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

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1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. PROPOSED BASIS OF HARMONIZATION AND CONVERGENCE

3.1 Institutional organization and strength

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

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

3.1.1 Basic institutional organization

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1.2 Independence from political power and other interests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Those basic measures are the following:

a.) To ensure the agency is self-financed

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

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

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

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

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

[51] Röller, *supra* note 12 at Section 4, describes the following challenges: effective enforcement, legal certainty, communication and capacity building.
[52] This is what the U.S. Department of Justice did in the *GE-Honeywell case*. *See* Grant & Neven, *supra* note 19, Part 1.3.
[53] *See* OECD, *supra* note 25, at 157.
[54] OECD, *supra* note 25, at 183, note 156.

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

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

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

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

d.) Publicity of the agency's decisions

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

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

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

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

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

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

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

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

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

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

3.1.5 Key role of the court system

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[69] *Schneider-Legrand*, January 30, 2002, Case COMP/M.2283; *Schneider Electric SA v Commission*, Case T-77/02.
[70] *Tetra Laval BV vs. Commission*, October 25, 2002; Cases T-5/02 and T-80/02; *Commission v Tetra Laval BV*, February 15, 2005, Case C-12/03 P.
[71] *Independent Music Publishers and Labels Association (Impala, international association) v Commission*, July 13, 2006, Case T-464/04.
[72] *See, e.g.*, *United States v. Oracle Corp*., 331 F. Supp. 2d 1098, 1158– 65 (N.D. Cal. 2004); *FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. Whole Foods Mkt., Inc*., 502 F. Supp. 2d 1 (D.D.C. 2007).
[73] *See supra* note 36.

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

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

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

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

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

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

3.2 Exemptions to antitrust application

3.2.1 Impact of exemptions on international convergence

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

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

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

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

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

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

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

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

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

3.2.2 Types of exemptions

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

a.) Regulated activities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b.) General category exemptions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c.) Particular exemption of certain industries

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

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

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

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

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

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

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

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

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

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

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

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

d.) Particular exemptions to certain collective activity

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

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

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

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

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

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

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

e.) On-demand, discretionary exemptions

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

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

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

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

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

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

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

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

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

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

f.) State aid

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

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

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

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

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

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

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

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

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

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

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

g.) Other direct governmental interventions in the economy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.4 Proposals

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

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

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

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

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

a.) Basis for the exemption

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

b.) Necessary technical features of the exemption

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

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

c.) Role of the competition agency

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

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

[139] *See supra* subsection a.).

[140] Many of these recommendations are consistent with the standards for assessing exemptions and immunities from the antitrust laws recommended by the Section of Antitrust Law of the American Bar Association. *See Comments of the ABA Section of Antitrust Law on the Comprehensive Alcohol Regulatory Effectiveness Act*, *supra* note 95, at 5.

[141] In Argentina there are no legal provisions about exemptions to competition law. However, since the National Constitution commands the authorities to protect competition, it would be reasonable to sustain that any exemption to that principle should at least be approved by Congress. *See supra* note 34.

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

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

d.) Necessary evidence by the requesting parties

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

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

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

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

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

4. CONCLUSION

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

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

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

[142] *See supra* subsection 3.2.3.

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

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

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

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

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

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

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