off or counterfeiting, as with restrictive agreements or monopoly abuses. None have led to a major success; at least, no important cases seeking or awarding either injunctive relief or damages, single or multiple, have been reported.

79. Other laws in Chinese Taipei include innovative processes to encourage private recoveries. Consumer protection law provides for *parens patriae* and class-recovery actions by recognised consumer groups, including treble damages in the case of wilful violations, with reduction or waiver of some of the costs of suit.[17] There have been about a half dozen consumer class actions for damages. The most notorious suit resulted in an award of TWD 200 million against a builder for defective construction that was unable to withstand an earthquake. Three consumer NGOs have been approved by the Consumer Protection Commission to bring these representative actions. Each action must be approved by the consumer ombudsman, who is a local government official. These approved consumer protection groups or the ombudsman can also sue to obtain injunctions. In addition, the securities regulator has encouraged recoveries through private-party litigation. It supported a non-profit foundation, that was set up in the 1990s to protect investors, soliciting claims to "opt in" to its cases, piggybacking on public prosecutions with private claims for damages in a process that waives filing fees.

80. Metropolitan, country and city governments have a limited role, although most of their responsibilities were eliminated in the 2000 amendments. They are defined in the FTL as "competent authorities" (Article 9); however, the most important powers are reserved to the "Central Competent Authority," which is the FTC. There is a system of regular contacts and semi-annual reporting among the FTC and these levels of government, which support the FTC with advocacy and public relations. The FTC can call on local governments for assistance, but it does so only for regular inspections of the operations of multi-level sales businesses.

3.5 International issues

81. The FTL applies to foreign enterprises to the extent that their conduct affects market competition in Chinese Taipei, irrespective of whether those foreign enterprises have representatives, subsidiaries or branches there or of the status of the relationship between Chinese Taipei and their home governments. A foreign juristic person or organization may file a complaint with the FTC, provided that the country from which this foreign person or organisation comes authorises similar actions there by individuals or enterprises from Chinese Taipei.

82. A high proportion of the FTC's cases involving foreign firms are international mergers. The FTC has adopted guidelines about its treatment of these transactions. To reduce the burden of requiring insignificant filings, jurisdiction is based on whether it could be reasonably predicted that the merger would directly and substantially have an impact on Chinese Taipei. It is not clear that the FTC has considered international markets in its analysis, but it has noted the effect of foreign trade on the definition of domestic markets. For example, when the elimination of tariffs made imported cement competitive and it was imported to the point that had traditionally marked the boundary between northern and southern markets, the FTC decided the whole island was one market.

83. The FTC has no role in application of anti-dumping laws. In theory, the FTC can envision taking action against abuses of that process, to raise prices, restrict imports or intimidate competitors. In 1997, the FTC requested as a condition for a merger that the parties refrain from anti-dumping claims that would have kept out cyclical imports from Korea and Japan. The parties have in fact refrained from such actions.

84. The FTC has only a limited ability to undertake enforcement against international cartels. The FTC has gotten some evidence in several cases about international collusion. But the FTC concentrates on finding better proof of agreement about domestic sales, in the absence of realistic prospects of applying its law to non-resident international or foreign firms.

85. The FTC has signed a trilateral anti-trust cooperation agreement with the enforcement bodies of Australia and New Zealand as well as a cooperation agreement with France's *Conseil de la concurrence*. It has had a co-operation arrangement with the ACCC since 1996. The co-operation arrangement with the ACCC was invoked in a 1998 investigation, when the ACCC queried the FTC about possible enforcement actions a multi-level sales operation. To help facilitate regional collaboration, the FTC also maintains the APEC Competition Law and Policy Database. In announcing its recent decision imposing fines on a cartel in the cement industry, the FTC called attention to the international scope of this cartel and emphasised its willingness to share information and work co-operatively with other enforcers.

3.6 Resources and priorities

86. Resources, in staff and budget, have been stable for some time. Staff levels have averaged about 217 for the last five years. The budget level declined slightly, from about TWD 370 million in 2001 to about TWD 355 million in 2004, as the FTC has borne its share of general fiscal tightening. About a quarter of the FTC staff have an academic background in law, about one-sixth in economics, and another one-sixth in business administration or accounting. Most of the staff (85%) have at least a bachelor's degree.

Table 1. Trends in Competition Policy Resources

	Person-years[1]	Budget (TWD MM)
2004	211	355.1
2003	223	353.7
2002	221	361.0
2001	219	370.0
2000	210	570.0[2]

1. As of the end of the year; the budget is the amount set at the beginning of the year.
2. The fiscal year changed in 2001; budget expenditure for 2000 includes the second half of 1999.
Source : Annual Performance Report of the FTC, 2000-2004; Budget Report of the FTC

87. The composition of the FTC caseload has shifted as its role evolved from education to enforcement. Successful early publicity about the law attracted a huge number of complaints, which overloaded resources at first. For its first ten years, the FTC averaged well over 2 000 matters per year, or one for every 10 000 inhabitants. The total number of cases dropped sharply in 2002 because of the change in the merger notification threshold, reducing the number of merger filings by 97% (from 1 089 to only 33). Responsibilities for administering rules about multi-level sales are not reflected in the table about trends in competition policy actions. These multi-level sales cases occupy a significant share of the FTC's attention, accounting for 19% of dispositions. Over these 5 years, the issue has declined in importance, probably because the public is more aware of the nature of these Ponzi schemes.

88. The top enforcement priority has been horizontal agreements, as measured by number of cases and magnitude of sanctions. Most fines have been imposed in Article 14 cases about concerted actions. The major action, clearly dominating the statistics, was the 2003 LPG case resulting in total fines over TWD 300 million. In most other years too, the total sanctions against horizontal agreements has outweighed those against other violations. Overall, the trend in enforcement intensity has been downward since 2000. For every basic substantive category, in 2004 the number of matters in which the FTC sought or obtained sanctions and the total sanctions imposed were at or near their lowest points of the period.

Table 2. Trends in Competition Policy Actions

		horizontal agreements	vertical agreements[3]	abuse of dominance	mergers	unfair competition[5]
2004: matters opened[1]	1 194					
sanctions or orders sought[2]		16	16	5	24	227
orders or sanctions imposed[2]		6	4		21	82
total sanctions imposed[4]		19.5	4.8		2.9	15.2
2003: matters opened[1]	1 156					
sanctions or orders sought[2]		38	25	8	33	273
orders or sanctions imposed[2]		24	12		32	133
total sanctions imposed[4]		352.6	10.5		3.5	20.7
2002: matters opened[1]	1 367					
sanctions or orders sought[2]		30	17	13	120	318
orders or sanctions imposed[2]		15	4	4	119	145
total sanctions imposed[4]		10.4	3.3	22.0	3.0	33.7
2001: matters opened[1]	2 511					
sanctions or orders sought[2]		38	18	15	1 090	323
orders or sanctions imposed[2]		17	3	1	1 088	155
total sanctions imposed[4]		155.3	.9	14.0	.4	74.4

		horizontal agreements	vertical agreements[3]	abuse of dominance	mergers	unfair competition[5]
2000: matters opened[1]	2 609					
sanctions or orders sought[2]		47	48	15	1 184	395
orders or sanctions imposed[2]		30	9	2	1 182	170
total sanctions imposed[4]		87.7	7.9	10.0	5.2	35.9

1. Includes cases upon complaint, FTC self-initiated investigations, applications for concerted actions and merger applications and notifications.
2. Includes approvals of applications for concerted actions, approvals of merger applications, non-prohibited merger notifications and prohibited merger notifications.
3. Cases involving Articles 18 and 19 of the Fair Trade Law.
4. TWD 1 000 000.
5. Cases involving Articles 20, 21, 22 and 24 of the Fair Trade Law.
Source : 2004 Statistical Yearbook of the Fair Trade Commission.

4. Limits of competition policy: exclusions and sectoral regimes

89. Where the FTL conflicts with another law, the FTC claims a strong presumption in favour of the competition law. The competition law will apply where other laws "conflict with the legislative purposes" of the FTL. (Article 46) This phrase was added in 1999 at the initiative of the legislature. Before that change, the presumption went the other way, that the FTL "shall not apply to any act performed by an enterprise in accordance with other laws." The FTC asserts that the change now gives the FTL the status of a "fundamental economic law." That is, actions of enterprises that are subject to competition law but that are in response to or affected by other economic policies should still comply with the FTL. According to the FTC, other applicable laws can have precedence only if the basis of the other laws is both set out expressly and also does not conflict with the legislative purposes of the Fair Trade Act. The previous FTL language had simply stated the common principle that general laws such as the FTL would defer to specific ones in the event of inconsistency. The amendment was thought to confer a stronger priority to the FTL.

90. But the change has not made a substantial difference in practice. Conflicts are most often resolved through consultation between the FTC and other authorities, a process that the FTC treats as advocacy. (Article 9(2)) A big early project was identifying and correcting a host of arrangements that excluded particular industries from FTL coverage. After the 1999 amendment tried to strengthen Article 46, the FTC in 2001 launched another round of reviewing laws and regulations on the books, followed by working with the other ministries to correct them. The first and only time the FTC tried to take advantage of the strengthened Article 46, however, through an enforcement action against anti-competitive conduct that was authorised by another part of the government, the Appeal and Petition Committee ruled that the FTL was inapplicable because the conduct was authorised by other law. Thus despite the ostensibly stronger presumption in favour of the FTL, the FTC is considering reverting to advocacy rather than enforcement confrontation where laws conflict with the purposes of the FTL.

91. Controversy over whether the FTL would cover government-related enterprises was resolved by a compromise transition period, during which conduct could continue if it was specifically authorised at an appropriately high level. Examples include supply of diesel fuel to the railroad and supply of sugar to the military and to honeybee farmers. The transition period ended in 1996. Pressure from consumers, media and the private sector helped keep special deals for government-related enterprises under control. Still, due in part to the four-year transition period and lingering consideration of public service obligations at stake, the FTC took few enforcement actions against such firms during its first decade. Any competition issues arising from conduct of government-owned enterprises are now fully subject to the FTL, but controversies are still typically resolved by consultation rather than enforcement. In telecoms, the FTC deferred to the Ministry about how the government-owned incumbent priced innovative services when the market was opened up. In LPG, the FTC consulted with the two government-related authorities that had jointly monopolised the market to develop administrative guidelines that would avoid violations in the future. When petroleum product markets were liberalised, the FTC tried to set up a "fair competition mechanism and standards" in response to complaints that China Petroleum Corporation was discriminating in selling

aviation fuel and otherwise abusing its dominant position, although in that situation the FTC also imposed a fine.

92. Government ownership has some market-distorting effects, as government influence or preference is more likely to affect the decisions and strategies of enterprises in which the government is a major shareholder. For example, one of the two petroleum refining companies remains government controlled, and the government reportedly instructed it not to increase prices following increases in international crude oil prices. A firm is classified as "privatised" when the government's shareholding is below 50%, regardless of the actual composition of the board, the presence of other substantial shareholders or the firm's responsiveness to government interests in its operation. Firms that are not yet privatised even by that definition include China Petroleum Corporation, Aerospace Industrial Development Corporation, China Shipbuilding Corporation, Tang Zong Iron Works Company, Taiwan Power Company, Taiwan Sugar Company, Taiwan Water Supply Corporation, Taiwan Tobacco and Liquor Company, Bank of Taiwan, Land Bank of Taiwan, Central Trust of China, Taiwan Railway Administration (which is not yet corporatised), Chunghwa Post Company, Veterans Pharmaceutical Plant, Lung-Chi Chemical Plant, and RSEA Engineering Corporation. The government holds significant, although less than majority, shares in other firms. The government's shareholding in Chungwha Telecom Company, for example, is still substantial, although it fell below 50% after an auction of shares and issuance of ADRs in August 2005.

93. Commercial activities by entities that are part of the government may not be covered if those entities are not "enterprises". On the one hand, the FTC has asserted that the FTL applies to government agencies that engage in business, such as the Directorate-General of Telecommunications when the predecessor of Chung Hua Telecom was the Ministry's business arm. On the other hand, the FTC has been cautious, finding some monopoly operations by government offices to be beyond its reach, but not others. Printing schoolbooks was exempt, but reselling books printed by others was not. The emerging legal test for the application of the FTL is functional: whether the government entity is performing a government function or is engaged in a market transaction. The tests are not completely coherent. If an entity is not an enterprise because of its structure, even if it engages in a commercial act, it is difficult to see how it could become one based on its function. The FTC is evidently more comfortable applying the FTL where competition is distorted in a situation in which the government agency is a purchaser. In that situation, the object of FTC action may be the seller, even though it was the agency's conduct that led to the competition problem, for example by writing a bid specification that eliminated competition.

94. Conduct in connection with the exercise of intellectual property rights under the Copyright Act, Trademark Act, or Patent Act is not covered by the FTL, unless it is "improper". (Article 45) The FTC has explained the relationships in its 2001 *Rules for Review of Technology Licensing Cases*. The rules explicitly do not presume that patents or know-how confer market power, and they acknowledge the formal exemption from the FTL for proper conduct in connection with the exercise of intellectual property rights. But an arrangement that oversteps the scope of proper exercise of those rights, even if formally proper, will be reviewed to determine whether it restrains competition. The Rules call for examining effects not only in the market for goods and services directly subject to the intellectual property, but also in markets for technology that is substitutable for that technology and in innovation markets related to the goods or services. The Rules describe the kinds of stipulations in licences that would not typically amount to restraints or unfair competition, those that normally would violate the law and those that are more indeterminate. In addition, FTC *Guidelines for the Reviewing of Cases Involving Enterprises Issuing Warning Letters for Infringement on Copyright, Trademark, and Patent Rights* advise against abusive claims to competitors about alleged infringements of copyrights, trademarks, or patents. Complaints of discrimination and monopolisation against a copyright royalty association were rejected in a 2004 decision, because the Copyright Act provided for other means of resolving disputes, such as mediation (and demands for fees within the regulated range, or an appeal for criminal enforcement against infringement, could not be regarded as abuse of the rights).

95. Concerted actions by small businesses, even agreements about price, may be exempted from the Article 14 prohibition, where the intent is to improve their operational efficiency or strengthen their competitiveness. These actions must be shown to be beneficial to the economy as a whole and in the public interest, and they must receive prior approval from the FTC. The FTC guideline about these SME price agreements sets out two reasons for finding them to be beneficial to the public interest and the economy, despite dampening price competition. The first is transaction stability. The guideline contends that resources might be wasted on inquiries and shopping for small-scale but sporadically purchased goods or services, that consumers who cannot inquire might be taken advantage of and that coordination will make suppliers more efficient. The second is information transparency, which can lessen the social costs of transactions and help create trading opportunities. The guidelines recommend that firms work through their trade associations, to negotiate with the trade associations of their trading counterparts a consensus on reasonable concerted prices, and propose a self-disciplinary code and procedures that are consistent with the spirit of the FTL. Criteria for FTC approval include whether the agreed prices are "reasonable." The FTC's process may include public hearings or seminars with academics, specialists, organizations representing the trading counterparts, other relevant organizations, trade associations, target industries, and social and administrative authorities. The FTC may require conditions, restrictions or undertakings. Approved prices would generally be ceilings, not mandatory uniform prices; however, for "special transactions" where fixed prices involve both buying and selling prices, or where the principal concern is information transparency, the FTC could approve setting both the maximum and minimum prices and valuation methods.[18]

96. The potential scope of the small-business price-fixing exemption is determined by criteria in the general statute about development of small and medium sized enterprises. An enterprise qualifies for that status if its paid-in capital is below NTD 80 million for manufacturers, or its sales revenues are below NTD 100 million in the previous year for services providers. Alternative criteria that agencies may apply, depending on the nature of the business for which they provide guidance, are having fewer than 200 regular employees for manufacturers and fewer than 50 for services providers. The exemption has only been applied once. In 1997, the FTC permitted tire repair shops to agree on a maximum price to charge commercial vehicles for highway emergency service, on the grounds that it would reduce search costs, prevent opportunistic exploitation and provide an impetus for product or service providers to compete.

4.1 Ocean shipping

97. Regulation of ocean shipping conferences leads to a *de facto* exemption from the FTL ban on restrictive agreements. The FTC investigated complaints it received after the Pan-Pacific Stability Association and the Canadian Pan-Pacific Stability Association raised rates in 2003. These rate hikes had been duly filed with the regulatory authority, the Ministry of Transportation and Communications, pursuant to Articles 39, 40 and 25 of the Shipping Law. The FTC considered the legislative purposes of the Shipping Law, the characteristics of the shipping industry, the effects of concerted operation on efficiency, past policies of the FTC towards these organizations and the fact that exemptions for similar agreements were common internationally. Applying the rule in Article 46, the FTC gave precedence to the Shipping Law, while urging the Ministry to strengthen its supervision.

4.2 Telecoms

98. A ten-year effort has liberalised telecom markets. The Telecommunications Act of 1996, amended in 2005, has further promoted liberalization while trying to curb abuse of dominance. The law has been administered by the Directorate General of Telecommunications (DGT) under the Ministry of Transportation and Communications, which was the historic monopoly. The first steps were tentative, keeping the successor to the historic monopoly, Chunghwa Telecom Co. (CHT), a government-owned enterprise and limiting competitive investment in facilities-based providers. A second phase began in 1998

with tendering for the fixed network and fair competition rules for telecoms. The evolution of the ensuing legislation and regulations has been complex. In general, the telecoms law now permits more foreign direct ownership of fixed line businesses, provides for incentive price regulation through flexible price caps, requires accounting separation and bans cross-subsidies and anticompetitive conduct. The legislative barrier to privatisation of CHT has been removed, and the government no longer holds a majority; however, the government is still the largest shareholder, and it also retains a golden share to control or prevent CHT from taking some actions.

99. DGT, through a staff of about 90 in its General Planning and Public Telecommunications departments, has been in charge of liberalizing the market and establishing an environment for fair competition. Its *ex ante* rules and powers address accounting separation for facilities-based systems, designation and funding of a facilities-based universal service provider, number portability and equal access, price-cap tariffs for facilities-based services, co-location for facilities-based carriers and operator choice. DGT rules about fair competition set a presumption for finding significant market power at a market share of 25%.[19] Its *ex post* oversight powers define prohibited dominant-firm conduct, setting out a list of nine industry-specific infractions such as obstructing an interconnection request, refusing to explain fee calculation and rejecting without due cause requests to lease components or circuits or to negotiate co-location. There is also a general catch-all prohibition of abusing dominant status or engaging in other acts of unfair competition. The FTC retains jurisdiction in this sector, but will typically defer to DGT as long as its actions support competition and are consistent with the purposes of the FTL. DGT and the FTC have on occasion dealt with the same case, and they reached consistent results.

100. Despite the cautious approach of the original legislation, mobile operation became competitive. CHT remains the leader in this sector, but it is now only one among three nearly equal-sized national providers. Disputes about interconnection costs slowed down the process. These were reported resolved more effectively by the Telecommunication Tariff Schedule Advisory Council, rather than through DGT's Dispute Resolution Committee.

101. There are plans to move DGT's functions to the new National Communications Commission (NCC). New entrants have not always been confident that DGT is sufficiently independent, since the government still holds nearly half of the shares of CHT. NCC will be clearly outside the government. Its broader jurisdiction is intended to accommodate better the convergence of technologies and services. Under discussion since 1998, the legislation creating the NCC finally became effective in November 2005. The NCC will be an independent agency with 13 full-time Commissioners, serving three-year terms. The NCC is expected to be in operation in early 2006, once the nominees have been confirmed. In the meantime, DGT has been proceeding with changes in the telecoms statute or regulations, including number portability to mobile phones and fixed lines, requiring CHT to adopt a wholesale tariff for resellers of its services and ruling about voice-over-internet service. One key change would be to raise the threshold for asymmetric regulation to a higher market share level (or control over essential facilities). This would eliminate the anomaly that the three national mobile groups, each with a market share of about 30%, could be subject to regulation because they exceed the "market power" threshold.

4.3 Cable television

102. The 1999 Cable TV and Broadcast Act set sector-specific rules that govern acquisitions in the industry. The aim is to curb concentration and to prevent the mutual boycotts of programming that the big operators had used as negotiating tactics against each other. In 1994, the regulator, the Government Information Office (GIO), set up 51 service areas or zones.[20] A horizontal merger among operators or systems may not combine more than one-third of subscribers nationwide, one-half of operators in a zone (unless there is only one operator in the zone), or one-third of operators nationwide. For vertical mergers,

an operator and related enterprises may use only one-fourth of the available channels. These and other GIO responsibilities are to be transferred to the new NCC.[21]

103. The FTC has long disagreed with the GIO about how to deal with this industry. The GIO considers cable TV service to be a natural monopoly suitable for direct regulation, and so it permits and even encourages mergers to monopoly within geographic zones. When the GIO could not stop the pattern of mutual boycotts, the FTC stepped in. FTC guidelines about joint procurement and joint sale of programming deemed transactions outside of the defined structural limits to be violations of Article 24. The FTC also issued a guideline about vertical mergers. The vertical merger guidelines acknowledge that conditions in each zone are likely to be at best duopoly, and often monopoly; thus, the guidelines demand that parties "externalise the internal benefits and propose positive measures … to prevent competition-restraining results". They include a rebuttable presumption that transactions over the structural thresholds fail the merger law's public-interest balancing test. The FTC advised that there should be at least two providers in each zone, except in extremely isolated regions, and that the disposition of the areas and the rules about cross-ownership ought to be reviewed to remove entry barriers. The law was amended to remove the cap and permit more cross-ownership and foreign investment. But most of the areas are served by a monopoly provider with a nine year licence. Virtually the only mergers that the FTC has rejected have been among cable TV systems and program providers (including both horizontal and vertical combinations), although some of those transactions were later approved after the parties divested some of their positions and gave undertakings not to discriminate or refuse to deal.

4.4 Financial sector mergers

104. Mergers of financial institutions may be accelerated for prudential reasons, subject to a competition proviso that is applied by the financial regulator. The precise legislative authority varies slightly for different kinds of institutions. Under the Banking Act, the FTL merger review process and FTC approval do not apply where a bank is in difficulty and the regulator determines that it is necessary to proceed with a transfer immediately and that there will be no serious and adverse effect on competition. Under the Financial Holding Company Act, similar emergency moves for a financial holding company, bank subsidiary, insurance subsidiary or a securities subsidiary of a financial holding company are similarly exempted from merger review authority, if immediate measures are necessary and such measures will not result in unfair competition. The Financial Institutions Mergers Act affords similar treatment to bank takeovers of the credit departments of farmers' and fishers' associations, where such measures would not have any material adverse effect on competition. And the Insurance Act affords similar treatment to takeovers in that sector, where the competent authority deems that there is a need for urgent measures and there will be no material adverse impact on competition. In all these cases, the relevant authority is the Financial Supervisory Commission, which was established in 2004 to develop, improve and oversee integrated financial supervision, consolidating supervision over the banking, securities and insurance sectors and assuming the role of single regulator for all of these industries. A failing firm defence would probably excuse the transactions covered by these special provisions. The FTC does not see risks in this assignment of responsibility.

105. The banking market is fragmented. There are 47 local banks, with the top five holding only 38% of the local market, plus 31 credit-cooperatives. The FSC is concerned about an excess of competition in the financial sector, as institutions are too small to achieve economies of scale or afford innovation. The government holds about 50% of financial assets, while the private banks are family-controlled. Because the industry is so fragmented, most bank mergers would not raise competition issues and indeed many would not even require pre-notification. Merger filing thresholds are set separately for financial institutions. For financial holding company transactions, one party must have revenues over TWD 20 billion. Notification would be required only for combinations involving a firm with a substantial share of the economy's banking revenues. The government is promoting consolidation among existing banks and facilities, rather

than formation of new banks or opening new branches, aiming to reduce the number of financial holding companies to seven by the end of 2006. This policy has stirred some controversy, although in the market conditions of Chinese Taipei combinations to reach that result would not necessarily impede effective competition.

4.5 Electric power

106. Reform in electric power has been under discussion for 10 years, so far without results. Publicly-owned Taiwan Power Company (Taipower) had a 30 year monopoly concession covering generation, transmission and distribution sales, which expired in 1998. Reform would involve both liberalisation and privatisation. The FTC produced two reports in 1999, recommending vertical separation of Taipower as the first-best solution, and other steps as complements if that were not feasible. The FTC recommended that the FTL apply to mergers and abuse of dominance in the sector. The Cabinet approved amendments to the Electricity Act in 1999, limited to setting up an ISO, an independent regulator and a universal service fund, but Parliament did not pass them. Draft legislation providing for phased liberalisation is still officially on the agenda. But legislation to permit larger customers to buy power directly has not gotten through the legislature, because of concerns about effects on labour of privatisation, more than of liberalisation, and about supply security.

107. There are few competitive forces in this industry to date. The Electricity Act permits self-generation and encourages efficient co-generation. But independent producers have no market impact, since all power must to be sold to Taipower, who sells it back to the customers. Independent producers might profit from a production cost advantage or serve demands for service quality.

4.6 Professional services

108. Laws for several professions have required fee standards for practicing, to be set through the charter of the professional association. In some cases, the association must submit its proposal for fee standards for a regulator's approval. Since professionals cannot practice without being a member of the association, the fee standards reduce or eliminate price competition.

109. The FTC has been working to reform these constraints. In 1999, the FTC met with the Ministry of the Interior, the Ministry of Finance, the Ministry of Justice and the Public Construction Commission to discuss whether the price standards in the trade association charters for architects, accountants, lawyers and technicians were in violation of the FTL.[22] The FTC decided that they were violations and so advised the agencies and the professions affected, giving them one year to delete the association rules setting fee standards. Responses have been mixed. For engineering, there has been no change in the law yet, but the public construction commission informed the engineers that they should not send a proposed fee agreement for approval.

110. In the legal profession, the fee standards are no longer enforceable in practical fact. The Ministry of Justice held a conference on the issue, reaching a consensus to abolish the fee standards. That has not yet been done officially, but the standards are reportedly no longer applied. Entry controls limit competition, though. Because there is a limited quota of passes for the annual examination (now about 8%), there is only a limited number of lawyers. Of the total of 5000 lawyers, 3000 are in Taipei. Many people with legal education work in organisations, though, and they can represent their organisations in court. Thus the constraint on entry principally inhibits competition for legal services to individuals and to smaller businesses that cannot employ their own legal staff.

111. Although some associations thus moved to drop fee regulations, the architects resisted. Their system involved a schedule of service charges and a threat to expel from the association any providers that

undercut them. Compliance is monitored and enforced through centralised fee collection by consignment to the association. The FTC in 2003 ordered the three major associations to stop using their fee rules and to repeal them. The associations appealed, and the Appeal and Petition Committee reversed the FTC's decision. The ruling doubted that the standards affected the market, thus confirming that the FTL does not prohibit agreements about price *per se*. Moreover, the Committee found that the fee schedule was exempt from the FTL, because the requirement of regulator approval meant the agreed fees were attributable to an official order. The Committee's decision did not appear to apply the FTC's construction of Article 46, which would require a finding that the purpose of the legislation authorising collective fee setting conflicted explicitly with the purposes of the FTL.

5. Competition advocacy and policy studies

112. Review, analysis and reform advocacy have been among the FTC's most important functions, particularly during its 10 years of operation. The statutory foundation for the FTC to advise about the impact of other policies is a provision that calls on the FTC to co-operate with other government bodies. (Article 9) Among its many interventions, the FTC has advised the Department of Health about regulation of beauty and fitness salons, the Government Information Office about the competition framework for cable television, the Ministry of Finance about retailer hoarding of rice wine and the Ministry of Economic Affairs about liberalising the petroleum products and electricity markets.

113. About a dozen FTC staff are involved primarily in advocacy, out of a total of about 215. The share of budget is about the same, about TWD 21 million out of a total of about TWD 355 million. There was a peak in advocacy activity in 2003, when it accounted for about TWD 27 million. Others assist with industry-specific issues, and a large number of local government officials have responsibilities that include some advocacy.

114. The FTC organises and participates in meetings and seminars with other parts of the government about matters affecting competition. Often, the occasion for these efforts appears to be a concern to manage markets, or at least to listen sympathetically to the participants' complaints about conditions. For example, for 2004 the FTC has noted work with the Council of Agriculture, the Market Management Offices of local governments, the major wholesalers and the police departments to "establish an alarm system to ease the disorder in the demand for and supply of vegetables", a meeting about the "resolution of seasonal demand and supply disorder in the fresh milk market" and one about "stabilizing the steel-related market trading order and producer's self-discipline", to which the FTC invited the Industrial Development Bureau and the International Trade Bureau of the Ministry of Economic Affairs, the China Steel Corporation and 67 other firms in the iron and steel industry. Ten years ago, the FTC and the Council of Agriculture held meetings to air complaints when the price of garlic swung 90% from one season to the next.

115. Worries about unstable market conditions often afflict farmers. The Agricultural Products Market Trading Act encourages farmers to form and join co-operatives. The first sale of farm products at wholesale must go through local markets, although farmers also have the option of selling direct to processors, exporters or consumers. The FTC has expressed concern to the Council of Agriculture about requiring the local wholesale markets to give priority to the products of farmers' associations.

116. There has been a sequence of regulatory review and reform programs over the years. Their titles include the "Project for the Promotion of Regulation Liberalization", "Project for the Termination of Anti-competitive Actions of Publicly-owned Enterprises", "Project for Deregulation and Promotion of Market Competition" and the "Project for Review of the Enforcement of the 'Green Silicon Island Vision and Promotion Strategy' Regulations." The government supports developing the APEC-OECD Integrated Checklist for self-assessment about policies on competition, regulation and market openness. There is no

formal government-wide program of regulatory review and analysis in place yet. In April 2005 the Council on Economic Planning and Development endorsed in principle the establishment of a regular RIA system, and it is commissioning studies about implementation. The system is still under development within the government.

117. In 1994, the FTC set up its own project of review and advice, the "461 Review and Consultation Plan" and the "461 Project Task Force". (The titles refer to the relevant part of the FTL, Article 46, paragraph 1.) They reviewed all regulations which could have been inconsistent with the FTL. The projects were organised around seven sets of regulations, those of Ministry of Finance and Central Bank of China (Taiwan), the Ministry of Economic Affairs and Council for Economic Planning and Development, the Ministry of Transportation and Communications and Public Construction Working Group, the Ministry of the Interior and Veteran Affairs Commission, the Government Information Office, Council for Cultural Affairs and Ministry of Education, the Department of Health and Environmental Protection Administration and the Council of Agriculture. Each of these seven groups did a search and review of the regulations under their oversight, listing regulations that might be inconsistent with the FTL because of their impact on "trading order" and on consumers' interests. Thirteen consultation meetings were held and over two hundred regulations were reviewed.

118. In 1996 the FTC set up a "Deregulation Task Force", to come up with reform plans for presentation to and execution by the Executive Yuan. In manufacturing, the Task Force identified five markets for reform and opening to imports: sugar, petroleum products, telecoms, liquefied petroleum gas and gravel. In services, the Task Force identified eight markets for reform to remove entry barriers or improve regulation: consumers cooperatives, telecommunications, cable television, customs clearance information, courier services, warehouses of export processing zones, government procurement of freight services and electronic information related to securities trading.

119. During the FTC's second term, the Executive Yuan launched the "APROC" initiative (for "Asia-Pacific Regional Operations Center"), another regulatory reform program to remove barriers and create a stronger regional role based on Chinese Taipei's comparative advantages. One goal was to rely less on industrial policy and more on competition. The FTC took advantage of this with its concurrent "Article 46(2) special project", to review government regulations that displaced the market. The 1999 amendment to the FTL to strengthen Article 46 responded in part to the resistance the FTC encountered in this project.

120. An occasion for systematic participation in larger policy initiative was the 2001 Green Silicon Island Vision and Promotion Strategy. The project reported to the Cabinet in August 2003. Consultation in connection with that project led to reforms about insurance, attorney's fees and movie theatres. The Ministry of Finance agreed to permit firms to set their own supplementary premiums for fire and car insurance, to eliminate minimum fire insurance premiums and to admonish the industry to obtain FTC approval for concerted action about premiums for joint insurance. The Ministry of Justice reached a consensus with the FTC that bar associations should not set fee standards. And the Government Information Office eliminated the rule that had limited the number of screens showing foreign films (in part because it conflicted with WTO commitments). The Public Construction Commission agreed to remove fee-setting provisions from the relevant legislation, although it has not yet done so, nor has the association amended its own rules.

121. The FTC combined advocacy with enforcement to reform the market for liquefied petroleum gas. In 1998, the FTC recommended breaking up the distribution monopoly of the Department of LPG Supply of the Veterans Affairs Commission. The monopoly supplier responded with new rules for selecting qualified distributors, and that number increased from one to nine. In 1999, the Bureau of Energy issued new rules about permits for import, export and sale of petroleum products, in effect lifting import regulations. This broke the production and supply monopoly of China Petroleum Corporation through the

entry of a competitor, Formosa Petrochemical Corporation. The industry did not find this new competition comfortable, and thus the FTC's biggest enforcement action to date was needed to break up their post-liberalisation cartels.

6. Conclusions and policy options

122. By including a general competition law in the program of market-opening reforms, policy makers recognised that the economy of Chinese Taipei would need to apply a comprehensive approach to overseeing the competitive process. The substantive law generally follows mainstream practice to cover the basic competition problems of restrictive agreements, monopolies and anti-competitive mergers. The clear statutory basis for concentrating enforcement attention on horizontal collusion is particularly notable.

123. Including control of unfair competition and deceptive practices highlights a consumer dimension. These powers give the FTC many opportunities to demonstrate to the public that marketplace abuses will not go unchecked, especially in the absence of a central consumer protection enforcement authority. Most of the FTC's workload, measured in terms of numbers of decisions if not in terms of resources deployed, has been in this area. Treating objectionable practices as unfair is an obvious, natural and appropriate strategy in a cultural tradition that values fairness and harmony. Acknowledging that tradition might also facilitate the use of rules that are based on a conception of competition in terms of efficiency. But a focus on fairness can encourage interventions to correct differences in bargaining power. Where these do not also remedy market power that harms consumers, such interventions on behalf of particular competitors could dampen competition rather than promote it.

124. The ready appeal to fairness is consistent with the frequent resort to the general prohibition against "any deceptive or obviously unfair conduct" that could "affect trading order" in Article 24. The FTC admits that it uses this part of the law in circumstances where it cannot demonstrate a violation of other, more specific provisions of the law. But as long as it rests decisions on the assertion that practices are "obviously" unfair or deceptive, the FTC postpones developing experience and economically-informed doctrines for applying more specific provisions. The courts have been challenging the FTC to be more precise, and the FTC is invoking Article 24 less often. For the 10 years 1994-2003, the FTC relied on Article 24 for more than 75 decisions per year; in 2004, though, there were only 32 decisions based on Article 24, the lowest number since the first full year of FTC operation in 1993, and the number for 2005 may be even lower yet. Thus, the over-use of this general "catch-all" provision may be a transition phenomenon.

125. Merger control is up to the FTC alone. Its merger decisions are not subject to revision or reversal by the government or a political official based on effects on other policy interests such as employment or competitiveness. This underscores the independence of competition analysis in this sometimes sensitive area. The FTC uses a general "public interest" standard, though, which might invite the FTC itself to consider the effects of proposed mergers on other policies; however, the FTC explains its merger analysis only in terms of market effects. Still, the FTC has rarely found a threat of market power that required preventing or controlling merger plans. The only merger control applications have been to support the liberalisation of the petroleum market and to preserve some competitive confrontations in the usually-monopolised markets for cable TV service. Retaining merger control authority is worth the resource commitment despite its rare application, especially since the 2002 changes have greatly reduced the burdens of filing and reviewing applications. As FTC enforcement against horizontal combinations becomes more vigorous, there may be more attempted mergers among firms operating in domestic markets, some of which would justify FTC intervention. Indeed, that may be happening already, as the rate of merger filings has accelerated in 2005. The FTC guidance that limits the prospect of intervention in mergers outside of Chinese Taipei is straightforward and in principle neutral: a merger must be notified if the statutory turnover thresholds are met in Chinese Taipei. Some potential complications remain, though.

The guideline implies that the threshold might be met if the firms' products end up in Chinese Taipei even if the merging parties do not sell them there directly, so firms might not be able to determine whether they meet the threshold without knowing more about the downstream distribution and use of their products. The alternative threshold based on market share also raises problems, and not just for foreign firms, as basing notification on market share introduces elements of uncertainty and subjectivity.

126. The FTC is now a stable, experienced administrative agency. It followed an appropriate sequence in introducing competition policy to Chinese Taipei, emphasising transparency and guidance to encourage compliance before undertaking stronger enforcement measures. To further improve transparency and accountability, the FTC has implemented the new general law about administrative processes, by ensuring that governing legal criteria are set out explicit in the statute and using the new provision for formal public hearing that will emphasise the importance of principled legal justifications. The FTC has enough resources to do the job. Its budget and personnel complement have been stable while the workload has shifted. As the number of merger filings dropped sharply in 2002, the FTC could pay more attention to other complex competition issues. The overall activity level declined for a while but rebounded in 2005. The total number of cases undertaken through November 2005 (1 698) exceeded the total for the full year 2002 (1 387).

127. Whether the FTC has the discretion to concentrate its resources on higher-priority cases remains in doubt. The FTL provides that the FTC may investigate, on complaint or *ex officio*, any violation that "harms the public interest." The FTC's rules do not include the "public interest" criterion, however, but instead provide only that the FTC may reject complaints that "lack substantive content" or proper identification of the complainant. The FTC contends that it can dismiss complaints that lack the public interest element, but in practice the FTC does not do so. This should be clarified, particularly since the law's provision for rights of private suit in court are comparatively generous. Disappointed complainants have a credible alternative outlet for their complaints. It is not clear from the FTC's enforcement statistics how it is using its *ex officio* powers to target high-priority problems. The number of *ex officio* matters has increased greatly, with 104 in 2004 compared to a long-term annual average of about 50. The FTC's decisions are still heavily concentrated on unfair practice issues, of multi-level sales and deception. Of 34 decisions finding violations in 2004, only 3 were about anti-competitive practices (and 2 more fell under the catch-all of Article 24). The absence of FTC cases about bid rigging is explained only in part by the alternative enforcement route of criminal prosecution, because that route would only apply to collusion about public projects. The same firms might also be colluding about private projects. The FTC may need the additional enforcement lever of a leniency program to uproot this kind of conduct.

128. The public profile of the FTC is lower now than when the law was new and the government was promoting liberalising reforms. To be sure, competition policy is important enough that a change in the party in power is leading to changes in the composition of the FTC, to include people with political backgrounds. Legislators expressed interest in the constituents' complaints that led to recent cases involving intellectual property licensing and pricing. Ultimately, agencies in a politically open society must be responsive to public concerns. But sound competition policy requires that the enforcer be able to resist pressure, and even the appearance of pressure, to use the law to favour the interests of some competitors or customers over others. The proposed reforms to underscore the independence of the FTC, as well as the independence of other bodies that should be removed from the apparent influence of short-term political calculation, are thus welcome.

129. Competition policy issues still require attention in other areas. The record of regulatory reform in Chinese Taipei since the mid-1990s follows experience in many other jurisdictions. Progress has been slow in sectors where change has come slowly in other jurisdictions too, such as electric power, postal services and some aspects of professional services. The most visible reforms have been in telecoms, particularly in establishing a competitive market for mobile service; however, an independent regulator is just now being

set up, and this will be particularly important as long as the government still has a substantial interest in the historic incumbent. The extent of the government's direct interest in the economy is obscured by terminology, as firms are described as privatised if the government shareholding falls below 50%. Under that definition, government holdings in nominally privatised firms can still be substantial enough to affect the firms' strategies and government policies about their industries in ways that could have implications for market competition. FTC vigilance about the risk of cross-subsidy or other distortion remains warranted. Considerations of industrial policy and targeting are prominent in policy debates, although government interventions tend to be aimed at helping firms participate in international markets that are usually competitive. The government is now paying some attention to the structure of the financial sector, evidently motivated by policy considerations other than competition. In the fragmented market conditions of Chinese Taipei, to reduce the number of financial holding companies to seven or to support the creation of three locally-based financial firms with market shares over 10% would not on its face threaten adverse effects on market competition. The FTC may be an awkward position, though, if FTC acquiescence in a combination because it does not threaten competition is understood by the public as FTC approval of other aspects. The FTC may need to explain that the basis for its non-action is limited to the absence of adverse effect on market competition.

6.1 Policy options for consideration

6.1.1 Implement a leniency programme.

130. Putting a sound leniency program in place should be a high priority. This is the principal gap in the FTC's toolkit. An effective leniency program could invigorate the FTC's enforcement against cartels and bid rigging, where the FTC seems to defer to the prosecutor about public projects while taking few cases itself about matters that are outside the prosecutors' jurisdiction. As businesses become more familiar with the FTL, "on the record" formal cartels will go underground. Experience elsewhere has shown that leniency tools are invaluable to penetrate clandestine cartels. The FTC has been working on legislation to authorise leniency. When that is adopted, it will design the details of the program. The FTC is also planning to propose clearer rules about joint ventures for research and development. These two aspects of enforcement concerning horizontal combinations might be planned as a legislative package, joining a measure to make enforcement tougher with another to reassure industry that the FTC will not attack efficient joint ventures.

6.1.2 Sanctions must be sufficient to deter.

131. Substantial sanctions against cartels are closely related to leniency, which does not work unless the benefit of avoiding punishment is great enough. The sanctions provided under the original FTL were insignificant. Before 1999, the maximum administrative fine was only TWD 500 000, and the maximum criminal fine only TWD 1 million. Recognising this deficiency, the 1999 amendments increased the potential fines a hundredfold. Sanctions for violations of the FTL are now higher than sanctions provided against other kinds of business misconduct. But fines against hard-core conduct are still low by international comparison: the fines issued in December 2005 against the cement cartel amounted to only USD 6 million. The FTC's regulations call for considering criteria such as the parties' gain from the violation in determining the fine. The general statement is not backed by a more specific measure or target that is clearly related to economic impact. Its application is limited by the statutory cap. Set at an absolute level rather than as a proportion of turnover or some other flexible measure, the cap may prevent the FTC from imposing fines that are high enough to deter big firms from big violations, although fines under the cap may be adequate to deter smaller firms from smaller violations.

6.1.3 Limit special treatment for SME price fixing.

132. The provision for the FTC to approve price-fixing agreements among small businesses sends a confusing signal. The prohibition of hard-core horizontal cartels should be a bright-line rule. By contrast, the exemption from Article 14 looks like price regulation through FTC ratification of privately-reached agreements, as long as the agreed prices are "reasonable". The FTC tries to justify the provision for these exemptions in terms of information transparency and costs and what it calls "transaction stability". Permitting price fixing so consumers will not have to waste resources on inquiry and shopping displays a paternalistic distrust of consumer choice in the market. Information transparency can indeed reduce costs of transactions and create trading opportunities, but overt price fixing is not typically needed to support it. Of greater concern, perhaps, is the unusual "hold-up" situation in which consumers who cannot take the time to inquire might be taken advantage of. A better approach in these situations could be to encourage price transparency, rather than countenance actual price fixing. The exemption has only been granted once, so perhaps the provision is thought to be insignificant as a practical matter. The provision responds to a general policy goal of supporting small business, and having it on the books, subject to close FTC oversight, might reduce the temptation to seek broader statutory exclusions for the same kind of conduct.

6.1.4 Eliminate market share as a criterion for merger notification.

133. A market share test is uncertain in administration, because market definition is sometimes unclear and often contested. Making the reporting obligation depend on market share tends to confuse the administrative obligation with the substantive rule. Basing the reporting obligation on market share is not consistent with best practices.[23] It would be better to base it solely on a less contested measure, such as assets or turnover. The FTC acknowledges that this kind of test leads to uncertainty on both sides, noting that it has had disputes with firms about market definitions and shares and thus about the obligation to notify. Rather than keep it just to control consolidation in the cable TV sector, it would be better to adopt a specific merger enforcement policy for that sector, perhaps in collaboration with the NCC.

6.1.5 Clarify the FTC's independence from political oversight.

134. Each of the proposed changes in the structure of independent agencies like the FTC would be sound. The FTC chairman would no longer participate in Executive Yuan meetings. This would move the FTC away from policy-making discussions and require changes in the FTC's approach to advocacy. There are advantages to being at the table when other policy issues are discussed, but being more independent would not necessarily prevent the FTC from expressing views and even objections concerning anticompetitive impacts of other government actions. Appeals from FTC decisions would be taken directly to the Administrative Court rather than to an appeals committee that is responsible to the Executive Yuan. This is already possible for decisions that have been taken after a formal hearing at the FTC. This change would underscore that application of competition law is not a matter for political balancing of interests and policies. Commissioner appointments would be subject to consent by the legislature. This change would broaden the base of support and "ownership" of competition policy, although the effects on institutional independence might be mixed. Legislative confirmation provides some check on possible arbitrariness, but also another avenue for expression of political interest. Terms would be staggered rather than consecutive, which would promote continuity.

6.1.6 Consider strengthening rights of private action further.

135. The FTC could concentrate its resources more efficiently if it did not feel obliged to respond to every complaint. Private litigation appears more frequent in Chinese Taipei than in many other places, but still there are some measures that might make it even more attractive as an alternative to a no-cost complaint to the FTC. Chinese Taipei has already put in place some procedural innovations to aggregate

consumer-level claims for consumer claims and securities cases. It would be straightforward to extend them to actions for similar kinds of claims under the FTL. Another measure that would tend to facilitate private litigation would be to increase the number of lawyers available to represent smaller parties by eliminating the quota on new lawyers.

NOTES

1. Parenthetical citations are to the Fair Trade Law as amended, unless otherwise indicated.

2. Constitution, Article 142; see Williams, 2005.

3. There was at one time some authority for reading Article 14 as a *per se* prohibition. (Chao, 1998)

4. An early, unpublished decision had implied a de minimis interpretation: no action was taken against two transport firms for fixing freight rates, because each had less than 1% of the market. (L.S. Liu, 2002)

5. Originally, the law included a "fair trade" rule, regulating how firms could set retail prices for consumer goods for which there was adequate inter-brand competition. This rule was never applied, and it was removed in 1999.

6. The FTC no longer has any responsibility to compile and publish a roster of "monopolies". It built on this to publish a roster of concentrated industries as well. That function, which occupied substantial resources, was eliminated in the 1999 amendments. In addition to the monopolies in energy and petroleum products, the most concentrated non-service sectors had been in polyester, cement, steel, paper and some chemical products, while the 1993 list of monopolistic enterprises included railroad passenger service, fixed line telecoms, ports, airport ground services, long-haul buses, life insurance, commercial paper trading, the stock exchange and trading financing, and TV broadcasting. (K-C. Liu, 2002)

7. The case is reported on the English part of the FTC's website under "mergers."

8. In the similar case pending in the United States, the CAFC ruled in September 2005 that packaging essential and non-essential CD patents together for licensing was not *per se* patent misuse.

9. This legalism may be a carryover from debates over the original construction of the competition law, which included concern about unfair and irregular corporate activities and related-party transactions as well as market competition. The definition of "merger" was also affected by 1997 legislation amending the Company Law to protect creditors and minority shareholders. (L.S. Liu, 2002, pp. 43-44)

10. The 2002 amendments raised the thresholds substantially. Before the amendments, the law required notification and approval of minor and competitively insignificant transactions such as as parent-subsidiary share transfers and franchise contracts.

11. The Ministry of Justice would limit this treatment to items that are not clearly covered by a specific law.

12. In this practice, the FTC followed the example of the Council of Grand Justices, which publishes dissents (unlike the regular courts, which do not). (L.S. Liu, 2002)

13. The FTL also has an obscure provision for individual fine and imprisonment where an enterprise is found to have made false statements that damage business reputation. (Article 22, Article 37)

14. It does not, however, include criminal enforcement against multi-level sales schemes under Article 23.

15. Government Procurement Act, Article 87(4). This Article also prohibits several other forms of coercion and interference with the procurement process.

16. This total represents about 4% of all of the criminal cases under the Government Procurement Act. Most prosecutions evidently involve fraud or coercion.

17. Consumer Protection Law, Articles 49-55.

18. Fair Trade Commission Guidelines on the Approval of Concerted Pricing among Small or Medium sized Enterprises, 13 January 2005.

19. The provision of the telecoms law about anticompetitive conduct was taken from the part of the original FTL, which has since been repealed, that required the FTC to maintain a roster identifying firms with market power, based on market share. (L. S. Liu, 2001)

20. The Cable Television Law in place at that time limited the number of providers in each of these zones to a maximum of five.

21. The GIO also applies rules under the Broadcasting Law requiring prior approval of transfers of shares in over-the-air broadcasters. These rules set maximum holding limits, to discourage excessive concentration of media ownership. The GIO will not permit a transfer to a natural person if the transferee (together with related parties) holds more than 50% of the shares or more than 10% of the shares of a newspaper or broadcast business, or a transfer to a legal person that holds more than 50% of the shares of a newspaper, broadcast or related business.

22. At first, the FTC did not treat self-employed professionals and other individuals in trade as enterprises covered by the law's prohibitions, and thus the FTC did not comment on their price control arrangements in its first round of reviews in the mid-1990s. (L.S. Liu, 2002)

23. The OECD Council Recommendation on Merger Review (section I.A.1.2.2) calls for notification requirements that are based on clear and objective criteria., Similarly, the International Competition Network, in its Recommended Practices for Merger Notification and Review Procedures (II.B), calls for notification criteria that are objectively quantifiable, and it considers market share to be inappropriate.

BIBLIOGRAPHY

Chao, Yang-Chin (1998), "Exemptions and exceptions to competition policy and law", speech by former FTC Chairperson at APEC Competition Policy and Deregulation Workshop, September 8, 1998.

Chuang, Chuen-Fa (2005), "Economic Effects of Liberalization on the Liquefied Petroleum Gas Market", *Economic Research*, vol. 45, no 1, pp. 1-29.

EIU (2005), Economist Intelligence Unit, *Country Report: Taiwan*, August 2005.

FTC (2002), *Competition Law and Policy in Chinese Taipei – 2002*, Annual Report to OECD Competition Committee.

FTC (2003), *Annual Report on Competition Policy Developments in Chinese Taipei – 2003*, OECD Competition Committee.

FTC (2005), *Annual Report on Competition Policy Developments in Chinese Taipei – 2004*, OECD Competition Committee.

Liu, Kung-Chung and Yun-Peng Chu (2002), "Market power in Chinese Taipei: Laws, policies and treatments", *Review of Industrial Organization*, Kluwer Academic Publishers, Netherlands, vol. 21, pp. 129-43.

Liu, Lawrence S. (2002), "Fostering competition law and policy: A façade of Taiwan's political economy", Global Studies Law Review, Washington University Law School, vol. 1.

Liu, Lawrence S., Chorng-Jian Liu and Chuen-Fa Chuang (2001), "Communications, convergence and competition: the case of Taiwan", in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo and Jiming Ho, eds, Kluwer Law International, The Hague, pp. 329-46.

Liu, Len-Yu (2004), "Taiwan's financial reforms and competition", in *The Future Development of Competition Framework*, Tzong-Leh Hwang and Chiuan Chen, eds., Kluwer Law International, The Hague, pp. 223-38.

Lo, Changfa (2001), "Intervention of competition law in international trade: the Taiwan experience", in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo and Jiming Ho, eds, Kluwer Law International, The Hague, pp. 399-425.

Peerenboom, Randall (2002), *China's Long March toward Rule of Law*, Cambridge University Press, Cambridge.

San, Gee and Changfa Lo (2001), "A Decade of Fair Trade Law Legislation and its Enforcement in the Republic of China", in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo and Jiming Ho, eds, Kluwer Law International, The Hague, pp. 80-116.

Shieh, Ming-Yan (2004), "A discussion of the relationship between the patent law and the Fair Trade Law in Taiwan with a review of the *Philips* CR-R decisions", in *The Future Development of Competition Framework*, Tzong-Leh Hwang and Chiuan Chen, eds., Kluwer Law International, The Hague, pp. 155-75.

Su, Yeong-Chin (2001), "Competition authorities in competition", in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo and Jiming Ho, eds, Kluwer Law International, The Hague, pp. 163-79.

Williams, Mark (2005), *Competition Policy and Law in China, Hong Kong and Taiwan*, Cambridge University Press, Cambridge.

DAF/COMP/GF(2006)1/FINAL

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EXAMEN PAR LES PAIRS DE LA LOI ET DE LA POLITIQUE DE LA CONCURRENCE AU TAIPEI CHINOIS

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2006

DROIT ET POLITIQUE DE LA CONCURRENCE AU TAIPEI CHINOIS - EXAMEN PAR LES DROIT ET POLITIQUE DE LA CONCURRENCE AU TAIPEI CHINOIS

Encadré 1. Synthèse

Le droit de la concurrence au Taipei chinois est un élément important du programme de réformes économiques qui a transformé une économie dirigée, axée sur la fabrication et les exportations, en une économie de marché reposant sur les services et la haute technologie. Suivant la pratique établie, la loi sur la concurrence couvre les principaux problèmes de concurrence : accords restrictifs, monopoles et fusions anticoncurrentielles. Il convient de noter en particulier le fondement juridique explicite qui rend possible l'application spécifique de la loi aux ententes horizontales.

La présence de règles sur les pratiques commerciales trompeuses et déloyales établit un lien entre le droit de la concurrence et les intérêts des consommateurs et incorpore une conception de la concurrence qui reconnaît l'importance du traitement loyal. Le respect de cette tradition culturelle pourrait faciliter le recours à des règles relevant d'une définition de la concurrence en fonction de l'efficacité. L'importance attachée à la loyauté pourrait toutefois conduire à des interventions visant à corriger des différences de pouvoir de négociation qui, au lieu de favoriser la concurrence, risquent de la freiner.

La Commission de la concurrence, bien qu'elle soit officiellement rattachée au Yuan exécutif, exerce ses activités de manière largement indépendante. Ses décisions ne peuvent pas être révisées ou annulées en raison de leurs effets sur d'autres intérêts pratiques. Certaines réformes générales actuellement en cours préciseront l'indépendance de la Commission et de certains autres organes comme le nouveau régulateur des télécommunications et la Banque centrale, qui doivent se situer clairement en dehors du processus de décision des pouvoirs publics.

Le travail de la Commission porte en grande partie sur les pratiques commerciales trompeuses et déloyales. Dans ses activités de supervision de la concurrence, la Commission s'est principalement attachée aux restrictions horizontales. Les sanctions les plus sévères qu'elle ait prononcées jusqu'ici se sont appliquées en 2003 à l'encontre de cartels du secteur du GPL, auxquels elle a imposé des amendes de 344 millions TWD (environ 10 millions USD). Pour mieux lutter encore contre les ententes injustifiables, il faudrait que la Commission mette en place un dispositif de clémence. Le traitement particulier réservé aux ententes illicites sur les prix et aux autres ententes entre petites et moyennes entreprises, qui envoie un message ambigu sur l'importance de la répression des ententes sur les prix, devrait être supprimé. Les sanctions devraient être suffisantes pour avoir un effet dissuasif ; le plafond des amendes est faible comparativement aux autres pays. Certains autres aspects du dispositif d'application devraient être revus. Fait plus important encore, l'obligation de déclaration des fusions devrait reposer uniquement sur des critères objectifs et raisonnables, et non sur la part de marché. Les droits relatifs aux actions privées en justice pourraient être renforcés par l'introduction dans le domaine de la concurrence des procédures innovantes déjà utilisées au Taipei chinois pour examiner les plaintes des consommateurs.

La Commission a fait preuve de prudence dans l'application de la loi sur la concurrence aux problèmes de monopole, qui sont souvent soulevés par des entreprises ayant un rapport avec l'État. Elle a en général préféré la négociation à la répression, même si elle a pris des mesures très sévères à l'encontre de l'ancien monopole du pétrole, auquel elle a infligé une amende de 5 millions TWD pour refus d'approvisionnement d'un nouveau distributeur de carburant avion. L'imposition par la Commission d'une amende à une communauté de brevets qui refusait de négocier des redevances à la baisse a été annulée en appel et cette affaire est toujours en instance.

Les réformes de la réglementation qui ont le plus retenu l'attention ont été engagées dans le secteur des télécommunications, où elles ont notamment consisté à établir un marché concurrentiel pour le service des mobiles ; un régulateur indépendant est toutefois en cours d'installation. Les pouvoirs publics conservent dans l'économie un intérêt direct supérieur à ce qu'aurait pu sous-entendre l'ampleur de la « privatisation », étant donné que ce vocable recouvre simplement le fait que la part détenue par l'État est inférieure à 50 %. La participation de l'État peut être suffisamment importante pour avoir sur les stratégies et les politiques une incidence qui se répercute sur la concurrence sur le marché. La vigilance de la Commission à l'égard du risque de subventions croisées ou d'autres distorsions demeure assurée.

1. Les fondements

1. Les institutions qui appuient la concurrence fondée sur les entreprises dans l'économie du Taipei chinois partagent des valeurs propres aux traditions confucéennes de gouvernement d'entreprise. Ainsi, les instruments et orientations juridiques du régime de concurrence présentent certains parallélismes avec ceux du Japon et de la Corée, et sont influencés par d'autres traditions en droit de la concurrence, en particulier par le modèle de l'Allemagne. Le régime de concurrence du Taipei chinois contraste avec d'autres régimes de la région qui partagent ces traditions mais ont été plus lents à adopter un régime réglementaire exhaustif en matière de concurrence.

1.1 Contexte et historique

2. Comparativement à d'autres, le Taipei chinois possède une économie florissante, souple et dynamique. En termes de PIB global en PPA, le Taipei chinois se situe derrière la Corée du Sud et l'Indonésie et peu après l'Australie, mais devance la Thaïlande et, plus largement encore, la Malaisie. Il compte 22.5 millions d'habitants, soit moins de la moitié de la population de la Corée du Sud. L'île est aujourd'hui prospère, son PIB par habitant pour 2004 étant estimé à 25 300 USD (en PPA). Le Taipei chinois est un important investisseur dans toute l'Asie du sud-est. Son excédent commercial est considérable et ses réserves en devises sont les troisièmes du monde. Le conservatisme financier et la vigueur de l'entrepreneuriat ont protégé le Taipei chinois de la crise financière asiatique de 1998. L'économie est entrée en récession en 2001, première année de croissance négative jamais enregistrée par cette économie, en raison de l'effet conjugué de la détérioration de la conjoncture mondiale, de problèmes de coordination stratégique et de mauvaises créances bancaires. Le chômage a également été porté à des niveaux sans précédent. En 2002, la production s'est toutefois redressée et en 2003-2004, Taipei a renoué avec une forte croissance. L'économie repose maintenant sur les services (66 %). La fabrication (32 %) est principalement axée sur le matériel informatique de haute technologie, secteur où le Taipei chinois occupe le troisième rang mondial (après les États-Unis et le Japon). L'agriculture ne représente que 2 % du PIB, ce qui traduit un recul de 32 % par rapport au début des années 50. La fabrication connaît un ralentissement alors que la production se déplace, notamment vers le continent. Font exception à cette évolution la fabrication de machines et d'équipements destinés aux installations manufacturières extraterritoriales, de même que les écrans TFT/LCD, dont le Taipei chinois demeure le principal producteur (suivi de près par la Corée) et qui bénéficient du soutien étatique pour la technologie.

3. Le développement du Taipei chinois s'est déplacé vers la technologie et les services. Avant 1990, l'économie se caractérisait par la stimulation des exportations et le protectionnisme. Les industries lourdes nationales étaient dominées par des entreprises d'État et des sociétés appartenant à des groupes d'entreprises. Le système de « capitalisme autoritaire » a engendré l'un des secteurs étatiques les plus importants dans une économie de marché. En 1952, les entreprises publiques représentaient 57 % de la production industrielle ; en 1986, ce chiffre était tombé à 20 %. Les chocs pétroliers des années 70 ont conduit à certaines restructurations tandis que l'État conservait le monopole du pétrole, de l'électricité, du gaz, de l'eau, de l'acier, des chemins de fer, de la construction navale, des services postaux, des télécommunications, du tabac, de l'alcool et de la banque. Deux sociétés d'investissement liées au KMT, le parti nationaliste au pouvoir, exerçaient un contrôle sur quelque 50 entreprises. Environ 100 conglomérats, composés d'environ 700 à 800 entreprises, et représentant 34 % du PNB mais moins de 5 % de la population active, étaient pour la plupart concentrés dans la haute technologie et la fabrication. Même si le Taipei chinois a eu tôt fait de supprimer la concurrence interne pendant sa phase de développement, son marché s'est révélé plus ouvert que ceux de bon nombre de ses voisins. Le Taipei chinois a libéralisé le commerce des biens dans les années 80 et celui des services dans les années 90.

4. L'économie du Taipei chinois s'intègre de plus en plus à l'économie continentale. L'île a effectué des investissements considérables en Chine continentale et ce, malgré l'absence de liens

commerciaux directs. La Chine, et non plus les États-Unis, est le principal marché d'exportation du Taipei chinois. Le Taipei chinois est devenu membre de l'OMC en 2002 en tant que territoire douanier distinct, peu après la Chine continentale. Les services dominent maintenant l'économie de l'île, qui a donc appuyé les initiatives de l'OMC visant à libéraliser les échanges de services, principalement dans les télécommunications, les transports, la finance et l'informatique.

5. Les principes juridiques et réglementaires s'inspirent de différentes sources. Dans la tradition chinoise, le droit est principalement conçu comme instrument de contrôle et les tribunaux faisaient partie de l'administration. Les réformateurs chinois de la première moitié du XX^{e} siècle ont rédigé une constitution et adopté des lois et des codes inspirés de modèles européens, pour l'essentiel allemands. Les liens avec les traditions du code civil allemand restent vivaces. De nombreux juristes du Taipei chinois ont étudié en Allemagne et la réglementation tend à s'aligner sur l'approche allemande. Les spécialistes qui ont été chargés de codifier le droit de la concurrence comptaient parmi eux certains juristes de la faculté de droit de la National Taiwan University, qui ont emprunté aux concepts du droit allemand. La plupart des économistes ont quant à eux étudié aux États-Unis.

6. La concurrence sur le marché suscite depuis longtemps un intérêt concret, bien que l'on ait généralement eu pour tendance de la supprimer. Certaines règles interdisant les monopoles et les ententes sur les prix remontent au code de la dynastie Tang. C'est toutefois le contrôle centralisé qui a prévalu. La méfiance à l'égard des commerçants, une caractéristique culturelle, a rapidement conduit à s'en remettre aux pouvoirs publics pour veiller au contrôle des prix et à la réglementation de la propriété des ressources et de la production. Le secteur privé s'est également livré à des restrictions anticoncurrentielles. Au tournant du XX^{e} siècle, les guildes concluaient des ententes sur les prix. Jusqu'au milieu des années 80, les tribunaux du Taipei chinois recevaient, dans le cadre d'actions judiciaires privées, des plaintes pour non-respect d'ententes anticoncurrentielles. L'État est par ailleurs souvent intervenu pour protéger les intérêts des entreprises.

7. Le programme de libéralisation, dans lequel s'inscrit la codification du droit de la concurrence, remonte aux années 80. Dans le discours d'orientation qu'il a prononcé en 1984, le Président a annoncé une nouvelle vision de la politique économique reposant sur l'internationalisation, la libéralisation et l'institutionnalisation. Cette annonce a coïncidé avec une période de crise économique marquée par des retraits massifs de fonds dans une institution financière et la démission des ministres des Finances et de l'Économie. En 1985, un comité de la réforme économique réuni par le Premier ministre Yu a recommandé un ensemble de modifications en profondeur devant déboucher sur la libéralisation de l'économie nationale, la privatisation de nombreuses entreprises publiques, la réduction des barrières tarifaires et non tarifaires, l'autorisation de la présence de banques étrangères et la libéralisation des flux de capitaux. L'une de ces modifications portait sur la création d'une autorité de la concurrence moderne et de grande ampleur, en remplacement de la Commission de surveillance des prix, qui avait tenté de coordonner l'offre et la demande par décrets.

8. En 1986, un projet de loi préparé par un groupe de spécialistes mandaté par le ministère de l'Économie a été soumis au Parlement. Selon les pouvoirs publics, cette loi s'imposait pour lutter contre les monopoles et les ententes ayant résulté de la libéralisation et pour contrôler les pratiques déloyales. De nombreux pays, notamment les États-Unis, exerçaient en outre des pressions pour que soient traitées des questions comme celle de la propriété intellectuelle. Les partenaires commerciaux souhaitaient que le Taipei chinois adopte des lois pour remédier aux problèmes de concurrence déloyale comme le détournement et la contrefaçon de marques. La question de savoir si le Taipei chinois se doterait d'une législation antitrust leur importait moins.

9. La législation sur la concurrence, qui a suscité bien des controverses, n'a été adoptée qu'après des années de débat. Ce retard s'explique en grande partie par le ralentissement de l'élan de réformes

économiques intervenu en 1985, année où l'attention s'est portée sur la réforme politique. Bien que la législation sur la concurrence ait été proposée par l'administration en place, la nouvelle orientation présentait une menace pour les monopoles, publics et privés, liés au clientélisme. L'opposition a accueilli favorablement la proposition, y voyant un moyen de démanteler les réseaux de pouvoir des entreprises en place. Le débat a notamment porté sur l'utilité même d'une législation sur la concurrence, l'incidence qu'aurait le contrôle des fusions sur l'efficacité et la responsabilité d'un organe indépendant chargé d'appliquer la loi. Les tenants de la législation faisaient valoir que la répression des pratiques déloyales comme les déclarations trompeuses et les mécanismes de ventes pyramidales serait beaucoup plus sévère que celle des restrictions anticoncurrentielles. Pour encourager l'adoption de la législation, l'administration a accepté un moratoire d'un an sur son application.

10. Le débat sur la question de l'indépendance de l'autorité d'exécution a suivi l'évolution de la situation politique. Le projet de loi a été rédigé alors que la loi martiale était encore en vigueur. Dans le style caractéristique des textes législatifs de cette période, il accorde une grande latitude à l'organe chargé de l'application de la loi. À l'origine, l'application devait être confiée à un service du ministère de l'Économie, et aurait donc été soumise au contrôle des pouvoirs publics. La loi a cependant été adoptée après la levée du décret instaurant la loi martiale. Dans ces circonstances nouvelles, il fallait conférer un statut autonome à l'autorité d'exécution. Celle-ci devait relever directement du Yuan exécutif, et non du ministère de l'Économie qui en était l'instigateur. La loi sur la concurrence a finalement été adoptée en 1991. La loi organique qui prévoit la mise en place de la Commission pour administrer cette loi a été adoptée le 13 janvier 1992 et est entrée en vigueur le mois suivant, le 4 février 1992.

11. La loi sur la concurrence a été amendée depuis à plusieurs reprises afin d'en améliorer l'efficacité et l'application. En 1999, des amendements ont remplacé les sanctions pénales pour monopolisation et action concertée par des amendes administratives et supprimé le registre des entreprises dominantes. D'autres amendements apportés en 2000 ont eu pour effet de modifier les pratiques administratives. En 2002, le système de notification des fusions a été revu et la transparence des procédures, améliorée. D'autres modifications seront vraisemblablement apportées étant donné que la Commission travaille à la mise au point d'un dispositif de clémence qui devra reposer sur un fondement juridique. La Commission est également en train de clarifier les aspects de la loi concernant les accords horizontaux afin de retirer les restrictions qui risquent de réduire les incitations à l'innovation pour les entreprises communes de recherche-développement.

1.2 Objectifs

12. La législation fixe à la politique de la concurrence des objectifs multiples, à savoir maintenir l'ordre commercial, protéger les intérêts des consommateurs, garantir une concurrence loyale et favoriser la stabilité et la prospérité économiques (article 1)[1]. Exceptionnellement, le terme « concurrence » est défini spécifiquement en tant que rivalité entre des entreprises qui, pour réaliser des transactions, offrent des prix plus intéressants ou des quantités, une qualité, un service ou d'autres conditions meilleurs (article 5). Les déclarations officielles sur les mesures de mise en œuvre et les objectifs de la législation réitèrent généralement ces éléments sans expliquer davantage leur relation ou leur ordre de priorité. Par exemple, les objectifs de la révision du régime de contrôle des fusions sont simplement de permettre aux entreprises de demeurer concurrentielles et efficaces tout en préservant la concurrence sur le marché.

13. La concurrence loyale semble être l'objectif principal de la loi. La définition de la concurrence donne à penser que la loi se préoccupe davantage du processus et de la loyauté que des effets sur le bien-être. Cette impression est renforcée par la prédominance des thèmes liés à l'ordre et à la stabilité du processus que l'on retrouve dans l'énoncé des objectifs. Le fait que l'accent soit mis sur la loyauté serait conforme à la tradition. Dans l'arbitrage entre l'efficacité et la loyauté, la culture chinoise a opté pour la loyauté. Il y a de cela un siècle, la vision réformatrice de Sun Yat-sen était celle d'une société équitable et

riche fondée sur un socialisme modéré. Les objectifs généraux de la loi fondamentale, qui ont été rédigés dans les années 40, sont empreints de scepticisme quant aux avantages de la concurrence économique et recommandent l'« égalisation de la propriété foncière et la restriction du capital privé afin de parvenir à un équilibre efficace entre richesse nationale et moyens de subsistance des personnes. »[2] Dans la pratique moderne, les décisions de la Commission et l'attention qu'elle porte aux principes directeurs applicables aux pratiques des grands distributeurs témoignent de l'importance accordée à la loyauté des négociations.

14. C'est le Parlement qui a fait ajouter la mention sur la protection des intérêts des consommateurs. En guise d'explication, la Commission réitère que le processus prime sur les mesures en faveur du bien-être, lequel ne renvoie pas aux intérêts personnels des consommateurs. La protection des intérêts des consommateurs est plutôt assurée dans la mesure où ceux-ci ont la possibilité de négocier sur des marchés ouverts et libres et de bénéficier d'une efficacité accrue et de l'innovation.

15. Les objectifs fondamentaux de la politique de la concurrence sont la stabilité et la prospérité économiques. On peut donc supposer que des considérations liées aux résultats économiques globaux ne sont guère susceptibles d'influencer une décision concernant une affaire particulière mais revêtiraient une importance primordiale pour la définition des priorités générales et l'évaluation de l'impact de l'application de la loi.

2. Questions de fond : contenu du droit de la concurrence

16. Les différents outils prévus par le droit de la concurrence représentent différents principes de jurisprudence. Certaines pratiques sont interdites, sous réserve d'exemptions bien définies. D'autres sont prohibées seulement lorsqu'elles sont « abusives », ce qui sous-entend que la législation attache de l'importance au contrôle des abus. Il est encore possible d'engager des poursuites pénales, bien que cela soit maintenant un moyen complémentaire et non plus le principal moyen de lutte contre les infractions. Enfin, la Commission a publié des principes directeurs détaillés que l'on peut assimiler à des codes de pratiques réglementaires.

17. La définition du terme « entreprise » détermine le champ d'application de la législation. Il renvoie à une société, à une société de personnes, à une entreprise individuelle, à une association professionnelle, ou en général « à toute autre personne ou organisation engagée dans des transactions par le biais de la prestation de biens ou de services » (article 2). La première partie de la définition couvre les formes traditionnelles d'exploitation d'une entreprise. Le fait que l'association professionnelle soit spécifiquement mentionnée garantit que les comportements répréhensibles courants n'échappent pas à la loi pour des raisons techniques. La deuxième partie de la définition, qui s'attache davantage à la fonction, pourrait faire en sorte que la législation s'étende à des exploitations commerciales gérées par l'État si elles peuvent être considérées comme des entreprises ou des personnes morales. La loi ne s'appliquerait qu'à l'activité menée par ce type d'entreprise en tant que fournisseur de biens ou de services, selon toute probabilité en concurrence avec des entités ne relevant pas du secteur public.

18. Des parties distinctes de la législation sur la concurrence traitent des pratiques monopolistiques, du contrôle des fusions, des accords horizontaux et de la concurrence déloyale. Les articles fondamentaux se terminent par une disposition générale qui interdit « toute pratique trompeuse ou manifestement déloyale » qui pourrait « affecter l'ordre commercial » (article 24). La distinction structurelle entre le traitement des pratiques horizontales et verticales n'est pas parfaite étant donné que certaines règles énoncées sous l'intitulé de concurrence déloyale et qui concernent surtout des restrictions verticales s'appliquent aux pratiques ayant des effets horizontaux.

2.1 Accords horizontaux

19. La coordination horizontale est interdite sauf en cas d'exemption spécifique accordée par la Commission (article 14). L'«action concertée » prohibée par la loi est définie comme une pratique exercée par le biais d'un contrat, d'un accord ou de toute autre forme d'entente visant à fixer conjointement le prix de biens ou de services ou à limiter les conditions relatives à la quantité, à la technologie, aux produits, aux installations, aux partenaires commerciaux ou aux échanges et à restreindre ainsi les activités commerciales de l'autre partie (article 7). Les amendements apportés en 2002 précisent clairement que l'interdiction s'applique seulement aux accords horizontaux, « au même stade de production et/ou de commercialisation », et officialisent les critères et la procédure d'exemption.

20. Aucune règle d'illicéité en soi ne s'applique aux accords horizontaux sur les prix[3]. Dans ses décisions, la Commission admet qu'il lui incombe de prouver que le comportement prohibé a ou pourrait avoir eu un effet significatif sur le marché. La définition de l'action concertée va dans le sens d'une interprétation minimale puisqu'elle demande que le comportement soit susceptible « d'affecter, sur le marché, la fonction de production ou d'échange des biens ou l'offre et la demande de services »[4] (article 7). Le fait de caractériser ainsi le comportement en fonction de l'ampleur de son impact n'implique pas nécessairement qu'il incombe à la Commission de démontrer l'existence d'un effet anticoncurrentiel, même s'il semble que ce soit dans la pratique ce vers quoi tendent ses décisions.

21. La référence à « toute autre forme d'entente », dans la définition, vise à éviter que l'interdiction soit limitée par des aspects techniques du droit des contrats. Cela signifie qu'un accord, qu'il soit contraignant ou non, devrait mener dans les fait à des actions conjointes. Citons par exemple les résolutions d'associations professionnelles et les ententes verbales, dans la mesure où elles n'auraient eu qu'un effet de contrainte morale, économique ou sociale. La définition pourrait également couvrir les ententes tacites conclues par communication délibérée et l'expression d'une intention. La divergence entre cette caractérisation et l'interprétation par le code civil des clauses d'un contrat, ainsi que l'ambiguïté de la collusion tacite au plan économique, rendent l'application malaisée. La définition n'est pas censée couvrir l'interdépendance oligopolistique pure ou le parallélisme délibéré de comportement. Dans ce type d'affaires, la Commission se montre habituellement prudente et se conforme à l'article 19 ou à l'article 24 lorsqu'il est malaisé de déterminer la portée et la nature de l'accord. Elle a néanmoins mis à l'amende, aux termes de l'article 14, deux sociétés pétrolières qui s'étaient concertées en vue de modifier les prix en annonçant publiquement leurs intentions, ce qui s'apparente à l'exercice d'une influence dominante sur les prix par un oligopole.

Encadré 2. Action concertée ou parallélisme délibéré des comportements ?

La Commission a ouvert une enquête sur les deux seuls fournisseurs d'essence présents au Taipei chinois afin d'examiner la façon dont ils s'y prenaient pour ajuster simultanément leurs prix de gros pour l'essence sans plomb 92 et 95 et le diesel premium. La société Chinese Petroleum Corp. (« CPC ») a longtemps été le fournisseur monopolistique. En 2000, la société Formosa Petrochemical Corp. (« FPCC ») a fait son entrée sur le marché. (Esso a aussi tenté de pénétrer le marché, mais en est sortie après moins de deux ans.) La CPC et la FPCC représentent respectivement environ 70 % et 30 % du marché de l'essence et du diesel.

À une vingtaine de reprises au moins, la CPC et la FPCC ont simultanément révisé leurs prix à l'intérieur d'une même fourchette. Habituellement, l'une d'elles annonçait dans les médias son intention de réviser les prix. Si sa rivale faisait savoir qu'elle lui emboîterait le pas, les deux sociétés concurrentes procédaient simultanément aux mêmes modifications. Si la société rivale annonçait au contraire qu'elle ne réviserait pas ses prix, la première société retirait ou modifiait son annonce initiale.

La Commission a soutenu (entre autres) que cet échange public de vues et d'intentions était davantage qu'une action parallèle et constituait plutôt une « concordance de vues » et, par là, une action concertée prohibée. La Commission estime que le fait de diffuser publiquement des informations commerciales sensibles, d'échanger des informations sur des stratégies commerciales ou de se communiquer directement des renseignements commerciaux peut être considéré comme l'établissement d'une concordance de vues. Dans l'affaire évoquée ici, cette concordance de vues a été déduite à l'aide de preuves indirectes,

constituées selon la Commission par les incitations, les avantages économiques, le moment ou l'ampleur de l'augmentation des prix, la possibilité d'avoir recours à différentes mesures de remplacement, la fréquence, la durée et la concentration des mesures prises, et l'unanimité. La Commission reconnaît qu'une simple tarification uniforme ne serait pas nécessairement illicite. Elle estime néanmoins que dans le cas présent, les deux entreprises n'ont pas seulement instauré des niveaux de prix identiques mais qu'elles ont aussi communiqué leur intention à l'avance et que leurs mesures ont débouché sur des modifications simultanées, habituellement suivies par les détaillants également.

La Commission a adressé une lettre d'avertissement aux deux entreprises pour leur demander de ne pas recourir à des annonces préalables pour modifier conjointement les prix de gros, et de prendre plutôt leurs décisions de tarification en fonction de leurs propres conditions d'exploitation. En octobre 2004, la Commission a infligé à chacune une amende administrative de 6.5 millions TWD pour non-respect de cet avertissement et pour action concertée, en violation de l'article 14(1). Les entreprises ont fait appel de cette décision et la Commission a dû justifier l'amende. En juillet 2005, la Commission a de nouveau imposé les mêmes amendes, énumérant les points pris en compte, lesquels sont énoncés dans ses orientations sur les sentences : le motif, l'objectif, les avantages indus escomptés, le dommage infligé à l'ordre commercial, la durée, les gains obtenus, l'étendue de l'activité, les exploitations commerciales, les recettes et la position sur le marché, l'application préalable de mesures correctives à l'encontre du comportement ou l'envoi d'un avertissement visant à le faire cesser, le type et le nombre d'infractions antérieures, l'intervalle entre les infractions, les condamnations prononcées, le comportement après l'infraction, la coopération à l'enquête et d'autres facteurs. Il a également été fait appel de cette décision.

Source : Commission de la concurrence

22. Les associations professionnelles sont définies comme étant des « entreprises » et sont donc entièrement assujetties à la loi sur la concurrence (article 2(3)). La déclaration d'orientation de la Commission relative aux associations professionnelles définit les pratiques susceptibles de violer la loi et énumère plusieurs infractions spécifiques qui sont pour la plupart tirées de la réglementation relative à la concurrence déloyale. Les associations professionnelles ne peuvent empêcher des entreprises d'entrer sur le marché ou d'en sortir, encourager la discrimination ou d'autres comportements déloyaux de même que des accords ou des contrats internationaux comportant notamment des conditions ou des restrictions abusives ou déloyales, imposer une normalisation excessive, répartir les marchés, refuser des autorisations nécessaires, restreindre la capacité, fixer des quotas, coordonner l'indisponibilité, effectuer des achats conjoints, fixer des conditions communes et imposer des prix. La déclaration d'orientation note que les associations peuvent recueillir et diffuser des informations et aider leurs membres à renforcer leurs capacités. Mais s'agissant des codes d'autodiscipline en matière de respect des normes ou de concurrence déloyale, et, bien entendu, de toute pratique mentionnée dans l'énumération des pratiques prohibées, ils doivent d'abord solliciter l'autorisation de la Commission.

23. La loi sur la concurrence énumère les exceptions qui peuvent être autorisées suite à une demande préalable auprès de la Commission s'il est estimé dans l'affaire examinée qu'elles seraient bénéfiques à l'économie dans son ensemble et servent l'intérêt général. Ces sept catégories d'exemption portent sur les spécifications harmonisées (visant à réduire les coûts, à améliorer la qualité ou à accroître l'efficience), les activités communes de recherche et de développement, la spécialisation et la rationalisation de l'exploitation, les accords d'exportation, les accords d'importation, les cartels de crise et les accords entre PME destinés à améliorer l'efficacité et à renforcer la compétitivité (article 14). La Commission peut imposer des conditions et des délais de validité lorsqu'elle approuve une exemption, et peut révoquer ou modifier son autorisation si les conditions évoluent ou si les parties ne respectent pas les conditions de l'autorisation. Les exemptions sont généralement valides pendant une période maximale de trois ans. La Commission n'émet pas d'attestations négatives, et la loi sur la concurrence n'autorise pas la réglementation des exemptions par catégories.

24. La Commission consacre relativement peu de temps ou de ressources à l'examen des demandes d'exemption, qui portent seulement sur la coopération horizontale. Elle n'a reçu en moyenne qu'une dizaine de demandes par année, et deux seulement en 2004. Elle a répondu favorablement à la plupart des

demandes. En octobre 2005, on ne recensait que 11 accords autorisés en vigueur. La principale catégorie d'exemption est celle des accords d'importation. Les autres catégories sont le traitement des cartes de crédit et le remboursement de justificatifs de billets d'avion. La Commission a rejeté en tout une dizaine de demandes et en a approuvé partiellement 11. Elle a révoqué son autorisation dans des cas où les parties à un accord d'importation autorisé avaient conclu parallèlement une entente visant à restreindre la concurrence au niveau national. La Commission dispose, pour rendre ses décisions sur les demandes d'exemption, d'un délai de trois mois qui peut être prorogé une fois (article 14). Elle s'interroge enfin sur la manière dont elle pourrait définir un espace de sécurité juridique plus précis pour les entreprises communes de recherche-développement.

25. Les demandes concernant les cartels de crise sont rares. Une action commune visant à limiter la production ou à freiner les réductions de prix lors d'une détérioration de la conjoncture ne serait autorisée que si les conditions du marché avaient fait baisser le prix du marché en deçà du prix de revient moyen et que les entreprises étaient menacées de sortie ou de surproduction. On ignore au juste si le prix de revient renvoie aux coûts variables ou aux coûts totaux. De toute manière, peu de demandes d'exemption ont été présentées à cet égard. En 1998, la Commission a rejeté une demande concernant un accord de réduction de capacité entre des fabricants de fibres au motif que les conditions n'étaient pas installées durablement et que le marché était susceptible de se redresser.

26. Des mesures d'application ont été prises contre des cartels formellement organisés. Les affaires les plus importantes que la Commission a eu à juger concernaient la répartition du marché et l'imposition des prix du gaz de pétrole liquide (GPL), qui est le principal carburant domestique au Taipei chinois. Jusque dans les années 90, la production et la distribution de gros constituaient des monopoles autorisés distincts et la distribution, de même que la tarification de détail, faisaient l'objet d'un contrôle rigoureux. Lorsque le marché a été libéralisé et que de nouveaux producteurs et importateurs y sont entrés, certains pans du secteur ont évidemment essayé de conserver des habitudes ancrées depuis longtemps. La Commission a mené des enquêtes à la suite de plaintes déposées par des détaillants concernant des refus de vente et a constaté l'existence de deux cartels dans les marchés traditionnellement séparés du nord et du sud de l'île. Les membres de ces cartels se rencontraient de temps à autre pour conclure des accords visant à contrôler la concurrence entre les régions, affecter des embouteilleurs aux différents distributeurs, fixer les prix de détail, gérer des fonds de « stabilisation » destinés à compenser les éventuelles défections et mettre en place des sanctions sous forme de réduction de prix ou de refus de vente contre ceux qui avaient désobéi aux consignes d'affectation. Selon les estimations de la Commission, le montant surfacturé par le cartel à l'œuvre dans le marché septentrional aurait dépassé un milliard TWD. Dans sa décision de 2003, la Commission a infligé des amendes totales de 344 millions TWD. En décembre 2005, elle a condamné 21 fabricants et distributeurs de ciment à verser une amende totale de 210 millions TWD, après une enquête de quatre ans sur des accords conclus par des acteurs de ce secteur dans le but d'imposer les prix, de se répartir les marchés, de limiter la capacité et d'entraver les importations. Ces stratégies visaient à contrer la menace d'entrée de nouveaux fournisseurs dans la région après la crise asiatique de 1997.

27. La Commission a mis au jour et sanctionné d'autres ententes sur les prix ou la répartition des marchés réalisées à plus petite échelle. Au début, les ententes classiques sur les prix étaient peu réprimées. Les premières affaires examinées par la Commission concernaient des ententes sur les prix des œufs et les taux d'intérêt pratiqués par des coopératives de crédit. Une étude sur les premiers travaux de la Commission a montré que contre toute attente, l'autorité a souvent imposé des sanctions à des contrevenants exerçant sur des marchés en apparence concurrentiels, et que les PME et les entreprises moins avancées technologiquement étaient plus susceptibles de s'attirer des sanctions. Sur ces marchés, la pression sur les profits est plus forte, et les acteurs sont davantage incités à restreindre la concurrence. En outre, plus les acteurs sont nombreux, plus il est nécessaire de recourir à une structure formelle pour conclure une entente et s'assurer qu'elle est respectée. Les PME et les entreprises moins avancées technologiquement, qui sont moins susceptibles de chercher à obtenir des conseils juridiques afin de savoir

si elles se conforment à la loi sur la concurrence, concluent par conséquent des ententes explicites, et la Commission peut prouver plus facilement leurs infractions. L'étude a également indiqué que les marchés régionaux ou présentant des caractéristiques oligopolistiques attiraient davantage l'attention de l'autorité d'application.

28. La Commission est rarement intervenue dans des affaires de soumissions concertées dans le secteur du bâtiment, un terrain d'application du droit de la concurrence pourtant habituel dans d'autres pays. Dans le cas des marchés publics, les soumissions concertées constituent une infraction pénale dans d'autres systèmes de droit, et le ministère public poursuit énergiquement la collusion dans les projets financés par les pouvoirs publics.

29. Les sanctions pour collusion horizontale sont faibles comparativement à d'autres pays. Ce sont néanmoins les sanctions les plus sévères qui soient prévues par des dispositions administratives au Taipei chinois. Les amendes infligées en vertu de la loi sur la concurrence sont soumises à un plafond réglementaire de 25 millions TWD (qui peut être doublé en cas de récidive). En deçà de ce plafond, la Commission dispose d'une certaine marge d'appréciation pour fixer une amende en fonction de l'infraction et d'autres facteurs. Elle n'a jamais usé entièrement de la latitude que lui accorde la législation. Le total des amendes imposées au cartel du GPL, de loin les plus lourdes jamais prononcées par la Commission, est inférieur au plafond autorisé par la loi.

2.2 Accords verticaux

30. Les règles relatives aux restrictions verticales figurent dans l'article de la loi sur la concurrence qui traite de la concurrence déloyale. L'imposition de prix de vente minimums ou maximums fait l'objet d'une interdiction absolue (article 18). Cette interdiction s'applique à l'imposition des prix de vente des biens seulement, et non à celle des prix des services. Un accord ou un ordre explicite de fixation des prix constituerait manifestement une infraction à la loi. Les décisions de la Commission montrent en outre que la fixation des prix peut être inférée d'une pratique de sanctions à l'encontre de ventes au rabais[5]

31. D'autres restrictions verticales, qui ont été étudiées au cas par cas, selon la « règle de raison », sont classées séparément (article 19). Les pratiques énumérées sont interdites lorsqu'elles font entrave à la concurrence. Les sous paragraphes utilisent différents termes pour décrire la « règle de raison ». La constatation d'un refus de vente est subordonnée à un « objectif » visant à nuire à l'entreprise écartée (article 19(1)), la discrimination « injustifiée » est interdite (article 19(2)) et tout autre comportement est interdit s'il est « abusif » ou adopté par des « moyens abusifs ». La preuve d'un effet anticoncurrentiel évident doit être clairement établie pour statuer sur la responsabilité au titre de pratiques de ventes liées, d'exclusivité, de restrictions relatives au découpage géographique et à la clientèle, de discrimination et de refus de vente. La Commission prend en compte l'intention des parties, leur but et leur situation sur le marché, la structure du marché, les caractéristiques du produit et l'incidence sur la concurrence. Un critère de pouvoir de marché de 10 % est utilisé en interne de manière empirique pour déterminer si une contrainte verticale risque d'entraver la concurrence. Ce critère de 10 % ne constitue ni un seuil de sécurité ni une présomption positive. La Commission examine également si la concurrence est véritablement affaiblie, si la concurrence inter marques est suffisante, et s'il existe des obstacles à l'entrée et, partant, aux perspectives de concurrence.

32. La Commission a très peu statué sur des contraintes verticales. Elle a interdit les clauses de protection qui empêchaient les fournisseurs d'un grand magasin qui détenait une part de marché d'un peu moins de 30 % dans l'agglomération de Taipei de vendre des produits identiques à ceux d'autres magasins situés dans un rayon de deux kilomètres. En 2004, elle a suivi un raisonnement analogue à l'encontre d'un grand magasin qui détenait une part de marché local d'environ 33 % et qui menaçait d'évincer les locataires d'une boutique s'ils s'établissaient également chez un concurrent situé à 600 mètres. Dans une

affaire d'accord d'exclusivité se rapportant à des licences de chansons *karaoke*, les distributeurs détenaient apparemment environ 60 % des licences du marché – et le prévenu avait reçu un avertissement à la suite d'une infraction préalable similaire. La Commission renvoie abondamment aux principes directeurs pour expliquer le traitement juridique des relations verticales et encourager par conséquent la mise en conformité sans avoir recours à des mesures formelles d'application. Certains principes généraux couvrent l'« entrave potentielle à la concurrence loyale » aux termes de l'article 19, les associations professionnelles et la distribution, tandis que des principes spécifiques portent entre autres sur les pratiques commerciales des grands magasins et des fournisseurs de produits de marque.

2.3 Position dominante - monopolisation

33. Il est interdit aux entités qui sont des « entreprises monopolistiques » d'empêcher d'autres entités de rivaliser en ayant recours à des « pratiques déloyales » ; de fixer, imposer ou modifier les prix de manière « abusive » ; de demander un traitement préférentiel « injustifié » ; et d'abuser de quelque autre manière de leur pouvoir de marché (article 10). Une « entreprise monopolistique » est définie comme une entreprise qui n'affronte aucune concurrence ou qui détient une position dominante qui lui permet d'exclure des concurrents présents sur un marché considéré (article 5). Le critère de part de marché qui définit un seuil de sécurité est maintenant inscrit dans la loi. Une entreprise n'est pas considérée comme « monopolistique » si sa part de marché est inférieure à 50 %, et si les deux premières entreprises détiennent ensemble une part inférieure à 67 % et les trois premières, à 75 %. Une entreprise possédant une part de marché inférieure à 10 % ou dont le chiffre d'affaires annuel est inférieur à 1 milliard TWD n'est pas considérée comme monopolistique. Ces seuils de part de marché peuvent toutefois ne pas s'appliquer si les contraintes juridiques ou d'une autre nature qui pèsent sur l'établissement de ces entreprises ou la commercialisation de leurs produits empêchent la concurrence d'autres entreprises (article 5-1). En d'autres termes, en présence d'obstacles réglementaires à l'entrée, la Commission peut ne pas tenir compte de ces seuils de sécurité prévus par la loi. Les seuils de part de marché, qui figuraient dans la réglementation de la Commission, sont inscrits dans la législation parce que la loi sur la procédure administrative exige que les normes importantes et juridiquement contraignantes figurent dans les textes de loi plutôt que dans les règlements d'application. Ils se présentent sous forme de présomptions négatives mais dans la pratique, sont également appliqués en tant que présomptions positives, de sorte qu'il incomberait à une entreprise détenant une part de marché de plus de 50 % de démontrer qu'elle n'a pas nécessairement bénéficié d'une position dominante malgré les facteurs propres au marché, comme l'absence de barrières à l'entrée.[6]

34. Deux entreprises ou plus peuvent être monopolistiques si elles ne mènent pas une concurrence par les prix et répondent malgré tout à la définition (article 5). La législation paraît autoriser qu'il soit statué en ce sens en se fondant simplement sur le fait que les entreprises ne sont pas en concurrence, autrement dit qu'elles sont en situation de coordination et d'interdépendance oligopolistiques. La Commission n'a jamais appliqué cette disposition à ce type de situation. Les décisions rendues aux termes de l'article 10 avaient généralement trait à des situations de domination exercée par une seule entreprise.

35. Aucune disposition ne prévoit d'exemption permettant de se référer à d'autres politiques ou de faire un arbitrage entre des effets anticoncurrentiels et des considérations d'efficacité. Les politiques sectorielles ne pourraient justifier une infraction, étant donné que les monopoles réglementaires ne sont plus considérés comme un moyen approprié pour favoriser le développement. C'est l'effet avéré ou probable sur le marché, et non la classification formelle, qui détermine la responsabilité, et l'évaluation des effets va nécessairement de pair avec l'exercice d'un jugement. Les adjectifs utilisés dans chacune des définitions de l'article 10, selon lequel le comportement répréhensible allégué peut être « abusif », « injustifié » ou « déloyal », sous-entendent l'exercice d'un certain arbitrage entre les effets restrictifs et les considérations commerciales courantes.

36. La Commission a rarement appliqué l'interdiction générale relative aux pratiques abusives. Pour appliquer la loi, elle se fonde plus souvent sur les interdictions spécifiques énoncées à l'article 10 et les règles relatives au comportement déloyal énoncées à l'article 19. Relativement longtemps après l'adoption de la législation, la Commission a notamment opté davantage pour la négociation que pour la confrontation. C'est ainsi qu'elle a choisi la négociation pour encourager la société des eaux à modifier ses règlements sur la responsabilité des nouveaux clients à l'égard des factures impayées des anciens clients et à ne plus monopoliser l'installation de compteurs ; pour inciter la Bourse à ouvrir à la concurrence son contrat de transmission de données ; et pour convaincre la direction des télécommunications d'améliorer la facturation et la vérification des appels. Les premières mesures de répression prises à l'encontre d'une entreprise dominante sont intervenues après le changement d'administration, en 2000. La Commission a infligé une amende de 5 millions TWD à la société pétrolière qui détenait un monopole de longue date pour avoir refusé d'approvisionner un nouveau distributeur de carburant avion. Elle a également adressé un avertissement aux sociétés pétrolières pour qu'elles ne tentent pas de conclure des contrats d'approvisionnement à long terme avec des stations service pendant la période qui a immédiatement précédé l'ouverture à la concurrence du marché de l'importation.

37. Les plaintes pour pratique de prix d'éviction sont examinées avec prudence. La Commission définit cette pratique comme le fait de renoncer à un profit à court terme dans le but d'évincer des concurrents d'efficacité égale ou de faire obstacle à leur entrée sur le marché en vue d'obtenir des profits excessifs à long terme. Le fait de fixer un prix inférieur au coût variable moyen est normalement assimilé à l'intention d'éviction, puisque ce prix correspond au point à partir duquel, lorsqu'il n'y a pas intention d'éviction, une entreprise rationnelle qui entend optimiser sa rentabilité mettrait fin à ses activités. Cependant, lorsque les coûts fixes ou généraux représentent une part importante du prix de revient total, on pourrait utiliser un autre point de repère, par exemple le coût marginal à long terme. Il est nécessaire de démontrer tant l'intention d'entraver ou d'évincer les concurrents que la capacité de récupérer les pertes en relevant les prix une fois atteint le but fixé. Plusieurs marchés peuvent être considérés parce que les subventions croisées entre les exploitations pourraient servir à soutenir une stratégie de prix d'éviction. La Commission ne traite pas les stratégies de prix limite et de vente à perte comme étant des pratiques d'éviction. Elle n'a encore jamais constaté d'infraction liée à une pratique d'éviction aux termes de l'article 10. Elle a rejeté une plainte pour prix d'éviction dans les télécommunications mobiles parce que les prix pratiqués par l'entreprise dominante étaient supérieurs aux coûts intégralement répartis et, partant, au coût marginal à long terme ; qui plus est, la stratégie de tarification ne comportait pas de renonciation à un profit à court terme. La Commission a cependant invoqué, dans des situations comparables, d'autres parties de la loi sur la concurrence. Par exemple, elle a estimé qu'un appel d'offres pour un contrat de fourniture de vaccins au ministère de la Santé à un prix quasi nul était une « incitation abusive » prohibée par l'article 19(3).

38. L'abus de contrôle monopolistique sur une installation essentielle peut constituer une violation de l'article 10. La Commission entérine et explique les éléments de cette doctrine dans ses principes directeurs sur les pratiques commerciales pour quatre grands secteurs (les télécommunications, la télévision par câble, les réseaux informatiques et le commerce électronique). L'« installation » doit être contrôlée par un monopoleur, et il n'y a donc pas de fournisseur de substitution. Les concurrents existants ou potentiels sur les marchés qui dépendent de cette installation doivent être incapables de la reproduire « à bref délai » d'une « manière raisonnable du point de vue économique » mais doivent y avoir accès afin de rivaliser avec le monopole qui la contrôle. Dans certains pans des télécommunications, la réglementation sectorielle garantit l'accès à ces goulets d'étranglement. La loi sur la concurrence s'est appliquée aux plaintes portées dans des secteurs où ce type de réglementation n'a pas été mis en place. C'est le cas du service d'échange de données électroniques sur le dédouanement des marchandises, au départ mis en place en tant que monopole d'État et par la suite transformé en société. Le monopoleur historique a refusé de partager sa norme avec un nouvel entrant et de s'interconnecter avec lui, fixé des redevances trop élevées,

interrompu le service et eu recours à des moyens dissuasifs comme les primes de fidélité. La Commission lui a infligé une amende de 1.5 million TWD pour avoir mis en place le dispositif de primes de fidélité.

39. Jusqu'ici, la Commission n'a pas établi que des pratiques de prix excessifs équivalaient à une infraction à l'article 10. Cependant, l'imposition d'une amende à la société gazière pour utilisation d'un compteur générant des tarifs de consommation minimum excessifs revient de fait à conclure que le monopole facturait des prix excessifs. Qui plus est, l'intérêt de la Commission pour les pratiques de prix élevés l'a incitée à prendre des mesures controversées dans deux affaires de propriété intellectuelle. Le règlement administratif intervenu en 2003 avec Microsoft donne à penser que l'initiative de la Commission était motivée par les prix. L'accord de règlement précise simplement que Microsoft prend l'engagement de se conformer à la loi sur la concurrence ; de faire en sorte que ses contrats de licence soient soumis au droit du Taipei chinois ; de retirer ses principes directeurs en matière de points de distribution exclusifs ; de prendre des mesures pour favoriser les relations avec la clientèle ; et d'étudier la possibilité de partager son code source. Dans cette affaire, aucune plainte n'a été déposée et le texte même de l'accord n'indique en rien l'existence d'une théorie spécifique de la responsabilité. L'annonce faite par la Commission insiste toutefois sur un accord secondaire en vertu duquel Microsoft s'engage à réduire ses prix de 27 % en moyenne.

40. L'importante décision rendue par la Commission dans une affaire de brevets de cédéroms est également motivée par des prix élevés. En 2002, la Commission a infligé des amendes totales de 14 millions TWD à une communauté de brevets créée par Philips, Sony et Taiyo Yunden pour plus de cent brevets de fabrication de cédéroms. Le Taipei chinois était le principal fabricant de cédéroms et détenait 70 % du marché mondial. La demande ayant augmenté et les prix, chuté, les fabricants locaux perdaient des profits étant donné que la redevance minimum à l'unité demeurait inchangée. En 1996, le taux effectif de la redevance représentait 3 % du chiffre d'affaires net, mais comme le prix du produit avait chuté de plus de 90 %, l'autre minimum fixé (.10 JPY) portait ce taux à environ 18 %. Les fabricants refusant d'acquitter les redevances de licence, le donneur de licence les a poursuivis en justice pour se faire payer et c'est alors que les fabricants ont demandé à la Commission d'ouvrir une enquête. La Commission a conclu que la communauté de brevets équivalait à un accord restrictif qui aurait nécessité une notification et une autorisation et qui constituait donc une infraction à l'article 14 ; que le refus de revoir le taux de redevance constituait un abus du monopole détenu par les sociétés en cause et que le fait d'inclure des brevets non indispensables, non valides et de substitution dans l'accord de licence équivalait à une vente liée.[7] La Commission était semble-t-il surtout préoccupée par le fait que le donneur de licence refusait de renégocier un taux de redevance plus bas, et ce même si le total des recettes qu'il tirait de ses activités de licence avait considérablement progressé à la faveur de l'augmentation de la demande de disques. En août 2005, le Tribunal administratif supérieur a annulé la décision de la Commission, estimant que la communauté de brevets n'était pas un accord horizontal parce que les contributions techniques de ses membres ne rivalisaient pas ; la Commission a fait appel de cette décision.[8]

2.4 Fusions

41. La Commission a rarement appliqué des mesures de contrôle des fusions. Le critère de fond est de fait une norme d'intérêt général : il s'agit de déterminer si l'avantage économique global d'une fusion dépasse les inconvénients qu'elle engendre en termes de restriction de la concurrence (article 12). Le fait que l'exigence de notification soit fondée sur une part de marché donne à penser que le contrôle des fusions vise les cas de situation dominante, même si le caractère général de la formulation irait également dans le sens d'une norme liée à la « réduction significative de la concurrence ». Lorsqu'elle évalue l'avantage économique global d'une fusion, la Commission prend en compte les économies d'échelle de production, d'administration ou de financement, les avancées technologiques et d'autres facteurs comme la réduction des prix, les avantages de l'intégration et les problèmes de défaillance d'entreprises. L'effet sur la concurrence est un élément important à prendre en considération. Lorsqu'elle établit s'il y a restriction

de la concurrence, la Commission vérifie si la fusion entraîne la création d'un monopole, l'imposition de barrières à l'entrée, la modification du degré de concentration, la diminution du nombre de concurrents, une similarité de produits et l'ouverture du marché.

42. La définition technique du terme « fusion » repose sur la fonction ainsi que sur la formalité juridique. Elle couvre la fusion regroupement véritable et la détention ou l'acquisition partielle de plus du tiers des parts ou du capital d'une autre entreprise. Cependant, la définition et, par conséquent, les dispositions contenues dans la législation relativement au contrôle et à la notification, s'appliquent également à l'exploitation commune, à la cession ou au crédit-bail et même au contrôle direct ou indirect ou à l'engagement ou au congédiement de personnel[9] (article 6). La création d'une nouvelle entreprise commune est également couverte par le contrôle des fusions depuis qu'en août 2002 la Commission a révoqué une lettre d'explication qui visait clairement à alléger les nombreuses formalités que nécessitait l'établissement d'une déclaration avant 2002.

43. Les amendements apportés en 2002 ont modifié le contrôle des fusions en instaurant un régime de notification préalable et en supprimant la nécessité d'attendre l'autorisation formelle de la Commission. Lorsque la Commission ne prend pas de mesures dans les trente jours suivant la notification, les parties peuvent procéder à la fusion. La Commission peut proroger ce délai de trente jours par décision écrite. Si les parties concernées effectuent la fusion sans avoir notifié la Commission ou sans respecter les conditions prévues, la Commission peut leur imposer un certain nombre de sanctions, allant du retrait des personnes concernées au dessaisissement ou à la dissolution. Le réexamen des seuils effectué en 2002 a fortement contribué à réduire le nombre de notifications. Entre 2002 et 2005, on a compté 177 notifications de transactions, et une seule transaction a donné lieu à une enquête plus approfondie. Les amendements apportés en 2002 ont également étendu le régime de contrôle des fusions à la loi sur les holdings financières, dont l'application était assurée par le Bureau des affaires monétaires et qui relève maintenant d'une entité autonome, la Commission de surveillance financière. Lorsque la création d'une holding financière répond à la définition d'une fusion conformément à la loi sur la concurrence, une notification de fusion doit être faite auprès de la Commission de la concurrence.

44. Les seuils de notification sont fondés sur la part de marché et le chiffre d'affaires. La Commission fixe les seuils de chiffre d'affaires. Le seuil de chiffre d'affaires annuel généralement applicable actuellement s'établit à plus de 10 milliards TWD pour l'une des parties et à plus de 1 milliard TWD pour l'autre partie ; dans le cas des entreprises financières, ces chiffres sont fixés respectivement à 20 milliards et à un milliard TWD[10]. Indépendamment de ces seuils de chiffre d'affaires, une transaction doit être notifiée si elle doit avoir pour effet de conférer une part de marché de plus de 33% à l'entreprise née de la fusion ou si l'une des parties à la fusion possède déjà une part de marché supérieure à 25 %. La Commission a infligé des amendes à des sociétés qui n'avaient pas présenté de déclaration faute d'avoir correctement évalué leur part de marché. Elle estime que le seuil de part de marché est utile malgré les indéniables problèmes conceptuels et pratiques qu'il pose, parce qu'il lui permet d'empêcher la formation de monopoles sur le marché de la télévision par câble.

45. Compte tenu du fait que la Commission s'oppose très rarement à des fusions, les coûts de son régime de contrôle des fusions ont pu sembler disproportionnés. Le régime initial, qui exigeait l'examen et l'approbation de milliers de transactions, a mobilisé d'importantes ressources et alourdi la charge de travail des entreprises déclarantes. Depuis l'adoption, en 2002, d'un régime de notification assorti de seuils plus élevés, les ressources engagées sont faibles. La Commission reçoit et examine environ 25 déclarations par an. Sur les 6 135 notifications de fusions qui lui ont été adressées pendant la période comprise entre 1992 et 2004, elle n'a interdit que quatre projets de regroupement qui auraient tous pu créer une situation de domination sur des marchés locaux de l'île. Trois de ces projets provenaient du secteur de la télévision par câble. À l'approche de la libéralisation, en 1997, la Commission a également informé la société pétrolière qui détenait un monopole de fourniture qu'elle s'opposerait à toute tentative d'acquisition d'installations

ou de points de vente au détail de sa part et à toute ouverture de stations-service par un nouvel entrant, une nouvelle entreprise commune ou une nouvelle entreprise. La société pétrolière souhaitait prendre les devants et compenser la perte imminente de son monopole de fourniture en étendant sa part de marché, qui était de 50 %. En décembre 2005, la Commission a annoncé la diffusion d'un projet de principes directeurs. Ces principes directeurs feront l'objet d'audiences en avril 2006 et recevront leur forme définitive pour la fin de l'année.

2.5 Concurrence déloyale

46. Les plaintes pour concurrence déloyale, en particulier pour publicité trompeuse, représentent l'essentiel de la charge de travail de la Commission. L'article de la loi sur la concurrence relatif à la concurrence déloyale aborde également les pratiques visées par la lutte antitrust, comme la fixation des prix, les boycotts et la discrimination, de même que les interdictions applicables à la contrainte, à l'incitation et aux autres moyens utilisés pour forcer des tiers à faire des affaires ou empêcher la concurrence par les prix, obtenir des informations confidentielles sur la production ou le chiffre d'affaires ou d'autres secrets commerciaux et restreindre les activités commerciales d'une partie. D'autres articles abordent l'imitation frauduleuse et les problèmes connexes liés aux marques commerciales comme la contrefaçon des caractéristiques distinctives, la publicité trompeuse, l'atteinte à la réputation, les dispositifs de commercialisation à échelons multiples et d'autres pratiques frauduleuses ou manifestement déloyales. La Commission répartit les différentes responsabilités entre le service chargé des affaires de marques commerciales, de déclarations trompeuses et de commercialisation à échelons multiples, et les sections de lutte antitrust, qui traitent la plupart des autres questions relevant de cette partie du texte de loi.

47. La Commission a compétence commune avec d'autres organismes sur certains aspects de la publicité et de l'étiquetage, qui sont également couverts par d'autres législations. La loi sur les marques de commerce traite également de l'imitation frauduleuse ; cependant, étant donné que l'on ignore comment cette loi s'applique en ce qui concerne l'apparence des produits, c'est souvent à la Commission qu'il revient d'examiner cette question. Les autres autorités qui régissent également la publicité sont le ministère de l'Éducation (formation complémentaire), le Conseil de la main-d'œuvre (emploi), la Commission de supervision financière (sociétés de placement et d'assurance, le ministère des Finances (vins et spiritueux), le Conseil de l'agriculture (pesticides) et le ministère de la Santé (aliments et laitages, produits pharmaceutiques, produits de beauté et aliments diététiques). En vertu d'un prochain amendement, c'est la sanction administrative la plus sévère qui s'appliquera lorsque plusieurs sanctions seront possibles.[11] Comme c'est la loi sur la concurrence qui prévoit la sanction la plus sévère de toutes, cet amendement pourrait alourdir la charge de travail de la Commission.

48. Les concurrents lésés peuvent engager des poursuites civiles pour pratiques anticoncurrentielles. La Commission encourage le recours à d'autres moyens de règlement des différends, et notamment à la médiation sous l'égide des associations professionnelles des différentes branches d'activité. Lorsque la Commission découvre que des pratiques abusives ont cours dans un secteur, sa première initiative consiste souvent à adresser une lettre à l'association professionnelle concernée pour lui demander de notifier le problème à ses membres et de leur recommander de s'auto discipliner. Il arrive que les associations énoncent une position identique à celle de la Commission dans leurs propres règlements (qui sont à leur tour approuvés par leurs autorités de tutelle). Les plaintes relevant de la protection des consommateurs sont adressées à l'administration locale et celles qui concernent la publicité, à la Commission.

49. La concurrence déloyale est aussi liée à la capacité de négociation et à la dépendance économique. Comme c'est également le cas ailleurs, le débat sur la frontière entre les concepts de concurrence et de loyauté a toujours cours au Taipei chinois. Les principes directeurs émis par la Commission relativement aux entreprises de la grande distribution illustrent bien cette préoccupation. Ces principes directeurs sont destinés aux hypermarchés, aux petits commerces de proximité, aux grands

magasins, aux supermarchés et aux coopératives de consommateurs. Il leur est recommandé de « corriger » les pratiques consistant à tirer avantage de leur position plus forte sur un marché, à imposer des surtaxes abusives à leurs fournisseurs et à exiger qu'ils leur consentent leurs meilleurs prix. Les principes directeurs abordent également la transparence en matière de retrait des rayons ; les modalités d'établissement de la responsabilité en cas de rupture de stock ; le calcul des pénalités en cas de pénurie de l'offre ; et la vérification, par les gros détaillants qui vendent à des clients « membres », que ces derniers sont bel et bien des « adhérents ». Les directives fournies par la Commission aux grands magasins témoignent également de l'intérêt qu'elle porte à la dépendance économique. Ces directives ne fondent pas la concurrence déloyale sur l'existence d'un pouvoir de marché, question qu'elles n'abordent du reste aucunement. Elles énoncent plutôt les règles régissant le traitement équitable dans une relation contractuelle caractérisée par la confiance qui s'est instaurée entre un point de vente ou un fournisseur et un grand magasin.

50. La Commission s'est largement fondée sur la disposition générale énoncée à l'article 24 en insistant à maintes reprises sur la protection des droits des consommateurs. Elle s'appuie sur cet article lorsqu'elle ne dispose pas de preuves suffisantes de la violation d'interdictions plus spécifiques contenues dans les textes de loi. Cet article s'est appliqué dans les affaires de pratiques qui paraissent relever davantage d'interdictions spécifiques, comme faire payer l'obtention d'un emplacement en rayon, exiger un traitement privilégié et refuser de vendre. Il a également été invoqué dans des affaires de concurrence déloyale liées à l'imitation frauduleuse, au plagiat, à l'intimidation en matière de droits de propriété intellectuelle, de parasitisme et d'exploitation sans licence. L'asymétrie d'information est le fondement de son application à la promotion commerciale, aux contrats portant sur des biens de consommation, aux commissions versées dans le secteur immobilier et aux contrats commerciaux. La Commission s'est appuyée sur l'article 24 dans près de 800 affaires. Elle a utilisé encore davantage, à savoir dans plus de 900 affaires, l'article 21 relatif à la publicité trompeuse. Les tribunaux contestent le recours excessif à l'article 24 au motif qu'il est trop vague et accorde un pouvoir discrétionnaire exagéré à la Commission.

51. Les *Principes régissant l'application de l'article 24* énoncés en 2002 par la Commission ne limitent pas tellement la latitude de cette dernière. Ils apportent des précisions sur la condition distincte énoncée à l'article 24, selon laquelle une pratique donnée doit être suffisamment importante pour « affecter l'ordre commercial ». Les *Principes* laissent entendre que cette condition pourrait signifier que la pratique doit « affecter la concurrence ». Cette condition vise manifestement à limiter l'application de la disposition générale contenue dans l'article de manière qu'elle ne recoupe pas d'autres textes de loi. Elle sert de critère d'intérêt général ou *de minimis*, afin d'orienter les différends privés vers un règlement par d'autres moyens que le droit des contrats ou les règles relatives à la protection des consommateurs. Il est expliqué ailleurs dans les *Principes* comment l'article 24 s'appliquerait à une pratique non régie ou interdite par d'autres textes de loi ou d'autres parties de la loi sur la concurrence elle-même. La Commission invoquerait l'article 24 à l'encontre d'une entreprise dont la « situation de marché avantageuse vis-à-vis des consommateurs est tellement ancrée dans le secteur d'activité concerné que les consommateurs sont lésés en raison d'une trop grande dépendance ou de l'absence de substituts ». La Commission appliquerait cet article aux recours abusifs en vertu des droits de propriété intellectuelle qui équivalent à de la concurrence déloyale mais non à l'abus de pouvoir de monopole. Selon les *Principes*, l'expression « ordre commercial » possède des dimensions morales autant qu'économiques et fait référence à des conditions de marché qui respectent l'« éthique sociale » de la société de même l'« éthique de la concurrence commerciale » efficace et le « sens de la concurrence libre et loyale ». Bien que les termes « suffisante pour affecter » impliquent une limite inférieure fondée sur le nombre de victimes et l'ampleur du dommage appréhendé ou véritable, il semble qu'ils établissent une échelle mobile. La Commission appliquerait l'article 24 à une pratique exercée aux dépens d'une seule organisation ou d'un seul groupe dans la mesure ou cette pratique serait suffisamment frauduleuse ou manifestement déloyale. Les exemples de pratiques déloyales cités sont le parasitisme au détriment du travail ou de la réputation de tiers, la publicité comparative visant à créer une impression globale défavorable, les actions en justice pour infraction au droit de la propriété intellectuelle engagées sans confirmation et notification suffisantes, et la contrainte exercée sur des partenaires

commerciaux. Le fait de tirer parti d'une asymétrie d'information ou d'un « avantage commercial » peut aussi violer l'article 24. Un exemple notable de ce comportement est la conduite qui est « contraire à l'éthique commerciale ou à l'ordre et aux bonnes mœurs » lorsque « l'offre et la demande sur le marché ne sont pas à l'équilibre » en raison de la « défaillance des mécanismes de marché ». Cet article peut couvrir le fait de tirer avantage de la vulnérabilité des consommateurs lors de pénuries dues à des cas de force majeure, mais peut être interprété comme appuyant l'intervention en cas de toute défaillance présumée du marché.

2.6 Protection des consommateurs

52. La protection des consommateurs relève d'une législation et d'une autorité distinctes. La loi relative à la protection des consommateurs, adoptée en 1994, a été appuyée par le Parlement et la Fondation pour la protection des consommateurs, une ONG. Il ne s'agit pas d'une initiative du Yuan exécutif. La législation instaure une stricte responsabilité à l'égard des biens et services défectueux, régit les clauses abusives dans les contrats et prévoit l'octroi de dommages intérêts de même que l'ouverture de procédures collectives. La principale voie de recours prévue pour les plaintes individuelles est la poursuite civile. La Commission de protection des consommateurs peut intervenir et faciliter l'accès aux procédures collectives lorsque les parties ne sont pas sur un pied d'égalité.

53. La Commission de protection des consommateurs est chargée de la coordination, et non de la mise en œuvre, de la politique. Elle dispose donc d'un effectif restreint. Elle est présidée par le vice-premier ministre et le Président de la Commission de la concurrence siège à son conseil d'administration. Depuis la fin des années 90, l'idée de regrouper la Commission de protection des consommateurs et la Commission de la concurrence fait l'objet d'un débat, mais bien qu'elle ait été reprise en 2002 par le Parti démocrate progressiste au pouvoir, n'est plus à l'ordre du jour. La Commission de la concurrence estime que les méthodes de mise en œuvre et les objectifs d'action des deux organismes sont trop dissemblables et ne tient manifestement pas à être chargée des plaintes de petite importance. Il n'existe pas de procédure de coopération formelle entre la Commission de la concurrence et les ONG spécialisées dans la protection des intérêts des consommateurs, bien que la Commission puisse échanger des vues avec ces dernières sur des questions spécifiques.

54. La Commission applique néanmoins la loi sur la concurrence en étant animée d'un objectif de protection des consommateurs visant à apporter des solutions globales à des problèmes d'information asymétrique. Ainsi, la Commission a émis des principes directeurs concernant les contrats de prêts à la consommation accordés par les banques et le fait que ces dernières doivent informer les consommateurs au sujet des règles applicables au solde minimum. Ces principes directeurs sont inspirés par l'article 24 et par un principe de transparence.

3. Questions institutionnelles : structure et pratiques de mise en oeuvre

55. Le droit de la concurrence est appliqué au moyen de procédures administratives. La Commission mise sur les conseils et la sensibilisation autant que sur le règlement formel des différends. De fait, au cours des dernières années, l'action formelle visant à assurer le respect semble avoir perdu de son intensité. La Commission est officiellement rattachée au pouvoir exécutif, bien qu'elle soit considérée comme étant indépendante. Les réformes en cours préciseront davantage son autonomie.

3.1 Institutions de la politique de la concurrence

56. La Commission est un organisme de niveau ministériel chargé de la politique et de la législation aussi bien que de l'application (article 9). Elle est dotée de neuf commissaires à plein temps, y compris le président et le vice-président. Les commissaires sont nommés par le Premier ministre et sont désignés par

le Président pour un mandat renouvelable de trois ans. Les mandats des commissaires sont simultanés. Par conséquent, les textes renvoient à la « première » et à la deuxième » Commission, et ainsi de suite. L'actuelle Commission est la cinquième. Il n'est pas rare que les mandats soient reconduits.

57. Le personnel de la Commission est organisé par secteur et par fonction. Les différents services sont affectés au commerce, aux services et à l'agriculture, à la fabrication et aux industries de réseaux, à la concurrence déloyale, à la planification, aux affaires juridiques et au soutien administratif. La presque totalité du personnel exerce ses fonctions depuis Taipei, mais certains effectifs sont basés au Centre des services du Cabinet de la région méridionale, avec pour mission de traiter les affaires de concurrence au plan régional. Les commissaires peuvent également se voir attribuer des responsabilités et des missions touchant aux affaires internationales et au droit.

58. Les commissaires supervisent les différentes affaires qui se présentent de manière aléatoire. C'est toutefois le personnel qui traite les plaintes et mène les enquêtes. La participation des commissaires au traitement des dossiers est variable. Le commissaire chargé d'un dossier donné revoit le rapport établi par le personnel avant qu'il soit envoyé à la Commission en vue de la prise de décision. Il peut de fait exercer un veto en refusant de transmettre la recommandation du personnel. Dans les affaires importantes, plusieurs commissaires peuvent être désignés pour préparer et présenter un dossier à la réunion des commissaires. Ces derniers se réunissent chaque semaine pour prendre des décisions. Les mesures sont décidées à la majorité des votes d'un quorum des participants correspondant à la moitié plus un de l'ensemble des commissaires. Théoriquement, par conséquent, une décision pourrait être prise par un vote de trois commissaires. Les réunions et les décisions de la Commission se font néanmoins en présence de tous les membres et la Commission ne prend pas de décisions en panels ou en comités.

59. La question de savoir si l'autorité de la concurrence devait être un élément organique du ministère de l'Économie ou un organisme indépendant a été au cœur du débat initial. Au bout du compte, le Parlement a décidé de créer un organe indépendant de spécialistes, même si c'est le Conseil de supervision des prix de ce ministère qui a fourni au début le personnel de la Commission. De par la loi, les commissaires doivent posséder des connaissances en droit, en économie, en finances, en fiscalité, en comptabilité ou en gestion. Les commissaires désignés pendant la première décennie d'existence de la Commission détenaient pour la plupart un doctorat en droit, en économie, ou en gestion et une expérience universitaire ou professionnelle. Les professeurs qui ont été engagés par la Commission ne voient pas tellement leur statut modifié, les universités nationales étant pratiquement assimilées à des unités de la fonction publique. Les détachements trop longs nécessitent peut-être parfois un choix de carrière étant donné que les postes universitaires ne demeurent pas nécessairement vacants. La Commission ne doit pas faire de politique partisane. Les commissaires sont « au-dessus des affiliations à des tierces parties », et pas plus de la moitié d'entre eux ne peuvent appartenir au même parti politique (loi organique, articles 11 et 13). Il n'en demeure pas moins que lors de l'arrivée au pouvoir du parti de l'opposition, des modifications du processus de nomination ont été observées.

60. La loi sur la concurrence et la loi organique contiennent des considérants en faveur de l'autonomie de la Commission. Les mesures prises par la Commission ne sont pas examinées par le Yuan exécutif ou d'autres organismes. Le président de la Commission et d'autres représentants officiels se présentent devant les législateurs pour expliquer leurs programmes et leurs propositions, et le budget de la Commission est examiné et approuvé par le Parlement. La Commission ne perçoit pas d'honoraires et ne garde pas les amendes. Le fait que la Commission agisse en tant qu'organisme public réduit la pression susceptible de s'exercer sur un commissaire donné. Cependant, pour témoigner de l'importance accordée à la valeur d'un examen indépendant, la Commission a tenu un registre des opinions dissidentes qui, depuis 2002, sont publiées d'abord au Journal officiel puis sur le site web de la Commission.[12]

61. La Commission a directement accès au processus de décision, étant donné qu'elle fait parti du Yuan exécutif, qui est la plus haute instance administrative reconnue dans la Constitution. Conformément à la Constitution, tous les organismes publics relèvent du Yuan exécutif. Le Yuan exécutif est dirigé par le Premier ministre, qui préside le Conseil des ministres. Le président de la Commission, qui a rang de ministre, assiste aux réunions où il présente les avis de la Commission sur des questions de concurrence et de réglementation. Cela ne compromet pas l'indépendance des décisions prises par la Commission étant donné que le Yuan exécutif ne vote pas.

62. Le statut indépendant de la Commission pourrait être précisé à la faveur d'une réforme à l'étude qui se répercuterait sans doute également sur d'autres organismes publics. Le Yuan législatif a adopté une nouvelle loi organique donnant la faculté à des organismes extérieurs à la structure hiérarchique du Yuan exécutif. Outre la Commission, des organismes susceptibles de devenir plus indépendants comprendraient le nouveau régulateur des télécommunications, la Banque centrale, le Comité central des élections et la Commission de supervision financière. Cependant, une loi permettant la mise en œuvre de ces principes par la Commission n'a pas encore été adoptée. Dans cette nouvelle loi, les appels des décisions de la Commission devraient être déposés directement auprès du Tribunal administratif plutôt que d'un comité d'appel relevant du Yuan exécutif. Le Président de la Commission ne participerait plus aux réunions du Yuan exécutif. La nomination des commissaires serait soumise à l'approbation du Parlement. La Commission ne compterait vraisemblablement plus que 5 à 7 membres, et les mandats seraient échelonnés et non consécutifs. Les modifications proposées affecteront probablement le cycle budgétaire de la Commission. La loi n'a pas encore été mise en oeuvre.

63. L'explication publique des décisions de la Commission de la concurrence au titre de la loi sur la concurrence est au premier rang des priorités. Les décisions sont annoncées en chinois sur le site Web de la Commission et certaines décisions importantes sont publiées en anglais. Les décisions sont également publiées en anglais dans la série *Cases and Materials* de la Commission ; les volumes de cette série paraissent toutefois avec un délai de deux ans. La Commission avait initialement pour priorité d'informer le milieu des affaires et le public sur le nouveau régime de la concurrence. En 2001, elle avait à son actif l'organisation de plus de 1 000 ateliers avec des associations professionnelles et d'autres groupes. En novembre 2005, une série de programmes de conférences de 36 ou de 72 heures avait permis de former 38 « classes » de plus de 2 033 cadres.

64. La Commission s'appuie largement sur des outils juridiques « souples » tels que des énoncés concernant ses méthodes et des conseils prodigués à des secteurs spécifiques. Elle a recours à l'« orientation administrative », et a également publié des principes directeurs à cet égard. Ces principes directeurs visent principalement à guider le personnel de la Commission mais ils font également ressortir des pratiques exemplaires en matière d'orientation informelle qui pourraient présenter une certaine utilité pour d'autres organismes. Selon ces principes directeurs, la Commission ne « donnera des avis que dans le cadre des pouvoirs qui lui sont dévolus par la loi » et « le pouvoir de fournir une orientation administrative ne doit pas être utilisé de façon abusive ». Lorsqu'une pratique est présumée violer la loi sur la concurrence ou « affecter l'ordre commercial » même si elle ne représente pas une infraction, la Commission peut adresser un avertissement au secteur ou à l'entreprise en cause. Le but des activités d'orientation est d'adresser des conseils et des admonestations afin d'encourager les bonnes pratiques ou de décourager les mauvaises. Les orientations n'ont pas d'effet juridique contraignant et il convient, dans le cadre des activités d'orientation, d'éviter les formulations à connotation contraignante ou restrictive que l'on retrouve dans les lois ou les décrets. Il faudrait au contraire privilégier les formulations du type « il est suggéré », « veuillez noter que », « veuillez vous assurer que » et « il est souhaitable que ». Les orientations doivent être fournies par écrit avec les précisions voulues, et motivées. Un avertissement adressé à un secteur doit être envoyé à l'association professionnelle concernée et publié sur le site web de la Commission. La Commission n'engage pas de mesures d'application au seul motif qu'une partie récuse l'initiative d'orientation administrative.

Encadré 3. Principes directeurs et orientation fournis par la Commission de la concurrence

L'orientation fournie par la Commission prend souvent la forme d'un bulletin destiné à un secteur spécifique, dans lequel sont réunis les extraits des textes de loi qui concernent ce secteur et indiquant comment ils s'appliquent aux situations ou aux pratiques propres au secteur. Les initiatives d'orientation s'adressent principalement aux secteurs de la grande distribution, de la banque, des programmes de formation informatique, de l'équipement de sécurité gaz et de la construction. Elles n'ont pas en soi de caractère contraignant. À l'inverse, les principes directeurs peuvent établir des règles qui sont contraignantes pour la Commission elle-même.

Les thèmes abordés dans les articles publiés sur le site web de la Commission donnent une idée de l'utilisation de ces instruments par la Commission :

Frais supplémentaires facturés par le secteur de la distribution
Application de l'article 24 de la loi sur la concurrence [pratiques frauduleuses ou déloyales en général]
Pratiques commerciales du secteur financier
Pratiques commerciales, participation croisée et prestations communes de quatre types d'entreprises [télévision par câble, télécommunications, informatique et commerce électronique]
Télévision par câble
Affaires régies par l'article 20 de la loi sur la concurrence [utilisation abusive de marque de commerce]
Affaires régies par l'article 21 de la loi sur la concurrence [déclarations trompeuses]
Affaires réglées par le biais de l'orientation administrative
Affaires impliquant des éléments étrangers
Examen d'une entrave possible à la concurrence
Critères d'application de la loi sur la concurrence à des lois de droit privé par des entités relevant du pouvoir exécutif
Directives aux entreprises qui présentent une demande d'autorisation d'action concertée
Directives aux entreprises qui présentent une déclaration de fusion
Divulgation d'informations par les franchiseurs
Secteur de la distribution
Fusions extraterritoriales
Pratiques de commercialisation de cartes d'adhésion à des villégiatures à l'étranger
Principes directeurs concernant les plaidoyers verbaux devant la Commission
Travail illicite à domicile
Transparence de l'information et pratiques commerciales abusives des entreprises du secteur de l'amaigrissement et des soins corporels
Commercialisation à échelons multiples
Pénalité pour remboursement anticipé de prêts immobiliers
Principes régissant l'autorisation des exemptions concernant la fixation concertée des prix par les PME
Promotion au moyen de cadeaux et de prix
Audiences publiques
Réglementation des pratiques du secteur immobilier – Réglementation des annonces immobilières
Accords de licences de technologie
Associations professionnelles
Pratiques commerciales des grands magasins à l'égard des fournisseurs de produits de marque
Lettres d'avertissement pour atteinte au droit d'auteur, au droit des marques de commerce et au droit des brevets

Source : site Web de la Commission de la concurrence

3.2 Procédures et pouvoirs de mise en oeuvre

65. La Commission peut lancer des enquêtes à la suite de plaintes déposées par des entreprises, des clients ou des consommateurs pour violation alléguée de la loi sur la concurrence. Elle peut ouvrir une enquête d'office sur une affaire concernant l'« intérêt général ». La Commission rend en outre des décisions sur certains accords restrictifs en réponse aux demandes d'autorisation d'exemption présentées par les parties à ces accords. Bien qu'elle ait le pouvoir d'examiner les conditions de concurrence dans un secteur donné, elle ne peut utiliser une procédure contraignante pour obtenir des informations dans ce type

d'enquêtes, et ne s'est donc pas encore prévalue de ce pouvoir. Les plaintes doivent être accompagnées d'explications détaillées et de preuves.

66. Le principal moyen à la disposition de la Commission pour mener ses enquêtes et obtenir des informations complémentaires consiste à demander aux parties, aux tiers et à d'autres particuliers et organismes de fournir des documents et des renseignements. La Commission a également le pouvoir d'effectuer des inspections dans les bureaux des entreprises concernées et d'obtenir des dépositions auprès de ces parties et de tierces parties qui leur sont associées. La sanction prévue pour refus de se conformer aux procédures d'enquête de la Commission est une amende administrative comprise entre 20 000 et 250 000 TWD. Le refus répété ou le défaut de se conformer aux procédures d'enquête sont passibles d'autres amendes équivalant au double de ces montants pour chaque refus (article 43). Seul le parquet a des pouvoirs de coercition effectifs en matière d'enquête et ces pouvoirs sont exercés seulement dans les affaires pénales impliquant des récidivistes.

67. Les parties et leurs associés ont le droit de revoir et de reproduire les dossiers et les documents de la Commission pour présenter leurs plaintes et préparer leur défense (article 27-1). La Commission a arrêté un règlement relativement à l'accès aux dossiers et documents dans lequel sont établis les critères et les règles permettant de déterminer le moment, la méthode, les frais et le champ d'action. Les textes juridiques et réglementaires n'autorisent pas l'accès aux projets de documents et aux documents internes de la Commission. Est également interdit l'accès aux documents protégés par la législation et à ceux pour lesquels le fournisseur a demandé et obtenu la confidentialité, ou l'accès susceptible de violer les droits de tiers ou d'entraver considérablement l'exécution de fonctions officielles.

68. Les réunions au cours desquelles la Commission prend ses décisions n'ont pas toujours été entièrement ouvertes au public. Habituellement, les personnes susceptibles d'y assister étaient des spécialistes des secteurs concernés, des concurrents, des groupes de protection des intérêts des consommateurs, des organismes publics compétents en la matière et des universitaires. Le commissaire chargé de la question examinée présidait ce que l'on peut appeler une table ronde. Les plaignants et leurs opposants n'étaient pas nécessairement présents, mais pouvaient être conviés afin de fournir d'autres explications. Il se peut donc que les entreprises aient estimé qu'elles n'avaient pas la possibilité réelle de se défendre.

69. La procédure d'audience et de décision est en train d'évoluer conformément à la loi sur la procédure administrative, qui prévoit maintenant la tenue d'audiences formelles au sein des organismes administratifs. En 2002, la Commission a diffusé ses principes directeurs relatifs à la mise en œuvre de la loi sur la procédure administrative et les a modifiés en 2005. En octobre 2005, elle a eu recours pour la première fois à la nouvelle procédure d'audience formelle dans le cadre d'une procédure intentée contre un cartel du ciment. Aucun autre organisme n'avait encore utilisé cette procédure formelle. Lorsque la Commission tient ce type d'audience publique, les parties qui n'ont pas eu gain de cause n'ont pas besoin de présenter une requête au Comité des appels et des requêtes du Yuan exécutif ; elles peuvent faire appel de la décision de la Commission directement devant le Tribunal administratif.

70. Lorsqu'elle n'est pas en mesure d'établir des informations factuelles ou juridiques complètes au cours de l'enquête et afin d'atteindre ses objectifs administratifs et de régler le différend, la Commission peut procéder à un règlement administratif plutôt qu'imposer des sanctions. Il s'agit là également d'une nouvelle procédure, qui suscite quelque peu la polémique. Le règlement auquel a abouti la Commission dans l'affaire Microsoft a créé un précédent.

71. Les réparations pour infraction proprement dite comprennent des amendes et des ordonnances faisant obligation de cesser et de corriger la pratique. L'amende administrative de base est comprise entre un montant minimum de 50 000 TWD et 25 millions TWD. Le montant de l'amende peut être doublé en

cas de récidive (article 41). Les mêmes réparations et amendes pourraient s'appliquer à toutes les catégories de violations proprement dites. Fait à noter, la loi n'établit pas de distinction entre le traitement réservé aux ententes injustifiables, aux autres violations d'interdictions spécifiques ou aux « pratiques frauduleuses ou manifestement déloyales » en vertu de l'article 24. Le règlement d'application de la Commission précise les facteurs qui doivent être pris en compte pour la détermination de l'amende. Ce sont notamment le motif de l'auteur de l'infraction, le but et le gain attendu de la violation, le préjudice causé à l'ordre commercial, l'avantage effectivement obtenu par l'auteur de l'infraction, la taille et la position sur le marché de l'auteur de l'infraction, toute autre mesure d'application prise ou avertissement donné relativement à ce type d'infraction, le dossier de conformité à la loi de l'auteur de l'infraction, et le « repentir » exprimé par l'auteur de l'infraction et sa coopération à l'enquête de la Commission (Règlements d'application, article 36).

72. La mise en place d'un dispositif de clémence nécessitera l'amendement de la loi sur la concurrence. La Commission a élaboré des modifications qui établiraient le fondement juridique de son pouvoir de négociation avec les parties au sujet des amendes et de ne pas infliger d'amende en échange de la fourniture d'informations utiles suffisantes. Les détails du dispositif de clémence seraient contenus dans les règlements de la Commission une fois la loi adoptée. S'agissant de clémence en droit pénal du Taipei chinois, il existe un précédent en vertu duquel la clémence est accordée en échange de la coopération aux poursuites. Cette question est toujours à l'étude à la Commission et les amendements proposés n'ont pas encore été soumis à l'examen.

3.3 Appel et examen judiciaire

73. Il peut être fait appel sur le fond contre les décisions de la Commission devant le Comité des appels et des requêtes du Yuan exécutif. C'est auprès de cet organisme qu'il est habituellement fait appel des décisions administratives. Son président est le chef des services juridiques du Yuan exécutif, mais la plupart de ses membres sont des spécialistes externes, des spécialistes du droit administratif et des constitutionnalistes. Son rôle consiste non pas à rendre des décisions à titre d'organisme supérieur en fonction de considérations de principe, mais à assurer la mise en conformité avec les normes administratives. Ses décisions peuvent également être portées en appel devant le Tribunal administratif. Le Comité des appels et des requêtes a eu tendance à appuyer les décisions de la Commission davantage que celles du Tribunal administratif. Depuis 2000, la Commission n'a perdu que 32 des 785 causes portées en appel auprès du Comité, soit 4 %, alors qu'elle a perdu 23 des 251 causes portées devant le Tribunal administratif et le Tribunal administratif supérieur, soit 9 %. La plupart des affaires sont portées en appel par des parties qui cherchent à faire annuler une décision de la Commission établissant leur responsabilité mais le quart environ de ces affaires consistent à s'opposer à une décision de la Commission de ne pas agir.

74. La législation adoptée récemment sur la procédure administrative a créé de nouvelles possibilités de recours. En vertu de la loi sur la procédure administrative, il ne peut être fait appel devant le Comité des appels et des requêtes d'une décision rendue par un organisme à la suite d'une audience publique formelle. L'appel doit plutôt être porté devant le Tribunal administratif supérieur, un tribunal de première instance récemment institué en vertu de la loi sur les différends administratifs de 2000 en tant que voie possible d'examen judiciaire. Ce tribunal initialement composé d'environ 19 juges et qui en compte aujourd'hui 28 a traversé une délicate période d'adaptation et a été saisi d'environ 20 000 affaires pendant sa première année d'activité. Ce nouveau niveau de recours et la possibilité de soumettre des affaires à un examen ont entraîné des retards considérables, ne serait-ce que pour qu'une affaire soit attribuée à un juge. Le délai nécessaire pour que commence l'examen est maintenant ramené à un mois environ. Les tribunaux administratifs ont le pouvoir de prononcer des jugements mais ils ne le font que rarement. S'ils ne sont pas d'accord avec la décision de l'organisme administratif, ils demandent plutôt la tenue d'autres délibérations. La perspective accrue d'un examen judiciaire contradictoire aurait apparemment eu pour effet de modifier

les pratiques des organismes qui ont ainsi été encouragés à mieux étayer les raisonnements qui ont conduit aux conclusions et aux décisions.

3.4 Autres méthodes d'application du droit de la concurrence

75. Des poursuites pénales sont possibles mais seulement en cas de non-respect d'une ordonnance de cessation émise par la Commission (articles 35 et 36). Le non-respect des ordonnances relatives à la monopolisation, aux pratiques concertées ou aux infractions à la législation sur les marques de commerce est passible d'un emprisonnement maximal de trois ans et d'une amende maximale de 100 millions TWD et celui des ordonnances relatives aux pratiques déloyales, d'un emprisonnement maximal de deux ans et d'une amende maximale de 50 millions TWD[13]. Les amendements apportés en 1999 à la loi sur la concurrence ont relégué la sanction pénale à ce rôle complémentaire, afin de rendre la mise en œuvre plus crédible. La menace de sanctions pénales à l'encontre d'un vaste éventail de violations de la loi sur la concurrence était manifestement trop étendue. Le système de mise en œuvre à deux voies en vigueur précédemment démontrait certaines différences entre les approches et les normes de preuve de la Commission, du parquet et des tribunaux. Les tribunaux imposaient parfois une sentence de six mois qui pouvait toutefois être commuée en amende. La menace avait néanmoins un effet dissuasif ; la Commission indique que les premières poursuites, tout du moins, ont fait prendre conscience aux associations professionnelles qu'il convenait d'e supprimer le poste de président, susceptible de constituer une cible évidente en cas de poursuites pénales. La limitation des poursuites pénales aux violations des ordonnances de la Commission visait aussi à tenir compte des préoccupations exprimées par les entreprises au sujet de l'abus du droit de recours au pénal dont disposent les particuliers en vertu des procédures pénales en vigueur au Taipei chinois.

76. Le pouvoir de mise en œuvre au niveau pénal a souvent été utilisé malgré la complexité des procédures, le plus souvent toutefois dans des affaires de déclarations trompeuses. Au début, la Commission a recommandé certaines poursuites pour ententes sur les prix de vente et soumissions concertées. Plusieurs affaires pénales ont été examinées avant 2000, et bon nombre d'entre elles ont entraîné des condamnations (environ 20 sur 25). Même après la révision de la législation, en 1999, on a compté 170 affaires. Ce chiffre comprend la mise en oeuvre des ordonnances de toutes sortes prises sur le fondement de la loi sur la concurrence.[14] Au cours des périodes de déclaration les plus récentes, des peines d'emprisonnement et des amendes pénales ont été imposées seulement dans des affaires de fraude liées à la commercialisation à échelons multiples. Depuis 1999, aucune procédure au titre de la loi sur la concurrence n'a été engagée pour récidive de pratique de cartel.

77. Les autorités chargées des poursuites s'attaquent souvent aux soumissions concertées en se fondant sur un autre texte de loi, la loi sur les marchés publics. Un contrat, un accord ou toute autre communauté de vues qui incite un fournisseur à ne pas présenter de soumission ou à faire une offre trop élevée dans le but d'exercer une influence préjudiciable sur le prix d'une adjudication ou d'obtenir des avantages illicites est passible d'un emprisonnement de six mois à cinq ans et d'une amende maximale de 1 million TWD.[15] Depuis 1999, le ministère public a engagé des poursuites dans 89 affaires de soumissions concertées anticoncurrentielles dans des marchés publics, soit près de 15 affaires par année.[16]

78. La loi sur la concurrence prévoit plusieurs types de réparations au titre d'actions privées. Des personnes privées peuvent engager des poursuites devant les tribunaux pour obtenir une ordonnance de cessation ou des mesures conservatoires en cas d'infraction appréhendée (article 30) et obtenir des dommages intérêts (article 31). Selon la nature de l'infraction, le tribunal peut attribuer des dommages multiples pour infraction intentionnelle, jusqu'à concurrence de dommages intérêts triples. Lorsque l'auteur tire profit de l'infraction, les dommages intérêts peuvent être établis en fonction du gain réalisé. Les actions judiciaires privées sont réputées être moins attrayantes que les plaintes déposées auprès de la Commission de la concurrence en raison de leurs coûts. Le délai de prescription applicable aux poursuites

privées est toutefois avantageux. La poursuite doit être engagée dans les deux années qui suivent la prise de connaissance de l'affaire par le plaignant, mais pas plus de dix ans après l'infraction. Malgré les coûts et le fait que la Commission examine généralement toutes les plaintes (même si elle prétend disposer de la latitude voulue pour ne pas intervenir dans les affaires qui ne soulèvent pas de questions d'intérêt général), plus de 100 actions privées ont été intentées depuis 1999, et sur ce nombre, plus de 50 visaient l'obtention de dommages intérêts multiples. Du fait que toutes les parties de la loi sur la concurrence peuvent être invoquées dans une action privée, les actions privées peuvent tout aussi bien concerner des plaintes pour concurrence déloyale, comme l'imitation frauduleuse ou la contrefaçon, que des accords restrictifs ou des abus de situation de monopole. Aucune action de ce type n'a été menée avec un succès notable ; du moins, aucune affaire importante ayant donné lieu à la demande ou à l'attribution de réparations ou de dommages intérêts simples ou multiples par ordonnance n'a été signalée.

79. D'autres dispositions législatives du Taipei chinois comprennent des procédures innovantes visant à encourager les recours privés. Le droit de la protection des consommateurs prévoit des poursuites suivant le principe *parens patriae* et des recours collectifs par des groupes de protection des droits des consommateurs, notamment des dommages intérêts triples dans les cas d'infraction délibérée, et la réduction ou l'annulation d'une partie des frais judiciaires[17]. On a recensé environ six recours collectifs en dommages introduits par des consommateurs. La poursuite la plus retentissante s'est conclue par la décision d'accorder des dommages intérêts de 200 millions TWD à un constructeur pour un vice de construction à cause duquel un immeuble s'était écroulé lors d'un séisme. Trois ONG représentant des consommateurs avaient été autorisées par la Commission de protection des consommateurs à introduire ces actions au nom des consommateurs. Chaque action doit être autorisée par le médiateur des consommateurs, qui est un représentant local des pouvoirs publics. Les groupes de protection des consommateurs ou le médiateur peuvent également obtenir des ordonnances. L'autorité financière a par ailleurs encouragé les recours privés. Elle a appuyé la demande d'une fondation à but non lucratif qui a été créée dans les années 90 dans le but de protéger les investisseurs et souhaitait regrouper des poursuites publiques et des poursuites privées en dommages dans une seule procédure, sans frais de dossier.

80. Les pouvoirs publics, que ce soit au niveau des grandes agglomérations, de l'administration centrale ou des collectivités locales, on un rôle limité bien que la plupart de leurs responsabilités aient été supprimées lors des amendements adoptés en 2000. Ils sont définis dans la loi sur la concurrence comme des « autorités compétentes » (article 9) ; cependant, les pouvoirs les plus importants sont réservés à l'« autorité compétente centrale » qui est la Commission de la concurrence. Il existe un système de contacts réguliers et de présentation de rapports semestriels à la Commission par ces différents niveaux d'administration, qui appuient la Commission dans les activités de sensibilisation et de relations publiques. La Commission peut demander l'assistance des administrations locales mais ne le fait que pour les inspections régulières des pratiques de commercialisation à échelons multiples des entreprises.

3.5 Questions internationales

81. La loi sur la concurrence s'applique aux entreprises étrangères dans la mesure où leur comportement affecte la concurrence sur le marché du Taipei chinois, indépendamment du fait que ces entreprises étrangères aient des représentants, des filiales ou des succursales dans ce pays ou de l'état des relations entre le Taipei chinois et leur administration nationale. Une personne physique ou morale étrangère peut déposer une plainte auprès de la Commission à condition que le pays d'origine de cette personne ou de cet organisme autorise des personnes ou des entreprises du Taipei chinois à engager des actions similaires dans ce même pays.

82. Une grande partie des affaires examinées par la Commission en rapport avec des entreprises étrangères sont des fusions internationales. La Commission a adopté des principes directeurs relativement au traitement de ces transactions. Pour alléger la charge de travail inhérente aux déclarations de petites

transactions, l'exercice de la compétence est déterminé par l'impact direct et significatif raisonnablement prévisible qu'une fusion est susceptible d'avoir sur le Taipei chinois. On ignore si la Commission a pris en compte les marchés internationaux dans ses analyses, mais elle a noté l'incidence des échanges internationaux sur la définition des marchés internes. Par exemple, lorsque la suppression des tarifs a rendu les importations de ciment concurrentielles et que celles-ci ont atteint le point qui marquait traditionnellement la frontière entre les marchés septentrional et méridional, la Commission a décidé de considérer l'île comme un seul marché.

83. La Commission ne joue pas de rôle dans l'application de la législation anti-dumping. En théorie, elle peut envisager des mesures contre l'abus de ce procédé afin d'augmenter les prix, de restreindre les importations ou d'intimider les concurrents. En 1997, la Commission a demandé qu'il soit posé comme condition d'une fusion que les parties s'abstiennent de porter plainte pour dumping car cela aurait eu pour effet d'exclure des importations cycliques de la Corée et du Japon. Les parties concernées se sont effectivement abstenues.

84. La Commission ne dispose que d'une capacité restreinte de répression à l'égard des cartels internationaux. Dans plusieurs affaires, la Commission a réuni des preuves de collusion internationale. Elles concentre toutefois ses efforts à la recherche de preuves plus solides de l'existence d'ententes dans des activités de commercialisation internes, sachant qu'il est peu probable qu'elle puisse appliquer les dispositions de la loi sur la concurrence à l'encontre d'entreprises non résidentes multinationales ou étrangères.

85. La Commission a signé un accord de coopération antitrust trilatéral avec les autorités d'exécution de l'Australie et de la Nouvelle-Zélande et un accord de coopération avec le *Conseil de la concurrence* de la France. Depuis 1996, elle est partie à un accord de coopération avec l'ACCC. Cet accord a été invoqué dans une enquête effectuée en 1998, alors que l'ACCC s'est informée auprès de la Commission de la possibilité que des mesures de mise en œuvre soient prises à l'encontre d'une activité de commercialisation à échelons multiples. Pour faciliter la coopération régionale, la Commission maintient également la base de données de l'APEC sur la politique et le droit de la concurrence. En annonçant récemment sa décision d'imposer des amendes à un cartel du secteur du ciment, la Commission a attiré l'attention sur le champ d'action international de ce cartel et souligné sa volonté de partager des informations et de travailler en coopération avec les autres services d'application.

3.6 Ressources et priorités

86. Les ressources, qu'il s'agisse du personnel ou du budget, sont stables depuis un certain temps. Au cours des cinq dernières années, l'effectif s'est établi à 217 salariés en moyenne. Le budget a légèrement baissé, pour passer d'environ 370 millions TWD en 2001 à environ 355 millions en 2004, la Commission ayant assumé sa part du resserrement budgétaire général. Environ le quart de l'effectif de la Commission possède un diplôme de droit, un sixième environ en économie et un sixième également en administration des affaires ou en comptabilité. La plupart des salariés (85 %) possèdent au moins une licence.

Tableau 1. Évolution des ressources au titre de la politique de la concurrence

	Années-personnes[1]	Budget (en millions TWD)
2004	211	355.1
2003	223	353.7
2002	221	361.0
2001	219	370.0
2000	210	570.0[2]

1. À la fin de l'exercice ; le budget représente le montant fixé au début de l'exercice.
2. L'exercice budgétaire a été modifié en 2001 ; les dépenses budgétaires pour 2000 comprennent le deuxième semestre de 1999.

Source : rapport annuel de la Commission de la concurrence, 2000-2004 ; budget de la Commission de la concurrence

87. La composition des affaires traitées par la Commission s'est modifiée à mesure que son rôle évoluait de l'éducation vers l'application. Le succès des activités de publicité menées initialement autour de la législation de la concurrence a attiré un grand nombre de plaintes qui ont eu pour effet de surcharger les ressources au début. Pendant ses dix premières années d'existence, la Commission a examiné plus de 2 000 affaires par année, soit une affaire par tranche de 10 000 habitants (L.S. Liu, 2002). Le nombre total d'affaires a chuté considérablement en 2002 en raison de la modification du seuil de notification des fusions, qui a réduit de 97 % le nombre de déclarations de fusions (de 1 089 à 33). Les responsabilités liées à l'administration des règlements relatifs à la commercialisation à échelons multiples ne se reflètent pas dans le tableau illustrant les évolutions des actions menées au titre de la politique de la concurrence. Ces affaires représentent une part importante des activités de la Commission et 19 % de ses décisions. Au cours des cinq dernières années, ce problème s'est atténué, sans doute parce que le public est davantage informé de la nature des escroqueries de type Ponzi.

88. Pour le nombre d'affaires et la sévérité des sanctions infligées, les accords horizontaux arrivent au premier rang des priorités en matière d'application. La plupart des amendes visent des affaires d'action concertée relevant de l'article 14. L'affaire qui a le plus retenu l'attention est certainement celle du GPL qui, en 2003, a valu aux contrevenants des amendes totales de plus de 300 millions TWD. Pendant la plupart des autres années également, les sanctions totales prononcées pour des accords horizontaux ont largement dépassé celles infligées pour d'autres infractions. Depuis 2000, la sévérité des sanctions s'est généralement atténuée. En 2004, pour chaque grande catégorie de base, le nombre d'affaires dans le cadre desquelles la Commission a demandé ou obtenu des sanctions et le total des sanctions imposées ont été les plus bas ou parmi les plus bas de la période.

Tableau 2. Évolution des actions menées au titre de la politique de la concurrence

		accords horizontaux	accords verticaux[3]	abus de position dominante	fusions	concurrence déloyale[5]
2004 : affaires ouvertes[1]	1 194					
sanctions ou ordonnances demandées[2]		16	16	5	24	227
sanctions ou ordonnances imposées[2]		6	4		21	82
Total des sanctions imposées[4]		19.5	4.8		2.9	15.2
2003 : affaires ouvertes[1]	1 156					
sanctions ou ordonnances demandées[2]		38	25	8	33	273
sanctions ou ordonnances imposées		24	12		32	133
Total des sanctions imposées[4]		352.6	10.5		3.5	20.7
2002 : affaires ouvertes[1]	1 367					
sanctions ou ordonnances demandées[2]		30	17	13	120	318
sanctions ou ordonnances imposées[2]		15	4	4	119	145
Total des sanctions imposées[4]		10.4	3.3	22.0	3.0	33.7
2001 : affaires ouvertes[1]	2 511					
sanctions ou ordonnances demandées[2]		38	18	15	1 090	323
sanctions ou ordonnances imposées[2]		17	3	1	1 088	155
Total des sanctions imposées[4]		155.3	.9	14.0	.4	74.4

		accords horizontaux	accords verticaux[3]	abus de position dominante	fusions	concurrence déloyale[5]
2000 : affaires ouvertes[1]	2 609					
sanctions ou ordonnances demandées[2]		47	48	15	1 184	395
sanctions ou ordonnances imposées[2]		30	9	2	1 182	170
Total des sanctions imposées[4]		87.7	7.9	10.0	5.2	35.9

1. Comprennent les affaires à l'étude, les enquêtes effectuées à l'initiative de la Commission, les demandes d'autorisation d'action concertée et les demandes et notifications de fusion.
2. Comprennent les autorisations des demandes d'action concertée, les autorisations des demandes de fusion, les notifications de fusions autorisées et les notifications de fusions non autorisées.
3. Affaires relevant des articles 18 et 19 de la loi sur la concurrence.
4. 1 000 000 TWD.
5. Affaires relevant des articles 20, 21, 22 et 24 de la loi sur la concurrence.

Source : annuaire statistique 2004 de la Commission de la concurrence.

4. Limites de la politique de la concurrence : exclusions et régimes sectoriels

89. Lorsqu'il y a contradiction entre la loi sur la concurrence et un autre texte de loi, la Commission préconise une forte présomption en faveur de la législation sur la concurrence. Celle-ci s'applique lorsque d'autres textes de loi en « contredisent les objectifs juridiques » (article 46). Cet ajout a été effectué en 1999 à l'initiative du Parlement. Auparavant, la présomption allait dans l'autre sens, comme en témoigne la formulation selon laquelle « la loi sur la concurrence ne s'applique pas à un acte exécuté par une entreprise conformément à d'autres textes de loi ». La Commission de la concurrence estime que la modification confère dorénavant à la loi sur la concurrence le statut de « loi économique fondamentale ». En d'autres termes, les pratiques des entreprises qui sont assujetties au droit de la concurrence mais qui résultent d'autres politiques économiques ou sont affectées par ces dernières doivent néanmoins respecter la loi sur la concurrence. Selon la Commission, d'autres lois applicables peuvent primer seulement si leur fondement est établi expressément et ne contredit pas les objectifs législatifs de la loi sur la concurrence. Dans l'ancienne formulation, la loi énonçait simplement le principe commun selon lequel des lois à portée générale comme la loi sur la concurrence devaient renvoyer à des lois spécifiques en cas de contradiction. L'amendement visait à conférer une priorité plus forte à la loi sur la concurrence.

90. L'amendement apporté à la loi n'a toutefois pas entraîné de différence notable dans la pratique. Les différends sont le plus souvent réglés par des consultations entre la Commission et les autres autorités, un processus que la Commission assimile aux activités de sensibilisation (article 9(2)). Un projet d'envergure lancé initialement visait à identifier et à rectifier un ensemble d'accords qui excluaient des secteurs spécifiques de l'application de la loi sur la concurrence. Après l'amendement adopté en 1999 dans le but de donner plus de poids à l'article 46, la Commission a entrepris, en 2001, un autre cycle de révision des lois et règlements existants et travaillé ensuite en collaboration avec d'autres ministères pour y apporter des amendements. Cependant, l'unique fois où la Commission a tenté de tirer parti de l'amendement apporté à l'article 46, par le biais d'une mesure d'application prise à l'encontre d'une pratique anticoncurrentielle autorisée par un autre organe de l'administration, le Comité des appels et des requêtes a décidé que la loi sur la concurrence ne s'appliquait pas puisque la pratique était autorisée par un autre texte de loi. Par conséquent, malgré la présomption manifestement plus forte en faveur de la loi sur la concurrence, la Commission envisage de privilégier la sensibilisation plutôt que la confrontation avec d'autres autorités lorsque des textes de loi contredisent les objectifs de la loi sur la concurrence.

91. La polémique sur la question de savoir si la loi sur la concurrence s'appliquerait à des entreprises publiques a été résolue par un compromis prévoyant l'instauration d'une période de transition pendant laquelle une pratique pouvait continuer à la condition d'avoir été autorisée spécifiquement à un niveau suffisamment élevé. Citons à cet égard les exemples de la fourniture de carburant diesel au secteur ferroviaire et la fourniture de sucre à l'armée et aux apiculteurs. La période de transition a pris fin en 1996. La pression des consommateurs, des médias et du secteur privé a contribué au maintien des accords spéciaux pour les entreprises publiques sous contrôle. Cependant, au cours de sa première décennie d'existence, la Commission de la concurrence n'a guère pris de mesures d'application contre ces entreprises, en partie parce qu'elle a respecté la période de transition de quatre ans et n'a pas cessé de prendre en compte les obligations de service public en jeu. Tous les problèmes de concurrence qui sont suscités par la pratique des entreprises publiques sont maintenant entièrement assujettis à la loi sur la concurrence, mais les différends sont habituellement réglés par voie de consultation plutôt que par coercition. Dans le secteur des télécommunications, la Commission s'en est remise au jugement du ministère pour ce qui concerne la question de la tarification des services innovants par l'opérateur public en place au moment de l'ouverture du marché. Dans l'affaire du GPL, elle a consulté les deux autorités publiques qui avaient conjointement monopolisé le marché pour élaborer des directives administratives qui permettraient d'éviter les infractions à l'avenir. Lors de la libéralisation des marchés des produits pétroliers, elle a tenté d'établir « un mécanisme et des normes de concurrence » à la suite des plaintes selon lesquelles la China Petroleum Corporation faisait de la discrimination dans la vente de carburant avion et abusait de sa position dominante, bien que dans ce cas précis elle ait également imposé une amende.

92. L'actionnariat de l'État entraîne certains effets qui faussent le fonctionnement du marché, étant donné que l'influence ou la préférence des pouvoirs publics est plus susceptible d'avoir une incidence sur les décisions et les orientations des entreprises dont l'État est le premier actionnaire. Par exemple, l'une des deux raffineries de pétrole demeure contrôlée par les pouvoirs publics et l'administration leur aurait recommandé de ne pas augmenter les prix à la suite des hausses des prix internationaux du brut. Une entreprise est classée comme « privatisée » lorsque la part des actions détenues par les pouvoirs publics est inférieure à 50 %, indépendamment de la composition réelle du conseil d'administration, de la présence d'autres actionnaires importants ou de sa compatibilité avec les intérêts des pouvoirs publics dans son exploitation. Les entreprises qui ne sont pas encore privatisées, même selon cette définition, sont les suivantes : China Petroleum Corporation, Aerospace Industrial Development Corporation, China Shipbuilding Corporation, Tang Zong Iron Works Company, Taiwan Power Company, Taiwan Sugar Company, Taiwan Water Supply Corporation, Taiwan Tobacco and Liquor Company, Bank of Taiwan, Land Bank of Taiwan, Central Trust of China, Taiwan Railway Administration (qui n'est pas encore constituée en société), Chunghwa Post Company, Veterans Pharmaceutical Plant, Lung-Chi Chemical Plant, et RSEA Engineering Corporation. L'État est actionnaire important mais non majoritaire d'autres entreprises. La part qu'il détient dans la Chungwha Telecom Company, par exemple, reste considérable, bien qu'elle soit tombée sous les 50 % à la suite d'une adjudication des actions et de l'émission d'ADR en août 2005.

93. La loi peut ne pas s'appliquer aux activités commerciales d'entités qui font partie des pouvoirs publics et qui ne sont pas des « entreprises ». Par ailleurs, la Commission a déjà affirmé que la loi sur la concurrence s'appliquait aux organismes publics qui ont des activités commerciales, comme c'était par exemple le cas de la Direction générale des télécommunications lorsque le prédécesseur de la société Chung Hua Telecom était l'émanation commerciale du ministère. La Commission a également fait preuve de prudence, puisqu'elle a estimé que certaines activités monopolistiques de services publics étaient hors de sa portée tandis que d'autres ne l'étaient pas. L'impression de manuels scolaires était exemptée de l'application de la loi, mais non la revente des manuels imprimés par d'autres entreprises. Le critère de légalité en train de se profiler pour la détermination de l'application de la loi sur la concurrence est fondé sur la fonction : il établit si l'entité publique exerce une fonction publique ou si elle est engagée dans une transaction commerciale. Les critères ne sont pas totalement rigoureux. Si une entité n'est pas une

entreprise en raison de sa structure, bien qu'elle soit engagée dans une pratique commerciale, il est malaisé de concevoir qu'elle puisse devenir une telle entreprise de par sa fonction. La Commission est manifestement plus apte à appliquer la loi sur la concurrence lorsque la concurrence est faussée dans les situations où l'acheteur est un organisme public. Dans ce cas, c'est le vendeur qui est visé par l'action de la Commission même si c'est la pratique de l'organisme public qui est à l'origine du problème, par exemple lorsque cet organisme établit un appel d'offres qui a eu pour effet d'abolir la concurrence.

94. Les pratiques liées à l'exercice des droits de propriété intellectuelle en vertu de la loi sur les droits d'auteur, de la loi sur les marques de commerce ou de la loi sur les brevets ne sont pas couvertes par la loi sur la concurrence, sauf si elles sont « abusives » (article 45). La Commission a explicité ces relations dans les *Règles applicables à l'examen des affaires de licences de technologie*, qu'elle a publiées en 2001. Ces règles ne sous-entendent manifestement pas que les brevets ou le savoir-faire confèrent un pouvoir de marché, et reconnaissent qu'une bonne pratique en matière d'exercice de droits de propriété intellectuelle peut valoir une exemption formelle de l'application de la loi sur la concurrence. Cependant, un accord qui dépasse le champ d'application de l'exercice adéquat de ces droits, même s'il est formellement approprié, sera réexaminé afin de déterminer s'il restreint ou non la concurrence. Les Règles préconisent l'examen des effets, non seulement sur le marché des biens et services directement soumis au droit de la propriété intellectuelle, mais aussi sur les marchés de technologies de substitution et les marchés de l'innovation liés aux biens et services. Les Règles décrivent les types de clauses contenues dans des accords de licence qui ne correspondraient pas généralement à une restriction de concurrence ou à une concurrence déloyale, celles qui enfreindraient la loi et celles qui sont plus floues. La Commission a aussi diffusé des *Principes directeurs pour l'examen d'affaires nécessitant l'envoi aux entreprises de lettres d'avertissement pour atteinte au droit d'auteur, au droit des marques de commerce et au droit des brevets,* dans laquelle elle déconseille les poursuites abusives contre des concurrents pour des atteintes alléguées au droit d'auteur, au droit des marques de commerce et au droit des brevets. Des plaintes pour discrimination et monopolisation déposées contre une société de droits d'auteur ont été rejetées dans une décision rendue en 2004, au motif que la loi sur le droit d'auteur prévoit d'autres voies de règlement des différends, comme la médiation (et les demandes d'honoraires situés dans une fourchette réglementée, ou une demande d'application pénale à la suite d'une atteinte au droit d'auteur, ne pouvaient pas être considérées comme un recours abusif au titre de la législation sur le droit d'auteur).

95. Les actions concertées auxquelles se livrent les PME, y compris les ententes sur les prix, peuvent être exemptées de l'interdiction faite à l'article 14 lorsque l'intention qui préside à l'acte est d'améliorer l'efficacité fonctionnelle ou de renforcer la compétitivité. Il faut établir la preuve que ces pratiques sont bénéfiques à l'ensemble de l'économie et servent l'intérêt général et elles doivent être autorisées au préalable par la Commission. La directive émise par la Commission relativement à ces ententes sur les prix précise les deux raisons pour lesquelles ces ententes peuvent être considérées comme bénéfiques à l'économie et à l'intérêt général même si elles diminuent la concurrence par les prix. La première raison est la stabilité des transactions. La directive estime que des ressources pourraient être gaspillées en recherches et en comparaisons pour des achats à petite échelle, mais sporadiques, de biens et services, que des abus pourraient être commis à l'encontre de consommateurs qui ne peuvent se procurer d'informations et que la coordination améliorera l'efficacité des fournisseurs. L'autre raison est la transparence des informations, qui peut diminuer les coûts sociaux des transactions et contribuer à ouvrir des débouchés commerciaux. La directive recommande que les entreprises, par l'entremise de leurs associations professionnelles, négocient avec les associations professionnelles de leurs partenaires commerciaux afin de parvenir à un consensus sur des prix concertés raisonnables et proposent un code de déontologie et des procédures conformes à l'esprit de la loi sur la concurrence. Les critères d'autorisation de la Commission portent notamment sur la question de savoir si les prix qui font l'objet d'une entente sont « raisonnables ». La procédure recommandée par la Commission peut comprendre des audiences publiques ou l'organisation de séminaires réunissant des universitaires, des spécialistes, des associations représentant les partenaires commerciaux, d'autres organisations concernées, des associations professionnelles, les secteurs cibles et

les autorités sociales et administratives. La Commission peut imposer des conditions, des restrictions ou des engagements. Les prix approuvés sont en général des plafonds et non des prix obligatoires uniformes ; cependant, pour des « transactions particulières », où les prix fixés sont à la fois les prix d'achat et les prix de vente, ou lorsque la principale préoccupation est la transparence de l'information, la Commission peut approuver la fixation des prix maximum et minimum ainsi que des méthodes d'évaluation.[18]

96. Le champ d'application potentiel de l'exemption de l'interdiction de fixation des prix par les PME est déterminé par des critères figurant dans la législation générale sur le développement des PME. Sont considérées comme telles les entreprises du secteur manufacturier dont le capital versé est inférieur à 80 millions NTD ou les entreprises du secteur des services dont le chiffre d'affaires est inférieur à 100 millions NTD. Les organismes publics peuvent appliquer d'autres critères suivant le type d'activité sur lequel ils sont appelés à fournir des orientations, par exemple que les entreprises considérées aient un effectif de moins de 200 salariés dans le secteur manufacturier et de moins de 50 dans le secteur des services. L'exemption ne s'est appliquée qu'une seule fois. En 1997, la Commission a autorisé des ateliers de réparation automobile à conclure une entente sur le prix maximum facturé pour les services d'urgence autoroutière dispensés à des véhicules commerciaux, en faisant valoir que cela réduirait les coûts de recherche d'information, empêcherait l'exploitation opportuniste et stimulerait la concurrence entre les fournisseurs de services ou de produits.

4.1 Transports maritimes

97. La réglementation des transports maritimes instaure une exemption de fait de l'application de la loi sur la concurrence aux accords restrictifs. La Commission de la concurrence a ouvert des enquêtes à la suite de plaintes déposées après le relèvement des tarifs de la *Pan-Pacific Stability Association* et de la *Canadian Pan-Pacific Stability Association*, en 2003. Ces hausses de tarifs ont été dûment soumises à l'autorité de réglementation -- le ministère des Transports et des Télécommunications -- conformément aux articles 39, 40 et 25 de la loi sur les transports maritimes. La Commission a pris en compte les objectifs législatifs de cette loi, les caractéristiques du secteur des transports maritimes, les effets d'une exploitation concertée sur l'efficacité, les politiques qu'elle avait suivies par le passé à l'égard de ces organisations et le fait que les exemptions accordées pour des ententes similaires étaient courantes ailleurs dans le monde. En appliquant la règle énoncée à l'article 46, la Commission a donné préséance à la loi sur les transports maritimes tout en pressant le ministère de renforcer sa supervision.

4.2 Télécommunications

98. Au bout de dix ans d'efforts dans ce sens, les marchés des télécommunications ont été libéralisés. La loi sur les télécommunications de 1996, qui a été amendée en 2005, a favorisé encore davantage la libéralisation tout en s'efforçant de lutter contre l'abus de position dominante. La loi était administrée par la Direction générale des télécommunications, qui relève du ministère des Transports et des télécommunications, le monopole historique. Les débuts ont été incertains, le successeur continuant d'appartenir au monopole historique, Chunghwa Telecom Co. (CHT), une entreprise publique non constituée en société, et les placements concurrents étant limités aux fournisseurs présents dans les installations. Une deuxième étape a commencé en 1998, avec le lancement d'appels d'offres pour le réseau fixe et l'élaboration de règles de concurrence à l'intention du secteur des télécommunications. L'évolution de la législation et de la réglementation qui a résulté de cette initiative a été complexe. En général, le droit des télécommunications autorise un pourcentage d'actionnariat direct étranger plus important dans les entreprises de téléphonie fixe, fournit une réglementation des prix attrayante au moyen de plafonds de prix souples, exige la séparation comptable et interdit les subventions croisées et les pratiques anticoncurrentielles. L'obstacle juridique à la privatisation de CHT a été retiré et l'État n'est plus l'actionnaire majoritaire ; il reste cependant l'actionnaire le plus important et détient également une action spécifique pour contrôler CHT ou l'empêcher de prendre certaines initiatives.

99. La Direction générale des télécommunications, à l'aide d'un effectif d'environ 90 salariés dans les services de planification générale et de télécommunications publiques, a été chargée de la libéralisation du marché et de la mise en place d'un cadre propice à la concurrence loyale. Ses règles et ses pouvoirs *ex ante* concernent la séparation comptable pour les systèmes implantés dans les installations, la désignation et le financement d'un fournisseur de service universel implanté dans les installations, la portabilité du numéro et l'égalité d'accès, le plafonnement des tarifs pour les services dispensés depuis les installations, la cohabitation des opérateurs implantés dans les installations et le choix de l'opérateur. Les règles de concurrence établies par la Direction générale des télécommunications instaurent une présomption de pouvoir de marché significatif en cas de détention d'une part de marché de 25 %.[19] Ses pouvoirs de contrôle *ex post* définissent les pratiques interdites à une entreprise dominante, et énumèrent une liste de neuf infractions spécifiques au secteur, comme le fait d'empêcher une demande d'interconnexion, de refuser d'expliquer la méthode de calcul du tarif, et de rejeter sans raison valable les demandes de location de composants ou de circuits ou de négocier une cohabitation. Signalons également une interdiction générale d'abus de position dominante ou d'autres pratiques de concurrence déloyale. La Commission de la concurrence conserve sa compétence dans ce domaine mais consulte habituellement la Direction générale des télécommunications dans les cas où ses interventions appuient la concurrence et correspondent aux objectifs poursuivis par la loi sur la concurrence. La Direction générale des télécommunications et la Commission de la concurrence ont à l'occasion examiné une même affaire et sont parvenues à des conclusions concordantes.

100. Malgré l'approche prudente caractéristique de la législation initiale, l'exploitation de la téléphonie mobile est devenue concurrentielle. La CHT demeure la principale entreprise du secteur mais n'est maintenant que l'un des trois fournisseurs nationaux, qui sont de taille presque égale. Les différends au sujet des coûts d'interconnexion ont ralenti le processus. Ils ont semble-t-il été résolus plus efficacement par le Conseil consultatif des barèmes dans le secteur des télécommunications que par le Comité de règlement des différends de la Direction générale des télécommunications.

101. Il est projeté de transférer les fonctions de la Direction générale des télécommunications vers la nouvelle Commission nationale des télécommunications. Les nouveaux entrants n'ont pas toujours été convaincus que la Direction générale des communications était suffisamment indépendante, étant donné que l'État détient toujours près de la moitié des actions de la CHT. La Commission nationale des télécommunications sera nettement distincte des pouvoirs publics. La compétence plus large qui lui est accordée vise à mieux tenir compte de la convergence des technologies et des services. Le texte de loi portant création de la Commission nationale des télécommunications, qui était à l'étude depuis 1998, est entré en vigueur en novembre 2005. La Commission nationale des télécommunications sera un organisme public indépendant doté de 13 commissaires à plein temps qui effectueront des mandats de trois ans. Elle devrait commencer ses activités début 2006, lorsque les candidats auront été retenus. Dans l'intervalle, elle doit apporter des modifications aux textes législatifs et réglementaires relatifs aux télécommunications, portant notamment sur la portabilité du numéro vers les téléphones mobiles et les lignes fixes, l'exigence que la CHT adopte un tarif de gros pour les entreprises qui revendent ses services et les règles applicables au service « voix sur Internet ». L'un des principaux changements consisterait à relever le seuil de réglementation asymétrique à un niveau supérieur de part de marché (ou de contrôle des installations essentielles). Cela permettrait d'éliminer l'anomalie induite par le fait que les trois groupes de téléphonie mobile présents dans l'île, qui détiennent chacun une part de marché d'environ 30 %, puissent être assujettis à la réglementation du fait qu'ils dépassent le seuil de « pouvoir de marché ».

4.3 Télévision par câble

102. La loi sur la télévision et la diffusion par câble adoptée en 1999 établit des règles sectorielles spécifiques qui régissent les acquisitions dans ce secteur. Elle a pour but de contrer la concentration et d'empêcher les boycotts mutuels auxquels les gros opérateurs ont eu recours en tant que tactiques de

négociation. En 1994, le régulateur, l'Office national de l'information, a créé jusqu'à 51 régions ou zones de service.[20] Une fusion horizontale entre des opérateurs ou des systèmes ne peut entraîner le regroupement de plus du tiers des abonnés à l'échelon national, la moitié des opérateurs d'une zone (sauf dans les cas où il n'y a qu'un seul opérateur dans une zone), ou le tiers des opérateurs à l'échelon national. Pour les fusions verticales, un opérateur et ses entreprises associées ne peuvent utiliser que le quart des canaux disponibles. Ces responsabilités et les autres responsabilités de l'Office national de l'information doivent être transférés à la nouvelle Commission nationale des télécommunications.[21]

103. La Commission de la concurrence a longtemps été en désaccord avec l'Office national de l'information sur la manière dont il convient de traiter avec ce secteur. L'Office national de l'information considère que le service de télévision par câble est un monopole naturel qui appelle une réglementation directe et, par conséquent, autorise, voire encourage, les fusions avec ce monopole dans les différentes zones géographiques. Lorsque l'Office national de l'information ne pouvait pas mettre fin aux mécanismes de boycotts mutuels, la Commission de la concurrence est intervenue. Les principes directeurs formulés par la Commission en ce qui concerne les marchés publics communs et la vente commune de programmes considéraient que les transactions situées en dehors des limites structurelles définies étaient des infractions à l'article 24. La Commission a également publié des principes directeurs sur les fusions verticales, en vertu desquels les conditions prévalant dans chaque zone sont susceptibles d'être au mieux un duopole, et souvent un monopole ; les principes directeur demandent donc que les parties « externalisent les bénéfices internes et proposent des mesures positives (…) pour empêcher les effets restrictifs sur la concurrence ». Ils comprennent une présomption réfutable selon laquelle les transactions qui dépassent le seuil structurel ne respectent pas le critère d'équilibre de l'intérêt général prévu dans la législation relative aux fusions. La Commission a recommandé qu'il y ait au moins deux fournisseurs dans chaque zone, sauf dans les régions extrêmement isolées, et qu'il soit procédé à l'examen de la disposition des zones et des règles applicables aux participations croisées afin de supprimer les barrières à l'entrée. Un amendement a été apporté à la législation afin de supprimer le seuil et de permettre davantage de participations croisées et d'investissements étrangers. La plupart des régions sont toutefois desservies par un fournisseur en situation de monopole titulaire d'une licence de neuf ans. Les seules fusions refusées par la Commission de la concurrence concernaient généralement des regroupements de systèmes de télévision par câble et de fournisseurs de programmes (sont compris dans ces fusions les regroupements horizontaux et verticaux), bien qu'un certain nombre de ces transactions aient été autorisées ultérieurement après que les parties eurent cédé certaines de leurs participations et pris l'engagement de ne pas se livrer à des pratiques de discrimination ou de refus de vendre.

4.4 Fusions dans le secteur financier

104. Les fusions d'institutions financières peuvent être accélérées pour des raisons prudentielles, sous réserve d'une condition relative à la concurrence posée par le régulateur financier. La législation applicable varie légèrement selon les différentes catégories d'institutions. En vertu de la loi sur les banques, le processus d'examen des fusions prévu par la loi sur la concurrence et l'autorisation de la Commission de la concurrence ne sont pas obligatoires lorsqu'une banque est en difficulté, et que, de l'avis du régulateur, le transfert doit s'effectuer sur-le-champ et n'aura pas d'effet préjudiciable significatif sur la concurrence. En vertu de la loi sur les holdings, le recours à des initiatives d'urgence similaires par une holding financière, une filiale de banque, une filiale de société d'assurance ou une société financière filiale d'une holding financière est également exempté de l'examen des fusions s'il est nécessaire et ne favorise pas la concurrence déloyale. La loi sur les fusions entre institutions financières réserve un traitement similaire aux prises de contrôle, par les banques, des services de crédit des associations d'agriculteurs et de pêcheurs dont il est probable qu'elles n'auront pas d'effet préjudiciable significatif sur la concurrence. Enfin, il en va de même de la loi sur l'assurance en ce qui concerne les prises de contrôle effectuées dans le secteur de l'assurance lorsque l'autorité compétente estime que des mesures d'urgence sont nécessaires et n'auront pas d'effet préjudiciable significatif sur la concurrence. Dans tous les cas, l'autorité compétente est la

Commission de surveillance financière, qui a été créée en 2004 avec pour mandat d'élaborer, d'améliorer et de contrôler la supervision financière intégrée, de consolider la surveillance des secteurs de la banque, des valeurs mobilières et de l'assurance et de remplir le rôle de régulateur unique pour tous ces secteurs. Une entreprise défaillante invoquerait sans doute, pour sa défense, des arguments visant à justifier les transactions couvertes par ces dispositions spéciales. La Commission de la concurrence ne perçoit pas de risques liés à l'attribution de cette responsabilité.

105. Le marché bancaire est fragmenté. On compte 47 banques locales, dont les cinq premières détiennent seulement 38 % du marché local, et 31 coopératives de crédit. La Commission de surveillance financière est préoccupée par l'excès de concurrence dans le secteur financier, étant donné que les institutions sont de taille trop réduite pour réaliser des économies d'échelle ou supporter le coûts de l'innovation. L'État détient environ la moitié des actifs financiers, tandis que les banques privées font l'objet d'un contrôle familial. En raison de l'importante fragmentation du secteur, la plupart des fusions entre banques ne soulèveraient pas de problèmes de concurrence et ne nécessiteraient même pas de notification préalable. Les seuils de déclaration de fusion sont fixés séparément selon les institutions financières. Dans le cas des transactions de holdings financières, l'une des parties doit avoir des recettes supérieures à 20 milliards TWD. La notification ne serait exigée que pour les regroupements auxquels seraient parties des entreprises détenant une part importante des recettes bancaires de l'économie. L'État favorise le regroupement entre les banques et les installations existantes plutôt que la création de nouvelles banques ou l'ouverture de nouvelles succursales afin de ramener à sept le nombre de sociétés holdings financières d'ici à la fin de 2006. Cette politique a quelque peu suscité la polémique, bien que compte tenu de la situation du marché au Taipei chinois, les regroupements qui seraient effectués pour atteindre ce but n'auraient pas nécessairement pour effet d'entraver la concurrence efficace.

4.5 Électricité

106. La réforme de l'électricité, qui est à l'étude depuis dix ans, n'a pas encore abouti. La société à capitaux publics Taiwan Power Company (Taipower) détenait pour la production, le transport et la distribution d'électricité une concession de 30 ans arrivée à échéance en 1998. La réforme envisagée porte sur la libéralisation et la privatisation du secteur. En 1999, la Commission a publié deux rapports dans lesquels elle recommandait la séparation verticale de Taipower, solution qu'elle considérait comme la meilleure, ainsi que d'autres mesures complémentaires s'il se révélait impossible de mettre cette solution en œuvre. La Commission recommandait que la loi sur la concurrence s'applique aux fusions et aux abus de position dominante dans le secteur de l'électricité. En 1999, le Cabinet a approuvé des projets d'amendements à la loi sur l'électricité qui se seraient limités à la création d'un office de normalisation, d'un régulateur indépendant et d'un fonds pour le service universel, mais le Parlement ne les a pas adoptés. Le projet de loi prévoyant la libéralisation progressive figure toujours officiellement parmi les points importants à l'ordre du jour. Le Parlement n'a toujours pas adopté de législation destinée à permettre à de gros clients d'acheter directement de l'électricité, en raison des préoccupations liées aux effets de la privatisation, plus que ceux de la libéralisation, sur la main-d'œuvre, de même qu'à la sécurité de l'approvisionnement.

107. Jusqu'à présent, la concurrence s'est peu fait sentir dans ce secteur. La loi sur l'électricité autorise la production pour compte propre et encourage la coproduction efficace. Cependant, les producteurs indépendants n'ont pas d'impact sur le marché, étant donné que toute la production d'électricité doit être vendue à Taipower, qui la revend à son tour aux clients. Les producteurs indépendants pourraient bénéficier d'un avantage au titre du coût de production ou répondre à la demande de qualité de service.

4.6 Services professionnels

108. Les textes de loi concernant plusieurs professions demandent que des barèmes d'honoraires figurent dans les statuts des associations professionnelles. Dans certains cas, l'association doit soumettre son projet de barème d'honoraires à l'approbation d'un régulateur. Comme il n'est pas possible d'exercer une profession sans adhérer à une association, les barèmes d'honoraires réduisent ou éliminent la concurrence par les prix.

109. La Commission de la concurrence a entrepris une réforme dans le but de lever ces contraintes. En 1999, la Commission a rencontré des représentants du ministère de l'Intérieur, du ministère des Finances, du ministère de la Justice et de la Commission des travaux publics pour déterminer si les normes tarifaires en vigueur dans les statuts des associations professionnelles d'architectes, de comptables, d'avocats et de techniciens contrevenaient aux dispositions de la loi sur la concurrence.[22] La Commission a conclu à l'existence de violations de la loi et en a informé les organismes et professions concernés, auxquels elle a accordé un délai d'an pour supprimer les barèmes d'honoraires. Les réactions ont été mitigées. Dans le secteur du génie, la législation n'a pas encore été modifiée, mais la Commission des travaux publics a informé les ingénieurs qu'ils ne devraient pas adresser de demande d'approbation des barèmes d'honoraires.

110. En ce qui concerne la profession juridique, les barèmes d'honoraires ne s'appliquent plus dans la pratique. Le ministère de la Justice a organisé une conférence sur la question et une identité de vues s'est dégagée en faveur de la suppression des barèmes d'honoraires. La suppression n'est pas encore officielle mais il semble que les barèmes d'honoraires ne soient plus appliqués. En revanche, la concurrence est entravée par des contrôles exercés sur l'entrée. En raison du contingentement des entrées à l'examen annuel (d'environ 8 % actuellement), le nombre d'avocats est limité. Sur les 5 000 avocats que compte la profession, 3 000 exercent à Taipei. De nombreux juristes travaillent toutefois dans des entreprises qu'elles peuvent représenter devant les tribunaux. La restriction à l'entrée entrave donc la concurrence essentiellement dans la prestation de services juridiques aux particuliers et aux petites entreprises qui n'ont pas les moyens de recruter des juristes.

111. Certaines associations ont abandonné les barèmes d'honoraires, mais non l'association des architectes. L'association imposait un barème d'honoraires et menaçait d'exclure les membres qui facturaient des honoraires inférieurs à ceux qu'elle prescrivait. La conformité des membres était assurée au moyen d'un système centralisé de recouvrement d'honoraires par l'association. En 2003, la Commission de la concurrence a ordonné aux trois principales associations de cesser d'utiliser leurs barèmes d'honoraires et de les retirer des statuts. Les associations ont fait appel et le Comité des appels et des requêtes a annulé la décision de la Commission. Le Comité a fait valoir dans sa décision qu'il doutait que les normes affectent le marché, venant ainsi confirmer que la loi sur la concurrence n'établit pas une interdiction absolue visant les ententes sur les prix. Le Comité a également estimé que le barème d'honoraires était exempté de l'application de la loi sur la concurrence parce que l'obligation d'obtenir l'approbation du régulateur signifiait que les honoraires fixés par une entente découlaient d'un décret officiel. La décision du Comité ne semblait pas appliquer l'article 46 tel que l'entend la Commission de la concurrence, c'est-à-dire en fonction d'une obligation de constater que l'objet de la législation autorisant la fixation d'honoraires collectifs entre manifestement en contradiction avec les objectifs de la loi sur la concurrence.

5. Sensibilisation à la concurrence et études orientées vers la recherche de solutions

112. Les activités d'examen, d'analyse et de sensibilisation à la réforme ont été au cœur des fonctions de la Commission, en particulier pendant ses dix premières années d'activité. Le fondement juridique de la responsabilité de prodiguer des conseils sur l'impact d'autres politiques est une disposition qui demande à la Commission de la concurrence de coopérer avec d'autres organismes publics (article 9). La Commission

compte à son actif de nombreuses interventions : elle a conseillé le ministère de la Santé au sujet de la réglementation des salons de beauté et de mise en forme, l'Office national d'information sur le régime de concurrence de la télévision par câble, le ministère des Finances sur la rétention de vin de riz par les détaillants et le ministère de l'Économie au sujet de la libéralisation des marchés du pétrole et de l'électricité.

113. Sur l'effectif total d'environ 215 salariés que compte la Commission, une douzaine de personnes sont affectées aux activités de sensibilisation. La part du budget est équivalente en pourcentage, puisqu'elle représente quelque 21 millions TWD sur un total d'environ 355 millions TWD. C'est en 2003 que le budget consacré à la sensibilisation a été le plus élevé, puisqu'il s'est établi à environ 27 millions TWD. Le reste de l'effectif s'occupe de questions sectorielles spécifiques et un grand nombre de représentants des autorités locales assument des responsabilités qui comprennent une certaine part d'activités de sensibilisation.

114. La Commission organise, de concert avec d'autres instances publiques, des réunions et des séminaires sur des questions affectant la concurrence. Ces efforts sont souvent l'occasion de gérer les marchés ou du moins de prêter une oreille attentive aux doléances des participants sur les conditions dans lesquelles ils mènent leurs activités. Par exemple, en 2004 la Commission a travaillé en collaboration avec le Conseil de l'agriculture, les offices de gestion du marché des différentes autorités locales, les principaux grossistes et les services de police afin de « mettre en place un système d'alarme destiné à remédier au déséquilibre de l'offre et de la demande de légumes ». Elle a également participé à une réunion visant à « remédier au déséquilibre saisonnier de l'offre et de la demande sur le marché du lait frais » et à une autre destinée à « stabiliser l'équilibre du marché des produits de l'acier et auto discipliner les producteurs », à laquelle elle avait convié le Bureau du développement international et le Bureau du commerce international du ministère de l'Économie, la China Steel Corporation et 67 autres entreprises du secteur de la sidérurgie. Il y a dix ans, la Commission et le Conseil de l'agriculture ont organisé des rencontres afin de prendre connaissance des plaintes des producteurs au sujet des prix de l'ail, qui connaissaient des écarts de 90 % d'une saison à l'autre.

115. Les agriculteurs sont souvent préoccupés par les conditions du marché. La loi sur le commerce des produits agricoles encourage les agriculteurs à mettre sur pied des coopératives et à y adhérer. La vente initiale de produits agricole en gros doit se faire par l'intermédiaire des marchés locaux, mais les agriculteurs ont également la possibilité de commercialiser leur production directement aux transformateurs aux exportateurs et aux consommateurs. La Commission a fait part au Conseil de l'agriculture des craintes que lui inspirait le fait que les marchés locaux de gros soient tenus d'accorder la priorité aux produits des associations d'agriculteurs.

116. Au cours des années s'est déroulé un cycle d'examen de la réglementation et de programmes de réforme. Citons le « Projet en faveur de l'assouplissement de la réglementation » ; le « Projet visant à faire cesser les pratiques anticoncurrentielles des entreprises publiques » ; les « Projets de déréglementation et de promotion de la concurrence sur le marché ; et le « Projet d'examen de la mise en place des réglementations relatives à la *Green Silicon Island Vision and Promotion Strategy* ». L'État appuie la mise au point de la liste de contrôle intégrée de l'APEC et de l'OCDE pour l'autoévaluation en matière de politiques de concurrence, de réglementation et d'ouverture des marchés. Aucun programme formel national d'examen et d'analyse n'a encore été mis en place à ce jour. En avril 2005, le Conseil de planification et de développement économiques a donné son accord de principe à l'adoption d'un système régulier d'analyse de l'impact de la réglementation, et a commandé des études sur la mise en oeuvre. La mise en place du système par les pouvoirs publics est toujours en cours.

117. En 1994, la Commission a entamé son propre projet d'examen et de conseil, le « Programme d'examen et de consultation relatif à l'article 46.1 » et le « Groupe de travail sur le projet relatif à l'article

46.1 ». (Les titres renvoient à l'article 46, par.1, de la loi sur la concurrence.) Ces travaux ont consisté à examiner tous les règlements susceptibles de contredire la loi sur la concurrence. Ils ont été organisés autour de sept ensembles de règlements émanant du ministère des Finances et de la Central Bank of China (Taiwan) ; du ministère de l'Économie et du Conseil de planification et de développement économiques ; du ministère des Transports et des Télécommunications et du Groupe de travail sur les travaux publics ; du ministère de l'Intérieur et de la Commission des vétérans ; de l'Office national de l'information, du Conseil des affaires culturelles et du ministère de l'Éducation ; du ministère de la Santé et de l'Administration de la protection de l'environnement ; et du Conseil de l'agriculture. Chaque groupe a effectué des travaux de recherche et mené un examen sur les règlements qu'il est chargé de superviser et dressé la liste de ceux qui étaient susceptibles de contredire la loi sur la concurrence en raison de leur impact sur l'« ordre commercial » et les intérêts des consommateurs. Treize réunions de consultation ont été organisées et plus de deux cents règlements ont été examinés.

118. En 1996, la Commission a constitué un « Groupe de travail sur la déréglementation » afin d'élaborer des programmes de réforme destinés à être présentés au Yuan exécutif et mis en œuvre par ce dernier. Dans le secteur manufacturier, le Groupe de travail a identifié cinq marchés appelés à faire l'objet d'une réforme et d'une ouverture aux importations : le sucre, les produits pétroliers, les télécommunications, le gaz de pétrole liquéfié et les graviers. Dans le secteur des services, le Groupe de travail a identifié huit marchés appelés à faire l'objet d'une réforme destinée à supprimer les barrières ou à améliorer la réglementation : les coopératives de consommateurs, les télécommunications, la télévision par câble, l'information sur le dédouanement, les services de messagerie, les entrepôts situés dans les zones de traitement des exportations, les marchés publics de services de fret et l'information électronique sur les échanges de titres.

119. Au cours du second mandat de la Commission, le Yuan exécutif a lancé l'initiative portant sur la création d'un centre d'opérations régionales en Asie Pacifique (*Asia-Pacific Regional Operations Center* (APROC)), un autre programme de réforme de la réglementation destiné à supprimer les barrières et à renforcer le rôle régional du Taipei chinois en misant sur ses avantages comparatifs. L'un des objectifs poursuivis était de s'en remettre moins à la politique industrielle et davantage à la concurrence. La Commission a parallèlement entrepris son « projet spécial au titre de l'article 46.2 » dans le but de réexaminer la réglementation mise en place par les pouvoirs publics et ayant pour effet de déplacer le marché. L'amendement apporté en 1999 à la loi sur la concurrence pour renforcer l'article 46 tenait partiellement compte des réticences observées par la Commission à cet égard.

120. En 2001, le projet d'orientation intitulé *Green Silicon Island Vision and Promotion Strategy* a fourni à la Commission l'occasion de participer concrètement à une action plus vaste. Le rapport établi à la suite de ce projet a été soumis au Cabinet en août 2003. La consultation menée dans le cadre de l'initiative a conduit à des réformes dans les domaines de l'assurance, des honoraires des avocats et des salles de cinéma. Le ministère des Finances a accepté d'autoriser les entreprises à fixer leurs propres primes supplémentaires pour l'assurance incendie et l'assurance automobile, de supprimer les primes minimums d'assurance incendie et de recommander au secteur de demander l'autorisation de la Commission pour les pratiques concertées en matière de primes d'assurance conjointe. Le ministère de la Justice est parvenu à un compromis avec la Commission sur le fait que les associations du barreau ne devaient pas fixer de barèmes d'honoraires. Enfin, l'Office national de l'information a supprimé la règle qui limitait jusque-là le nombre d'écrans réservés à la diffusion de films étrangers (en partie parce que cela contredisait les engagements pris auprès de l'OMC). La Commission des travaux publics a accepté de retirer les dispositions relatives à la fixation des honoraires de la législation pertinente. Ces dispositions sont néanmoins toujours présentes dans la législation et l'association n'a pas encore amendé ses propres règlements.

121. La Commission a conjugué ses activités de sensibilisation et de mise en œuvre afin de réformer le marché du GPL. En 1998, elle a recommandé le démantèlement du monopole de distribution que détenait le service de fourniture de GPL de la Commission des affaires des vétérans. Le fournisseur qui détenait le monopole a réagi en instaurant de nouvelles règles de sélection de distributeurs qualifiés, dont le nombre est passé de un à neuf. En 1999, l'Office de l'Énergie a émis de nouvelles règles concernant les permis d'importation et d'exportation et de commercialisation de produits pétroliers, levant ainsi la réglementation sur les importations. Cela a eu pour effet de mettre fin au monopole de production et de fourniture de la China Petroleum Corporation, à la faveur de l'entrée d'un concurrent, la Formosa Petrochemical Corporation. Le secteur n'a pas apprécié l'arrivée de ce nouveau concurrent, de sorte que la Commission a dû avoir recours aux mesures d'application les plus rigoureuses qu'elle ait jamais adoptées à ce jour pour mettre fin aux cartels mis en place par les entreprises à la suite de la libéralisation.

6. Conclusions et actions possibles

122. En insérant une législation générale sur la concurrence dans le programme de réformes en faveur de la libéralisation, les responsables de l'élaboration des politiques ont reconnu que l'économie du Taipei chinois devait aborder la supervision du processus concurrentiel de manière globale. Suivant la pratique courante, le droit matériel couvre les principaux problèmes de concurrence : les accords restrictifs, les monopoles et les fusions anticoncurrentielles. Le fondement juridique explicite permettant l'application spécifique de la loi à la collusion horizontale est particulièrement digne de mention.

123. La prise en compte de la concurrence déloyale et des pratiques frauduleuses souligne l'importance accordée aux consommateurs. Ces pouvoirs donnent à la Commission de la concurrence de nombreux moyens de démontrer au public que les pratiques commerciales abusives ne resteront pas impunies, surtout qu'il n'existe pas d'autorité centrale chargée de la mise en œuvre de la protection des consommateurs. Le travail de la Commission, mesuré en termes de nombre de décisions, sinon en termes de ressources déployées, porte principalement sur ce domaine. Le traitement de pratiques discutables comme des pratiques déloyales constitue une stratégie logique, naturelle et appropriée dans une tradition culturelle qui valorise la loyauté et l'harmonie. La prise en compte de cette tradition pourrait également faciliter le recours à des règlements fondés sur une conception de la concurrence reposant sur l'efficacité. Le fait de mettre l'accent sur la loyauté peut toutefois conduire à des interventions visant à corriger des écarts au plan du pouvoir de négociation. Lorsqu'elles ne remédient pas également au pouvoir de marché qui est préjudiciable aux consommateurs, ces interventions au nom de concurrents spécifiques risquent de nuire à la concurrence plutôt que de la favoriser.

124. L'invocation courante de la loyauté concorde avec le recours fréquent à l'interdiction générale concernant « toute pratique frauduleuse ou manifestement déloyale » susceptible d'affecter l'« ordre commercial » énoncée à l'article 24. La Commission reconnaît qu'elle fait valoir cette partie de la législation dans les cas où elle ne peut apporter la preuve que d'autres dispositions plus spécifiques contenues dans les textes ont été enfreintes. Cependant, dans la mesure où elle fonde ses décisions sur l'affirmation selon laquelle les pratiques sont « manifestement » déloyales ou frauduleuses, la Commission retarde l'acquisition d'expérience et l'élaboration de doctrines bien étayées au plan économique qui lui permettraient d'appliquer des dispositions plus spécifiques. Les tribunaux ayant demandé à la Commission d'être plus précise, elle invoque plus rarement l'article 24. Pendant la période de dix ans comprise entre 1994 et 2003, la Commission a eu recours à l'article 24 dans plus de 75 décisions chaque année alors qu'elle ne l'a fait en 2004 que dans 32 décisions, soit le nombre le plus bas depuis sa première année entière d'activité, en 1993, et le recours à l'article 24 devrait se faire encore plus rare en 2005. En conséquence, l'utilisation abusive de la disposition « générale » pourrait n'être qu'un phénomène transitoire.

125. La Commission assure seule le contrôle des fusions. Ses décisions en la matière ne sont pas soumises à révision ou à annulation par les pouvoirs publics ou par un responsable politique, au regard de leurs effets sur d'autres intérêts pratiques comme l'emploi ou la compétitivité. Cela souligne l'indépendance de l'analyse que mène la Commission dans le domaine parfois sensible qu'est la concurrence. La Commission a néanmoins recours à une norme d'« intérêt général » qui peut l'inciter à prendre en compte les effets des fusions proposées sur d'autres intérêts ; il n'en demeure pas moins que la Commission justifie ses analyses de fusions en termes d'effets sur le marché. Néanmoins, la Commission a rarement conclu qu'un pouvoir de marché représentait une menace telle qu'il fallait empêcher ou contrôler un projet de fusion. Les seules mesures d'application qu'elle a prises au titre du contrôle des fusions visaient à appuyer la libéralisation du marché du pétrole et à préserver certaines rivalités concurrentielles sur le marché traditionnellement monopolistique du service de télévision par câble. Le maintien d'un pouvoir de contrôle sur les fusions vaut que l'on y consacre des ressources même si ce contrôle s'exerce rarement, en particulier depuis qu'en 2002 des modifications ont grandement allégé les formalités de déclaration et d'examen des fusions. Plus les mesures d'application prises par la Commission à l'encontre des regroupements horizontaux sont sévères, plus les projets de fusion entre des entreprises présentes sur le marché national justifiant l'intervention de la Commission risquent d'être nombreux. Tel est peut-être déjà le cas, puisque le pourcentage de déclarations de fusions a augmenté en 2005. Les orientations fournies par la Commission, qui limitent les perspectives d'intervention en ce qui concerne les projets de fusion hors du Taipei chinois, sont explicites et, en principe, neutres : une fusion doit être notifiée si les seuils réglementaires de chiffre d'affaires sont atteint au Taipei chinois. Des complications peuvent néanmoins se présenter. Selon les orientations, le seuil pourrait être atteint si les produits d'une entreprise arrivent sur le marché du Taipei chinois, même si les parties à la fusion ne les y commercialisent pas directement. Il se peut par conséquent que les entreprises ne soient pas en mesure de déterminer si elles respectent les critères de seuil lorsqu'elles ne disposent pas de renseignements plus précis sur ce qu'il adviendra de la distribution en aval de leurs produits et de leur utilisation. L'autre seuil fondé sur la part de marché pose aussi certains problèmes et ce, pas seulement aux entreprises étrangères, étant donné qu'il introduit des éléments d'incertitude et de subjectivité.

126. La Commission de la concurrence est maintenant un organisme administratif stable et expérimenté. Elle a introduit la politique de la concurrence au Taipei chinois selon une progression mesurée et a encouragé la conformité en misant d'abord sur la transparence et la fourniture d'orientations, pour passer ensuite à des mesures d'application plus strictes. Pour améliorer la transparence et la responsabilité, la Commission a mis en œuvre la nouvelle législation générale sur la procédure administrative, en veillant à ce que les critères de droit applicables soient énoncés explicitement dans les textes et en insérant une nouvelle disposition relative aux audiences publiques formelles, qui mettra l'accent sur la nécessité de produire des justifications juridiquement fondées. La Commission dispose de ressources suffisantes pour s'acquitter de son mandat. Son budget et son effectif sont demeurés stables malgré l'évolution de la charge de travail. En 2002, année où les déclarations de fusions ont marqué une forte diminution, la Commission a pu se consacrer davantage à d'autres problèmes complexes de concurrence. Son niveau global d'activité a diminué pendant un certain temps mais a remonté en 2005. Le nombre total d'affaires examinées en novembre 2005 (1 698) a dépassé celui enregistré pour l'ensemble de l'année 2002 (1 387).

127. Il subsiste encore un doute sur la marge d'appréciation dont dispose la Commission pour affecter ses ressources à des affaires qui revêtent un degré élevé de priorité. La loi sur la concurrence prévoit que la Commission peut enquêter, à la suite d'une plainte ou de sa propre initiative, sur toute violation « préjudiciable à l'intérêt général ». Les règles de la Commission n'englobent toutefois pas de critère d'intérêt général, mais stipulent plutôt que la Commission peut rejeter les plaintes « sans fondement » ou dont l'auteur n'est pas bien identifié. La Commission affirme qu'elle peut rejeter les plaintes dénuées d'élément lié à l'intérêt général mais ne le fait pas dans la pratique. Ce point mérite d'être éclairci, notamment en raison du fait que les dispositions des textes de loi sur les droits d'action privée devant les

tribunaux sont par comparaison généreuses. Les plaignants dont la plainte a été rejetée disposent d'une solution de remplacement solide pour porter plainte. Les statistiques sur les mesures d'application mises en œuvre par la Commission ne permettent pas de savoir avec exactitude de quelle manière elle utilise son pouvoir de décider seule d'ouvrir une enquête pour s'attaquer à des problèmes hautement prioritaires. Le nombre d'enquêtes ouvertes à l'initiative de la Commission a augmenté rapidement, puisqu'il était de 104 en 2004, alors que la moyenne annuelle s'est pendant longtemps établie à environ 50. Les décisions de la Commission portent encore principalement sur des affaires de pratiques déloyales, de commercialisation à échelons multiples et de fraude. En 2004, sur 34 décisions ayant abouti à la constatation d'une violation, trois seulement concernaient des pratiques anticoncurrentielles (et deux autres étaient visées par la disposition générale contenue à l'article 24.) Le fait que la Commission n'ait pas examiné d'affaires de soumissions concertées tient seulement en partie à ce qu'il existe une autre voie de recours, en l'occurrence la poursuite pénale, cette voie de recours n'étant accessible que dans les affaires de collusion relatives à des projets financés par les pouvoirs publics. Les mêmes entreprises peuvent également se livrer à la collusion dans des projets du secteur privé. La Commission aurait peut-être intérêt à se doter d'un moyen additionnel de mise en œuvre, comme un dispositif de clémence, pour enrayer ce type de pratique.

128. La Commission est maintenant moins médiatisée que pendant la période qui a suivi l'adoption de la législation et où les pouvoirs publics encourageaient les réformes destinées à libéraliser le marché. Il ne fait pas de doute que la politique de la concurrence revêt suffisamment d'importance pour qu'un changement de gouvernement se traduise par des modifications pour la Commission, comme la nomination de personnes identifiées à un parti politique. Les législateurs ont manifesté de l'intérêt à des plaintes portées par des électeurs qui ont donné lieu récemment à des affaires d'attribution et de tarification de licences d'utilisation de la propriété intellectuelle. En définitive, les organismes d'une société politiquement ouverte doivent être à l'écoute des préoccupations du public. Une politique de la concurrence solide exige que l'autorité responsable de sa mise en œuvre puisse résister aux pressions réelles ou même apparentes exercées pour que la législation soit appliquée en faveur des intérêts de certains concurrents, clients ou autres intervenants. Les réformes qui ont été proposées pour affirmer l'indépendance de la Commission et d'autres organismes qui devraient être soustraits à l'influence apparente des calculs politiciens de court terme sont par conséquent souhaitables.

129. Les questions de politique de la concurrence exigent encore que l'on s'y intéresse dans d'autres domaines. Le dossier de la réforme de la réglementation entreprise au Taipei chinois depuis le milieu des années 90 se compare à celui de nombreux autres pays. Les progrès ont été lents dans les mêmes secteurs qu'ailleurs, notamment l'électricité, les services postaux et les services professionnels à certains égards. Les réformes les plus tangibles ont été apportées dans les télécommunications, notamment pour ce qui est de l'établissement d'un marché concurrentiel pour le service mobile ; cependant, un régulateur indépendant vient tout juste d'être créé, ce qui revêt une importance particulière tant que l'État détiendra une participation significative dans l'opérateur historique. L'ampleur de la participation directe de l'État dans l'économie ne transparaît pas exactement dans la terminologie, étant donné que les entreprises sont définies comme étant privatisées lorsque la part qu'y détient l'État passe en deçà de 50 %. En vertu de cette définition, les avoirs de l'État dans des entreprises désignées comme privatisées peuvent demeurer suffisamment importants pour affecter les orientations de ces entreprises et l'action des pouvoirs publics dans les secteurs concernés d'une manière qui pourrait avoir des effets sur la concurrence. La vigilance démontrée par la Commission quant aux risques de subventions croisées ou d'autres pratiques ayant pour effet de fausser la concurrence reste inchangée. Les considérations de politique et de ciblage sectoriels sont très présentes dans les débats sur les mesures à prendre, bien que les interventions des pouvoirs publics visent généralement à aider les entreprises à être présentes sur des marchés internationaux généralement compétitifs. L'État s'intéresse maintenant à la structure du secteur financier, manifestement motivé en cela par des considérations de principe autres que de concurrence. Dans un marché fragmenté comme celui du Taipei chinois, le fait de réduire le nombre de holdings financières en le ramenant à sept ou d'appuyer la création de trois entreprises financières implantées localement et détenant des parts de marché supérieures

à 10 % ne constituerait pas à première vue une menace pour la concurrence. La Commission risque toutefois de se trouver dans une situation inconfortable si le fait qu'elle autorise un regroupement parce qu'il ne constitue pas une menace pour la concurrence est interprété par le public comme une autorisation valable pour d'autres aspects. Il se pourrait que la Commission doive expliquer qu'elle s'abstient de prendre des mesures seulement dans les cas où il n'y pas d'effet préjudiciable sur la concurrence.

6.1 Mesures possibles à envisager

6.1.1 Mettre en place un dispositif de clémence.

130. La mise en place d'un dispositif de clémence solide devrait constituer une priorité élevée. L'absence d'un tel dispositif est la principale lacune de la boîte à outils dont dispose la Commission. Un dispositif de clémence efficace pourrait renforcer la répression des cartels et de soumissions concertées. Il semble que la Commission transmette les projets en cause au parquet s'ils sont financés par les pouvoirs publics, et n'examine elle-même qu'un nombre limité d'affaires ne relevant pas de la compétence du ministère public. À mesure que les entreprises connaîtront l'existence de la loi sur la concurrence, les cartels formels « enregistrés » opteront pour la clandestinité. D'après l'expérience des autres pays, les dispositifs de clémence sont indispensables pour mettre au jour les cartels clandestins. La Commission a commencé à élaborer un texte de loi qui autorisera la clémence. Ce texte précisera en détail les modalités du dispositif de clémence. La Commission prévoit également de proposer des règles plus claires pour les entreprises communes de recherche-développement. Ces deux initiatives applicables aux regroupements horizontaux pourraient s'inscrire dans une panoplie de dispositions législatives comportant une mesure destinée à renforcer la mise en œuvre et une autre mesure visant à garantir à l'industrie que la Commission ne s'attaquera pas aux entreprises communes efficaces.

6.1.2 Les sanctions doivent être suffisantes pour être dissuasives.

131. L'imposition de sanctions significatives à l'encontre des cartels est liée de près à la clémence, en ce sens qu'elle n'est pas suivie d'effets, à moins qu'il ne soit suffisamment intéressant d'éviter la sanction. La première version de la loi sur la concurrence prévoyait des sanctions légères. Avant 1999, l'amende administrative maximale n'était que de 500 000 TWD, et l'amende pénale maximale, que de 1 million TWD. Reconnaissant cette lacune, les amendements apportés en 1999 ont multiplié par cent les amendes potentielles. Les sanctions imposées pour violation de la loi sur la concurrence sont maintenant plus élevées que celles qui sont prévues pour d'autres catégories de pratiques commerciales abusives. Les amendes pour pratiques injustifiables demeurent faibles comparativement à celles qui sont infligées dans d'autres pays : celles qui ont été imposées au cartel du ciment en décembre 2005 ne se sont élevées qu'à 6 millions USD. La réglementation élaborée par la Commission exige que l'amende soit fondée sur des critères comme les gains que les parties ont retirés de l'infraction. L'énoncé général n'est pas étayé par une mesure ou un objectif plus spécifique qui serait clairement rattaché à un impact économique. Son application est limitée par le plafond réglementaire. Le fait que le plafond soit fixé à un niveau absolu plutôt qu'en proportion d'un chiffre d'affaires ou d'une autre mesure flexible pourrait empêcher la Commission d'imposer des amendes suffisamment élevées pour dissuader les grandes entreprises de se livrer à des violations graves, bien que les amendes inférieures au plafond soient peut-être appropriées pour dissuader les petites entreprises de commettre des infractions de moindre gravité.

6.1.3 Supprimer le traitement particulier réservé à la pratique de fixation des prix par les PME.

132. La disposition en vertu de laquelle la Commission peut approuver les accords de fixation des prix entre petites entreprises envoie un message ambigu. L'interdiction des ententes horizontales injustifiables devrait constituer une règle explicite. Inversement, l'exemption accordée en vertu de l'article 14 s'apparente à une réglementation tarifaire par le biais de laquelle la Commission autorise des accords

conclus par des parties privées pour autant que les prix convenus soient « raisonnables ». La Commission tente de justifier la disposition qui accorde ces exemptions en alléguant la transparence de l'information, la stabilité des coûts et ce qu'elle appelle la stabilité des transactions. Le fait d'autoriser la fixation des prix pour éviter aux consommateurs de gaspiller des ressources en recherche d'information et en comparaisons témoigne d'un manque de confiance paternaliste à l'égard des choix que peuvent opérer les consommateurs sur le marché. La transparence de l'information peut effectivement réduire le coût des transactions et ouvrir des débouchés, mais la fixation ouverte des prix n'est habituellement pas nécessaire pour appuyer cet objectif. Ce qui est peut-être encore plus préoccupant est l'entrave inhabituelle qui expose à des abus les consommateurs dans l'impossibilité de consacrer de temps à la recherche d'informations. Il serait plus approprié dans ces cas d'encourager la transparence des prix plutôt que de maintenir la pratique proprement dite de fixation des prix. Une seule exemption a été accordée jusqu'ici, de sorte que la disposition est considérée en réalité comme anodine, bien que son inscription dans les textes risque peut-être de réduire la tentation de chercher une exclusion réglementaire pour la même catégorie de pratique.

6.1.4 Ne plus faire de la part de marché un critère de notification des fusions.

133. Le critère de la part de marché est source d'incertitude du point de vue administratif parce que la définition du marché est parfois peu claire et souvent contestée. Le fait de subordonner la déclaration de fusion à la part de marché a tendance à introduire une confusion entre l'obligation administrative et la règle de fond. Fonder l'obligation de déclaration sur la part de marché n'est pas compatible avec les meilleures pratiques[23]. Il serait préférable de n'utiliser qu'une seule mesure, moins contestée, comme les actifs ou le chiffre d'affaires. La Commission reconnaît que ce type de critère conduit à l'incertitude de part et d'autre et qu'elle a déjà eu des désaccords avec des entreprises au sujet de la définition du marché et des parts de marché et, partant, de l'obligation de notification des fusions. Plutôt que de maintenir ce seuil dans le seul but de contrôler les regroupements dans le secteur de la télévision par câble, il serait préférable d'adopter une politique spécifique de mise en œuvre pour ce secteur, peut-être en collaboration avec la Commission nationale des télécommunications.

6.1.5 Préciser l'indépendance de la Commission vis-à-vis du contrôle politique.

134. Les projets de modification de la structure d'organismes indépendants comme la Commission sont tous pertinents. Le Président de la Commission ne participerait plus aux réunions du Yuan exécutif. La Commission ne participerait plus aux discussions concernant le processus de décision et devrait modifier son approche en matière de sensibilisation. La présence aux réunions où sont abordés d'autres problèmes de fond présente des avantages, mais une plus grande indépendance n'empêcherait pas nécessairement la Commission d'exprimer son point de vue et même son désaccord sur les effets anticoncurrentiels d'autres mesures prises par les pouvoirs publics. Les appels des décisions de la Commission seraient portés directement devant le Tribunal administratif plutôt que devant un comité d'appel responsable devant le Yuan exécutif. Cela est déjà possible pour les décisions rendues après une audience formelle organisée à la Commission. Ce changement soulignerait le fait que l'application du droit de la concurrence n'est pas un arbitrage stratégique d'intérêts et d'orientations. La désignation des commissaires serait soumise à l'approbation du Parlement. Cette modification élargirait l'assise et l'envergure de la politique de la concurrence, bien que ses effets sur l'indépendance institutionnelle puissent être mitigés. La confirmation apportée par la législation permet l'exercice d'un certain contrôle sur les éventuels comportements arbitraires, mais fournit aussi une autre voie possible pour l'expression de l'intérêt politique. Les mandats seraient échelonnés plutôt que consécutifs, ce qui favoriserait la continuité.

6.1.6 Envisager de renforcer les droits d'action privée.

135. La Commission pourrait concentrer ses ressources plus efficacement si elle ne se sentait pas tenue de répondre à chaque plainte. Les différends entre parties privées semblent plus fréquents au Taipei

chinois qu'ailleurs mais il n'en demeure pas moins qu'il existe certaines mesures qui rendent encore plus attrayant ce type de recours que le dépôt gratuit d'une plainte auprès de la Commission. Le Taipei chinois a déjà mis en place certaines innovations au plan de la procédure consistant à associer des plaintes de consommateurs dans des affaires de protection des consommateurs et de valeurs mobilières. Il serait logique d'étendre ces innovations aux poursuites concernant des plaintes similaires aux termes de la loi sur la concurrence. Une autre mesure qui faciliterait sans doute le traitement des différends privés serait d'augmenter le nombre d'avocats disponibles pour représenter des particuliers en éliminant les contingents fixés sur le nombre de nouveaux avocats.

BIBLIOGRAPHIE

Chao, Yang-Chin (1998), « Exemptions and exceptions to competition policy and law »", discours de l'ancien président de la Commission de la concurrence à l'atelier de l'APEC sur la politique de la concurrence et la déréglementation qui s'est tenu le 8 septembre 1998.

Chuang, Chuen-Fa (2005), « Economic Effects of Liberalisation on the Liquefied Petroleum Gas Market », *Economic Research*, vol. 45, n° 1, p. 1-29.

EIU (2005), Economist Intelligence Unit, *Country Report: Taiwan*, août 2005.

Commission de la concurrence (2002), *Competition Law and Policy in Chinese Taipei – 2002*, rapport annuel présenté au Comité de la concurrence de l'OCDE.

Commission de la concurrence (2003), *Rapport annuel sur les développements en matière de politique de la concurrence au Taipei chinois – 2003*, OCDE, Comité de la concurrence.

Commission de la concurrence (2005), *Annual Report on Competition Policy Developments in Chinese Taipei – 2004*, OCDE, Commission de la concurrence.

Liu, Kung-Chung et Yun-Peng Chu (2002), « Market power in Chinese Taipei: Laws, policies and treatments », *Review of Industrial Organization*, Kluwer Academic Publishers, Pays-Bas, vol. 21, p. 129-43.

Liu, Lawrence S. (2002), « Fostering competition law and policy: A façade of Taiwan's political economy », Global Studies Law Review, Washington University Law School, vol. 1.

Liu, Lawrence S., Chorng-Jian Liu et Chuen-Fa Chuang (2001), « Communications, convergence and competition: the case of Taiwan », in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo et Jiming Ho, dir. publ., Kluwer Law International, La Haye, p. 329-346.

Liu, Len-Yu (2004), « Taiwan's financial reforms and competition », in *The Future Development of Competition Framework*, Tzong-Leh Hwang et Chiuan Chen, dir. publ., Kluwer Law International, La Haye, p. 223-238.

Lo, Changfa (2001), « Intervention of competition law in international trade: the Taiwan experience », in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo et Jiming Ho, dir. publ., Kluwer Law International, La Haye, p. 399-425.

Peerenboom, Randall (2002), *China's Long March toward Rule of Law*, Cambridge University Press, Cambridge.

San, Gee et Changfa Lo (2001), « A Decade of Fair Trade Law Legislation and its Enforcement in the Republic of China », in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo et Jiming Ho, dir. publ., Kluwer Law International, La Haye, p. 80-116.

Shieh, Ming-Yan (2004), « A discussion of the relationship between the patent law and the Fair Trade Law in Taiwan with a review of the *Philips* CR-R decisions », in *The Future Development of Competition Framework*, Tzong-Leh Hwang et Chiuan Chen, dir. publ., Kluwer Law International, La Haye, p. 155-175.

Su, Yeong-Chin (2001), « Competition authorities in competition », in *International and Comparative Competition Law and Policies*, Yang-Ching Chao, Gee San, Changfa Lo et Jiming Ho, dir. publ., Kluwer Law International, La Haye, p. 163-179.

Williams, Mark (2005), *Competition Policy and Law in China, Hong Kong and Taiwan*, Cambridge University Press, Cambridge.

NOTES

1. Les citations entre parenthèses sont tirées de la Loi sur la concurrence amendée, sauf indications contraires.

2. Constitution, article 142 ; voir Williams, 2005.

3. L'article 14 a déjà été interprété comme étant une interdiction absolue. (Chao, 1998).

4. Une décision antérieure non publiée laissait entrevoir une interprétation minimale : aucune mesure n'a été prise à l'encontre de deux entreprises de transport pour entente sur les tarifs du fret, étant donné que chacune détenait moins de 1 % du marché. (L.S. Liu, 2002).

5. Initialement, la législation comportait une règle de concurrence loyale qui régissait les modalités de fixation, par les entreprises, des prix de détail des biens de consommation faisant l'objet d'une concurrence inter-marques appropriée. Cette règle n'a jamais été appliquée et a été levée en 1999.

6. La Commission n'est plus chargée de tenir et de publier un registre des monopoles, ni de publier une liste des secteurs concentrés. Cette fonction, qui nécessitait des ressources considérables, a été supprimée lors des amendements apportés en 1999. Outre les monopoles existant dans les secteurs de l'énergie et du pétrole, les secteurs autres que les services qui présentent la plus forte concentration sont ceux du polyester, du ciment, de la sidérurgie et de certains produits chimiques, et la liste des entreprises monopolistiques établie en 1993 cite les services ferroviaires de transport de voyageurs, les télécommunications sur ligne fixe, les ports, les services d'escale dans les aéroports, le transport longue distance en autocar, l'assurance vie, le papier commercial, la bourse et le financement d'opérations commerciales, et la radiodiffusion (K-C. Liu, 2002).

7. Cette affaire est mentionnée dans la version anglaise du site Web de la Commission, à la rubrique « *mergers* » (fusions).

8. Dans une affaire similaire toujours à l'étude aux États-Unis, la CAFC a conclu en septembre 2005 que les licences groupées de brevets de CD essentiels et non essentiels ne constituaient pas en soi une utilisation abusive de brevet.

9. Ce juridisme découle peut-être des débats sur l'édification initiale du droit de la concurrence qui attachaient de l'importance aux activités irrégulières et déloyales des entreprises et aux transactions avec des parties liées ainsi qu'à la concurrence sur le marché. La définition de « fusion » a également été influencée par les amendements apportés en 1997 à la Loi sur les sociétés afin de protéger les créanciers et les actionnaires minoritaires (L.S. Liu, 2002, p. 43-44)

10. Les amendements apportés en 2002 ont sensiblement relevé les seuils. Auparavant, la loi prescrivait la notification et l'approbation de transactions mineures et sans impact sur la concurrence, comme les cessions de parts à une société mère ou à une filiale et les contrats de franchises.

11. Le ministère de la Justice limitait ce traitement aux aspects non couverts explicitement par un texte de loi spécifique.

12. Ce faisant, la Commission a suivi l'exemple du Conseil des Grands juges, qui publie les opinions dissidentes (contrairement aux tribunaux ordinaires) (L.S. Liu, 2002).

13. La Loi sur la concurrence comporte une disposition obscure concernant chaque peine d'amende et d'emprisonnement infligée à une entreprise reconnue coupable d'avoir fait des déclarations mensongères ayant porté atteinte à la réputation d'une entreprise (article 22, article 37)

14. Ne sont toutefois pas compris dans ces chiffres les cas d'application pénale en vertu de l'article 23.

15. Loi sur les marchés publics, article 87(4). Cet article interdit également plusieurs autres formes de contrainte et d'ingérence dans le processus des marchés publics.

16. Ce total représente environ 4 % de la totalité des affaires pénales visées par la Loi sur les marchés publics. La plupart des poursuites concernent évidemment des affaires de fraude ou de contrainte.

17. Loi sur la protection des consommateurs, articles 49-55.

18. Principes directeurs de la Commission relatifs à l'autorisation de la fixation des prix par les PME, 13 janvier 2005.

19. La disposition de la législation sur les télécommunications sur les pratiques anticoncurrentielles est inspirée de la partie de la première version de la Loi sur la concurrence qui a maintenant été retirée, qui exige que la Commission maintienne un registre des entreprises détenant un pouvoir de marché déterminé en fonction de la part de marché. (L. S. Liu, 2001).

20. La Loi sur la câblodistribution alors en vigueur limitait à cinq le nombre des fournisseurs présents dans chacune de ces zones.

21. L'Office national de l'information applique également, en vertu de la Loi sur la radiodiffusion, des règles exigeant l'approbation préalable des transferts d'actions entre radiodiffuseurs. Ces règles établissent des plafonds de participation afin de contrer la concentration excessive de l'actionnariat dans le secteur des médias. L'Office national de l'information n'autorise pas un transfert vers une personne physique si le cessionnaire (et les parties qui y sont associées) détient plus de la moitié des actions ou plus de 10 % des actions d'une entreprise de journaux ou de radiodiffusion, ni un transfert vers une personne morale qui détient plus de la moitié des actions d'une entreprise de presse, de radiodiffusion ou d'une entreprise associée.

22. Au départ, la Commission ne considérait pas les professionnels indépendants et les autres particuliers engagés dans des activités commerciales comme des entreprises couvertes par les interdictions contenues dans la législation et n'a donc pas fait d'observations, lors du premier cycle d'examen intervenu au milieu des années 1990, sur leurs ententes visant à exercer un contrôle sur les prix (L.S. Liu, 2002).

23. La recommandation du Conseil de l'OCDE relative au contrôle des fusions (section I.A.1.2.2) prévoit des obligations de notification fondées sur des critères clairs et objectifs. De même, le réseau international de la concurrence dans ses pratiques recommandées pour la notification des fusions et les procédures d'examen (II.B) prévoit des critères de notification, objectivement quantifiables, et considère inapproprié l'approche part de marché.