

## THE COMMON MARKET AND COMPETITION POLICY IN THE EUROPEAN UNION

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### Abstract

*The article addresses, from a mainly economic perspective, the analysis of the competition policy in the European Union and its contribution to the process of consolidation of the common market.*

*The core of the work consists of a panoramic view of the European competition policy. First, we offer a synthesis of the five areas: suppression of the restrictive agreements of the competition and abuse of dominant position; the control of the aid granted by the states; the liberalization of the economic sectors under monopoly; these three in the Treaty establishing the European Community, as well as the merger control between companies and international cooperation.*

*Secondly, addressing the analysis of the new framework of the European competition policy, configured from the Council Regulations 1/2003, concerning the implementation of the rules of competition under articles 81 and 82 of the Treaty and the 139/2004, on the control of the mergers between companies.*

*We close the paper with an entry of conclusions in which outlines the key challenges facing the European competition policy in the scenario of the global economy.*

**Key words:** competition policy, dominant position, merger control, European Union

**JEL classification:** D4, K2, K21, L4

### 1. INTRODUCTION

The European Commission on the web page of the Directorate General for Competition (<http://ec.europa.eu/comm/competition/antitrust/overview>; consulted on 24/09/2007) said that the competition is a basic mechanism of the market economy and encourages companies to provide consumers with the products they want. At the same time, favours the innovation and pressed to the low prices. However, said the European Commission, in order to be effective, the competition requires bidders who are independent of one another, each of them subject to the competitive pressure exerted by the other.

In short, the European Commission, outlines the positive effects of the competition but, at the same time, clarifies some conditions that must be given for it to be effective. This means that we must establish, through the appropriate institutional framework, the conditions for the competition is able to energize a market economy as the prevailing in the European Common Market.

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In relation to the common internal market, the European Commission itself points out that the best guarantee for the increased efficiency and the innovative potential of European companies is that the domestic market is open and competitive. Therefore, says the Commission, vigorous competition is a key factor for competitiveness and economic growth (European Commission, 2004; p. 2).

In the framework of the Lisbon strategy and in the new scenario of an enlarged Europe, the competition policy is erected in key element to stimulate the competitiveness of European industry in order to achieve the demanding targets set out in the aforementioned Strategy. The new context claimed a new approach of the competition policy, which came into force on the 1<sup>st</sup> of May 2004, coinciding with the accession of ten new Member States. The new approach was described as proactive by the European Commission (2004, p. 2) and was characterized by:

- The improvement of the regulatory framework of the competition in order to promote an intense economic activity, a wide dissemination of knowledge, the better conditions for consumers and an economic restructuring efficient throughout the internal market;
- An action aimed at eliminating barriers to entry and obstacles to effective competition.

This work is designed to analyze this new framework proactive of Competition Policy in the European Union of 27 Member States. We are going to focus our interest in highlight the innovations introduced from the 1<sup>st</sup> of May 2004, in contrast with the previous regulatory framework. To carry out this task will be a fundamental referent the two Regulations (EC) in which has embodied the new approach: the no. 1/2003 of the Council of 16 December 2002 (Official Journal of the European Communities of January 4, 2003), on the implementation of the rules on competition under articles 81 and 82 of the Treaty and the no. 139/2004 of 20 January 2004 (Official Journal of the European Union on January 29 2004), on the control of the mergers between companies (Community Regulation of Mergers).

## **2. THE COMPETITION AS A FUNDAMENTAL VALUE IN THE PROCESS OF EUROPEAN CONSTRUCTION**

As stated by the European Commission (2004, p. 3), the system of economic governance of the EU and the Treaty of the European Communities (TEC) itself are based on the "principle of an open and free competition market economy ". Also understands the European Commission that vigorous competition in an enabling business environment is a key factor for growth in productivity and competitiveness.

However, there must be clear, as does the European Commission, that the competition is not an end in itself. In the document, the Commission (2004, p. 3) defines the competition as "a vital market process that rewards to companies that offer lower prices, higher quality, new products and an offer of broader product".

It seems that the Commission has opted for a dynamic approximation of competition – competition as a process of market" compared to other approximations of static and structuralist character.<sup>1</sup>

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<sup>1</sup> For a comprehensive discussion about the concept of competition and its multiple approaches, see Palma Martos (2005).

Among the objectives of the Treaty establishing by the European Community (TEC) is the improvement of living and a continuous and balanced expansion of economic activity, achieved through the establishment of a common market. This expansion should not be spoiled by the creation of barriers among Member States. In this context of free movement of goods and services, competition policy seeks to ensure consumers the opportunity to choose freely through the prevention and punishment of the proceedings of the agents seeking to establish barriers to the free choice (Prieto Kessler, 2005).

Next to this rationale, that Prieto believes it is essential, seeks other that contribute to the process of European construction. First, and we have previously noted, a dynamic internal market improves the competitiveness of European companies and favours its success in the global economy. And this is so, because a open and competitive market force companies to carry out innovative strategies to improve the quality and downward pressure on prices.

Secondly, competition policy is aware of the necessary balance to be given between innovative processes and competition. The European Union cannot base its competitive strategy in the low costs, but in the incorporation of high technology. And it may be generated only in a context that ensures the return of the high and risky investments, necessary to achieve it. This warranty of monopolization, even temporarily, contravenes the spirit of competition, while it is needed to move in the knowledge and in the economic progress.

Thirdly, the European competition policy should contribute, simultaneously, the benefit of consumers and business interests in the processes of mergers. These processes are justified by the need to strengthen cooperation and to adjust the size of the companies to the global scale in which they operate. The concentration limits competition while it can offer benefits through improvements in efficiency. Here lies the key to the intervention in this field.

Finally, competition policy is facing a complex challenge, which requires solutions that go beyond the community sphere. I refer to the possible international character of the cases. The European Commission has powers to deal with cases of community level, but such treatment is highly complicated by the existence of very different national legislation and different institutional frameworks in regard to the configuration of the competition authorities. In the community level would therefore requires an effective mechanism of coordination, especially when the new partners have a tradition far from the market economies. The Network of Competition Authorities can and must fulfil this role.

But there is another front of necessary coordination, already given operations and actions of the economic operators that transcend community. Are the differences with the USA. And they give rise to conflicts that require greater harmony between the competition authorities on both sides of the Atlantic. In a world economically global, is incomprehensible, in addition to hinder the governance on that scale, the lack of competition rules which ordered the enormous world trade. At the moment, we have to stick to the reinforcing coordination and transatlantic cooperation.<sup>2</sup>

We have seen that competition is flying as essential pillar in the strengthening of European common market and hence of economic construction of the EU. This conviction encourages the community competition policy, one of the most active and profiled in the making up the set of policies of the community.

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<sup>2</sup> See Evenett, S.J.; Lehmann, A. and Steil, B. (Eds.) (2000).

### 3. THE COMPETITION POLICY IN THE EUROPEAN UNION

At this point we are going to stop in the institutional framework of the European competition policy, drawing initially in the Establishing Treaty<sup>3</sup>.

#### 3.1. Five areas of action of the competition policy in the European Union

Among the measures to be taken to achieve the objectives with the establishment of the common market, the article three of the Treaty of Rome envisaged "create a system of guarantees against the distortion of competition in the common market" (Alcaide Guindo, 2005). In the course of its 50 years of existence, the European Union has been weaving the system that today covers five areas essentially. In order to provide an overview of those, we dedicate the lines that follow.

We need to clarify initially that the Treaty does not collect these five areas, because, as we will see, the control of economic mergers and actions toward a coordination and integration international, beyond the borders of the EU, of the competition policy, are not reflected in the text of the Treaty.

This, in the third party, Policies of the Community, in the Title VI, Common rules on competition, taxation and approximation of the laws, devotes Chapter 1 to the rules on competition and in this chapter 1 are collected, with more or less precision, the three remaining areas. The suppression of the restrictive agreements of the competition and abuse of dominant position; the control of the state aid and the impulse to the liberalization of the economic sectors. Let's start with the three areas in the treaty.

#### *3.1.1. Suppression of the Restrictive Agreements to Competition and Abuse of Dominant Position*

##### *a. The prohibition of restrictive agreements between companies*

The first section of the aforementioned chapter one contains provisions applicable to the companies (articles 81 to 86). The first paragraph of article 81 is the prohibition of the agreements between operators impeding, restricting or distorting competition. Then, and as an example and not as closed list, offers a typology of these agreements among which we can emphasize the price-fixing and market sharing. As Prieto Kessler (2005) highlights, the mere intent to limit the competition is sufficient for the prohibition applies, even though does not cause the intended effect. On the contrary, if you do not observe intent would have to calibrate the effects present or potential that, on the market, had the agreement, with adequate consideration of the structural characteristics of the relevant market.

The agreements to which referred to in article 81 have to affect trade between Member States of a sensitive manner, so he tries to avoid a over implementation of the community standard in cases in which the impact was not relevant.

The Commission has broad powers to combat the restrictive agreements of the competition. Thus, can request information from companies and administrations, to make home

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<sup>3</sup> See: Treaties of the European Union. Consolidated Texts (2000). Official State Gazette. Ministry of the Presidency. Madrid.

inspections and impose fines that can reach up to 10 percent of the sales volume (Prieto Kessler, 2005).

It should be noted, however, that the article 81, in its third paragraph provides possible exceptions from the general prohibition; provided that the agreements contributes to improving the production or distribution of products or to promote technical or economic progress and reserve at the same time, users an equitable participation in the benefits. Likewise these agreements should not impose to companies concerned restrictions that are not indispensable to achieve the planned objectives and must not allow the possibility of eliminating competition in a substantial part of the products involved in the agreement.

#### *b. The abuse of dominant position*

Article 82 of the Treaty declared incompatible with the common market and prohibited the abusive exploitation, by one or more companies, of a dominant position in the common market or in a substantial part of it. It is necessary to clarify that what is prohibited is not the dominant position in itself, but its abuse. An additional element and key to gauge whether exist or not abuse in the position of domain is the determination of the relevant market on which such abuse is exercised.

There are to take into account, to understand the difficulty of the competition policy in this area, which both the concept of dominant position as the relevant market are subject to ongoing debate both in theoretical terms as of political practice<sup>4</sup>. Take, for our purposes, the definition of dominant position offered by the Court of Justice of the European Community in the Judgment Hoffman-La Roche (13/21/1976, As. 85/76): "the power to hinder the maintenance of effective competition in the market in cause and to act with a considerable independence against competitors, customers and consumers". For his part Prieto Kessler (2005) said that the relevant market must include all goods or services to exert a competitive pressure on the company subject to review and cover the geographic area from which the competitors can, in his case, disciplining their behaviour<sup>5</sup>.

From the previous concepts, the abuse refers to any conduct of a company with dominant position which produces a weakening of the conditions of competition in the market, where the dominant company relies on different practices to the usual. The article 82 offers a list of abusive practices, by way of guidance without the will of completeness. This set of abusive practices could be classified into two broad typologies: exploitative and anti-competitive. (Prieto Kessler, 2005).

In the exploitative the dominant company takes advantage of its market power to seize part of the incomes of its customers through the setting of high prices, discrimination that is not based on objective criteria or payment of supplies to abnormally low prices. In the abuses anticompetitive behaviour, the dominant company seeks to limit the competition, in order to preserve or expand its market power.

#### **3.1.2. The control of the aid granted by the States**

The objective pursued by the European Commission (Directorate-General of Competition, 2007) by controlling the aid granted by the States is to ensure that interventions by the governments do not distort competition and the intra-community trade. The aid granted by

<sup>4</sup> See Prieto Kessler (2005) and Cabral (1997), pp.15-18.

<sup>5</sup> See in this regard the communication from the European Commission (1997) on the definition of market of reference for the purposes of the Community rules on competition.

the States are regulated in the Second Section (Articles 87 and 88) of the already referred chapter one on competition rules.

Shall be considered State aid, for the purposes of control by the Commission, the aid granted by States or through state funds, under any form, which distorts or threatens to distort competition by favouring certain enterprises or productions (article 87, paragraph 1). Would have to clarify that subsidies granted to individuals or the general measures open to all the companies would not be affected by the article 87 and do not constitute, therefore, State aid.

Although the Treaty draws a general ban on the granting of State aid, recognizes, however, that under certain circumstances, might be necessary interventions of governments. Thus, article 87 in their paragraphs 2 and 3, contains a series of aid compatible with the common market: the social, the intended to repair the prejudice caused by natural disasters, the intended to promote economic development of regions with standards of living abnormally low or with a grave unemployment situation, the intended to promote projects of common European interest or the intended to promote culture and heritage conservation, among others.

Along with articles of the Treaty, the Commission provides a serie of legislative acts, setting up a single system and integrated rules by which the Commission oversees and approves the State Aid in the area of the EU. This legal framework is subject to regular review in order to improve the efficiency of the system and to meet the requirements of the European Council of minors, even better State Aid finalists.

While the new legislation is adopted in close cooperation with the Member States, the implementation of exceptions to the general prohibition is the exclusive jurisdiction of the European Commission, which owns some broad powers of investigation and of decision-making. As the nucleus of those powers is the notification procedure that, except in certain instances, the Member States should follow.

Until the European Commission does not approve a measure that incorporates a State aid, it may not be launching. (European Commission, 2007; In: [http://ec.europa.eu/food/fs/scoop/comm/state\\_aid/overview](http://ec.europa.eu/food/fs/scoop/comm/state_aid/overview). Page consulted on 24/09/2007).

The Commission (2004, p. 14) is aware that in the European Union of 27 Member States is impossible assume the evaluation of each and every one of the possible distortion of competition produced by the State aid. Accordingly, the Commission says the will of the strategy of implementation of the rules are based on an economic analysis more rigorous on the effects of the aid on the competition.

Among the factors that can be considered to calibrate the greater or lesser impact of the aid on the competition are, in the view of the Commission: that an activity is the subject of trade, the amount of aid, the structure of the market concerned, the market power of the beneficiaries and the availability of aids among different market operators. These concepts are integrated into the general guidelines that the European Commission makes available to the Member States to which they design Aid which comply with the requirements to be considered compatible with existing rules.

### *3.1.3. The liberalization of the Economic Sectors Under Monopoly*

The third field of action of the competition policy in the European Union has its origin in Article 86 of the Treaty that incorporates a call attention to the Member States in relation to the public enterprises. Specifically, in its first paragraph, article 86 refers to the Member States not adopted or maintained respect of public enterprises and those companies to which

they grant special or exclusive rights, any measure contrary to the Treaty rules (with special reference to the provisions in articles 12 and 81 to 89).

In its second paragraph, article 86 submits to the rules of competition to the companies responsible for the management of services of general interest or having the character of fiscal monopoly prosecutor, in the well understood that this submission should not prevent, in fact or law, the compliance of specific objective of these companies.

It should be noted that the provision of goods and services of general interest has evolved for some parameters that go beyond the subjugation of public enterprises or of the legal monopolies, providers of these services, to the rules of competition. In fact, over and above has been superimposed a process of liberalization of these markets with the component of the dismantling of the monopoly situations. And in this process, the European Commission has had a very active role, which has sought to respond to diverse questions (European Commission, 2007; <http://ec.europa.eu/comm/competition/liberalisation/overview>. Page consulted on 24/09/2007).

The first question refers to the advantages of the liberalization compared to supply on the part of national organizations with exclusive rights. The European Commission argues that the opening of these markets (air transport, telecommunications, energy, postal services, gas, has enabled consumers the choice between a greater number of suppliers and services, also the consumers have benefited from lower prices and an offer of services more attentive to their necessities.

Found the advantages of liberalization will need to investigate the way in which it has been opening step in different markets. In this regard, we must indicate that the approach of the European Commission has evolved over time. To allow national governments opt for the sharing of the infrastructure or to build new infrastructure for the use of competitors, approach visible at the beginning of the 1990S, it has become an approach that separates legally the management of the infrastructure from the offer of the commercial services are offered using such infrastructure network. The change of approach was due to the difficulty of building new networks given the enormous volume of investment required and inefficiency detected in its use .

This new approach requires to the operators owners of the network permission for competitors to free access to the network. The monitoring of this free access is the key for the advantages of free choice enabling consumers the choice of supplier that offers the best conditions. In assessing the degree of success of this approach will be asked whether its implementation has had a positive and clear effect for consumers.

According to the European Commission (2007), this effect is found with sharpness in the two markets that were opened in the first place to competition: air transport and telecommunications. In these two sectors, the average prices have fallen significantly. In the rest of sectors mentioned above, open to competition after or in the process of opening, have not been appreciated price reductions, and even in some, as is the case of gas, they have risen, due perhaps to its close relationship with oil prices. In any case can be argued a direct relationship between lower prices and greater scope of the processes of opening up markets to competition. A last question is the relevance of delivering public services in open markets to competition, taking into account that the supply of these services due to the satisfaction of a general interest. At this point it should be noted the requirement of an adequate regulation to ensure a certain level and quality of the supply. We must insist that greater liberalization means greater exposure of the market to competition and no further deregulation. The intro-

duction of competition must be accompanied by an efficient regulation on, but not exclusively, in the case of the provision of public goods and services<sup>6</sup>.

The new framework of the European competition policy on that topic leads to greater cooperation between the European Commission and the national competition authorities. Another primary route for collaboration is what keeps the Commission with the national sectorial regulators, which play a key role in this liberalisation process. It is obvious note here that the enlargement is a great challenge for this process and the Commission must intensify this coordination with the competition authorities and with the sectorial regulators, particularly those in the new Member States. (European Commission, 2004, p. 18).

#### *3.1.4. The Merger Control between Companies*

As also notes Prieto Kessler (2005) the TEC does not include any standard related to the merger control. Until it approves the first community regulation in this matter (Regulation 4064/89) in 1989, the Commission used article 82 on the abuse of dominant position to prohibit some concentrations. The implementation of article 82 requires the prior existence of a dominant position, something that may not happen, to be precisely the achievement of the position the ultimate goal of the process of concentration. If exist the position of dominance, the merger could be oriented toward the strengthening of it.

Considering that processes of concentration are a critical pathway for the structural configuration of a market and that it has a direct effect on the conditions of competition, the Commission understood that scrutiny ex-ante merger could benefit the competition, to preserve an adequate structure in the market.

Moreover, the deepening in the process of construction of the Single Market required the existence of an instrument with which the Commission could control operations that passed the national borders of the Member States. Sought, essentially, mix the conditions that should govern the operations of concentration throughout the community.

The Commission is aware of (2005, p. 8) that the increase in the competition in the European internal market and the increased economic globalisation, are factors that lead to the companies to seek proper organization to such challenges. Such processes may be positive for the competitiveness of European companies in the world stage, although they should not hinder competition. Prevent the harmful effects on this is the objective declared by the Commission for the examination of the projects of concentration.

For that a project of concentration was considered by the European Commission should be given the fact that the annual turnover of the companies that want merged exceeds certain thresholds in terms of worldwide and European sales. In this case, the proposal must be notified to the European Commission for review. Below these thresholds, the operations could be examined by the national competition authorities.

Also, there are rules to apply to all concentrations, regardless of the place in which the companies involved in the project having their head office, its headquarters, or their production facilities. This is due to that the concentrations of companies based outside the European Union can affect the community markets if these companies operating in the EU.

Since the first of May 2004 is in force on the new regulation (EC) No. 139/2004 of the Council of 20 January 2004 on the control of mergers between companies ("Merger Regulation"), the topic that later we will analyse when we look at a whole the modernization of the

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<sup>6</sup> See Petitbó (2001)



competition rules that took place on May 1, 2004, coinciding with the largest enlargement of the history of the European Union.

### **3.1.5. International Cooperation**

With the increasing globalization more companies, mergers and cartels are an international character. As a result, the activities of the companies based outside the EU can affect competition within the EU. This reality has become essential international cooperation in the field of Competition Policy.

The EU has established bilateral agreements in defence of the competition, in particular with its main trading partners. It is also located as head of the efforts of multilateral cooperation. Has been one of the major players in the world economy in proposing the inclusion of the competition policy as a topic of discussion in the World Trade Organization (WTO) and adopts a key role in the International Network of Competition (CIP) and in the Competition Committee of the OECD.<sup>7</sup>

## **3.2. The new framework of the european competition policy**

The one in May 2004 came into force two regulations to redefine the framework of European action in competition. We refer to the Regulation 1/2003 on the application of Articles 81 and 82 of the Treaty, which replaces the force since 1962, and the Regulation 139/2004 on merger control which replaces the force since 1989. We, therefore, with the paragraphs that continue to proceed to an analysis of the main developments that presents this new scenario compared to previous.

### **3.2.1. The Modernization of the Community Competition Policy in relation to the Implementation of the Articles 81 and 82.**

In the White Paper on the modernisation of the rules of application of Articles 85 and 86 (now 81 and 82) of the Treaty (1999, p. 6), the European Commission says: "In 1999, this policy is unfolding in a world very different from that knew the authors of the founding texts. 15 Member States, a currency and a single market, a global economy, enlargement to the countries of Central and Eastern Europe and to Cyprus... That is now need to modernise the system not to diminish merits: created "ex nihilo" the community competition policy helped lay the foundations of the single market and to ensure the dynamism of the European economy. The new task is reorganizing the system to meet the challenges of the coming years".

This White Paper, immediate background of Regulation 1/2003, lays the foundations of the reform, which is as basic objectives the get a more efficient implementation of the competition policy, improve the basics, with special attention to the economics – of decisions, flattening the bureaucracy, especially for companies, and create a common culture in competition in a U. E. enlarged, which contribute to greater application of Community law.

The Regulation 1/2003 presents a series of developments that should facilitate the achievement of the objectives. We are going to refer to six specific fields (Prieto Kessler, 2005).

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<sup>7</sup> See : <http://ec.europa.eu/comm/competitio/international/overview>. Consulted on 24/09/2007.

*a. Abandonment of the notification system of prohibited agreements but autorizables (Article 81.3).*

Until the entry into force of Regulation 1/2003 the validation system of the agreements prohibited passed by the prior authorization and centrally by the Commission, which held a monopoly in this regard. This monopoly assumed a workload of large-scale, which would be between the causes of the reform toward a system of "legal exception". Under this system, companies must proceed to the self-evaluation of their agreements.

The new system involves a relief to the Commission, which can release resources and also for companies that are relieved of the burden that suppose the notification of their agreements in order to obtain its approval.

The new system may be unsafe for those companies that, given the complexity of the agreements adopted, will have no clear the valuation of these. Aware of this possibility, the Commission has scheduled the publication of communications containing guidelines and informal guidance to help companies to properly assess the agreements.

*b. Greater weight of economic analysis*

This shift in the European competition policy has been raised in recent years through reform of the exemption regulations by existing categories, which set the keys under which groups of similar agreements are considered compatible with the competition rules. The essence of the reform lies in moving from a system of court formalistic, this means that the agreements adjusted to the letter of the Law were considered conform to it, to one in which the premium economic analysis of the effects of the agreements, taking into consideration the specific conditions of the market in which the agreement is produced. In this context, the market power is erected in a key element in the assessment of the business behaviours. If the business strategy contributes to the strengthening of market power, less possibility will have to be considered under the law of competition (Prieto Kessler, 2005).

*c. Decentralization in the implementation of Community law*

With the disappearance of the monopoly of implementation of article 81.3 by the Commission, on extends the use of the EU competition rules to national authorities.

Of course this extension of the community law requires coordination and cooperation by all the instances involved. To this effect has been created a network of Competition Authorities, which will allow a more efficient distribution of the cases. Also the Network is erected in a powerful tool for coordinating the activities of the national authorities against practices of supranational level. The exchange of information and evidence should improve the efficiency of the fight against cartels and other prohibited conduct.

*d. Prosecution of the competition law*

This important novelty of regulation 1/2003 seeks to promote the private application of the competition rules on the part of the judges of the Member States. They may apply Articles 81 and 82, complementing the work of the administrative authorities. The primary purpose of the judicial intervention will be to ensure individual rights in relation to issues such as the validity of the contracts or compensation for damages.

*e. Leniency Programs and the fight against cartels*

The establishment in 1998 of a specific unit to combat cartels together with the introduction of the leniency programs, have assumed an important impetus for the detection and punishment of the cartels in the European Union. In the period 1999-2003 the community authorities have punished more than 20 cartels with a total of fines imposed more than 3,000 million euros (Prieto Kessler, 2005).

We must specify that a system of leniency exonerate of all or part of the sanctions, which should be of otherwise be applied, the member of a cartel to report on its membership in the cartel to a competition authority. In any case, without strong sanctions and a vigorous program to fight on the part of the competition authority, there is no incentive for participants in a cartel to invoke these programs. The corollary is that any leniency policy, by very generous or well-designed that it was, it would be effective without fear of an imminent detection and prosecution (International Competition Network, 2006).

*f. The abuse of dominant position*

Notes Prieto Kessler (2005) that this is the area of the European competition policy in the least has progressed, comparatively, in recent years and the remaining of reform, or at least for clarification as to what is considered lawful or not. In the direction of this reform, could maybe talk to redirect the focus in order to implement article 82, was raised in the report of EAGCP (Group Economic Adviser in the field of Competition Policy), coordinated by Patrick Rey which is entitled "An economic approach of article 82". The report argues in the implementation of article 82 an economic approach, similar to that used to implement article 81 or to assess a process of business concentration. The approach that defends the EAGCP must be based on the effects, instead of in the form. The approach must focus on the presence of anti-competitive effects that adversely affect consumers and would be based on the examination of each case, from a sound economic analysis and founded on the facts.

**3.2.3. The Merger Control between Companies**

*3.2.3.1 Merger control until the entry into force of Regulation 139/2004*

As we have already noted, the TEC does not incorporate any forecast with regard to the control of the business concentrations and until the adoption of the first community regulation (Regulation 4064/89), the Commission applied article 82, for the prohibition of certain concentrations, to understand that it could be abuse in the dominant position in the acquisition by a company of a competitor.

The criterion for determining whether a merger raises competition problems was embodied in article 2.2 of regulation 4064/89, which declared incompatible with the common market concentrations that create or strengthen a dominant position as a result of which impeded significantly competition in the common market or in a substantial part of it (double test substantive: 1) creation or strengthening of the dominant position and 2) significant impediment of the competition). The number of notifications submitted to the Commission reached a peak in 2000 (3450 operations). Since then, reducing the number of notifications has been accompanied by a decline in the number of cases that pose problems. (Prieto Kessler, 2005).

### 3.2.3.2 *The reform of merger control community: the Regulation 139/2004*

As we noted, May 1 2004 entered into force on the new regulation 139/2004 on the control of the mergers between companies. The entry into force of the regulation culminates a process of reforms launched with the publication of a Green Paper in the month of December 2001 and accelerated after three rulings on the part of the Court of First Instance of the European Communities in the year 2002 that nullified decisions of the Commission.

The adoption of regulation is accompanied by a set of guidelines for the evaluation of the horizontal mergers (between competing companies) and a Code of Good Practices in the handling of the procedures (Navarro and Baches, 2004). Then we are going to make a brief review of the main elements of the reform.

#### *a. Changes in the Internal Organization.*

In this area we could speak of three new substantial:

- There has been a reorganization of the Directorate-General, with the dissolution of the Merger Task Force and the incorporation of the units of concentration to the sectorial directorates.
- It creates the figure of the chief economist, following the American model in order to give greater weight to economic analysis. This chief economist depends directly on the Director-General of Competition and has a team of 10 economists. His essential function is to provide the services of the Commission an economic analysis independent, amen to intervene in the procedures of concentration (Navarro and Baches, 2004; Prieto Kessler, 2005).
- Has created a system of internal review, formed by civil servants of recognized experience, which operate in the cases of greatest complexity, in order to reinforce the legal and economic strength of the final decision.

#### *b. Jurisdictional aspects*

The new regulation introduces a system of referrals of operations between the Commission and the national competition authorities and vice versa. It is to strengthen with this system, the principle of single authority. To achieve it the new regulation provides a referral system, or at the request of the companies involved, or a Member State.

The companies may request the remission of an operation to a Member State when, even at community level, the operation affect significantly to the competition in that State. Similarly, may request that the Commission to study the option if it affects at least three Member States. The possibility recognized for the company to request the remission is the most significant in this field (Navarro and Baches, 2004).

Any Member State may request the referral of a case where understands that the same threatens to significantly affect the competition in its market. Article 22 of Regulation provides, likewise, the referral to the Commission of an operation at the request of one or several Member States (Prieto Kessler, 2005).

#### *c. Procedural aspects*

The procedure set out in Regulation 4064/1989 had been criticized by the lack of flexibility and transparency of the process. To cope with the criticism, the new regulation incorporates developments in the pursuit of improving both aspects. As for the flexibility,

removed the deadline for notification of a week, which allows the parties decide the moment to notify the concentration on the basis of their interests (Navarro and Baches, 2004).

Regarding the management of processing times for the files, the duration of the first phase becomes 25 working days from the date of the notification, expandable to 35 days in the case of the parties to offer commitments. Therefore, the maximum duration of the first phase would be 35 days, which represents an expansion of approximately a week. The second phase will extend to 90 working days, expand in approximately two weeks. In the case of commitments, and with the previous request of the notifying in the first 15 days of initiated the procedure, the deadline could reach 125 working days, which would be an expansion of approximately nine weeks (Prieto Kessler, 2005; Navarro, and Baches, 2004).

With regard to the measures in order to improve the transparency of the procedure, the Commission in the "Guide to Good practices" offers a description of the informal instruments that can be used, and that have proven be effective in investigations of mergers. Among those instruments include meetings with the parties to inform about of the situation of the process, the triangular meetings between the Commission, the notifying and third parties affected or the conditions under which the Commission will enable the parties make its allegations with respect to important documents or complaints received in the course of investigations (Prieto Kessler, 2005).

It should be noted that as a counterpart to the greater flexibility that the new regulation brings to the parties, there has been a major expansion of the powers of investigation of the Commission, stood at the same level as the collected in the Council Regulation 1/2003, concerning the implementation of the rules of competition under articles 81 and 82 of the Treaty. Also, and following the pattern of this regulation, the 139/2004 increases significantly the fines that may impose the Commission, both of punitive nature as coercive (Navarro and Baches, 2004).

#### *d. Substantive aspects*

##### **\*Application criterion for the evaluation of concentrations**

The establishment of a new substantive criterion for the analysis of the concentrations of community dimension has been one of the keys of the reform. The Regulation 4064/1989 contained in article 2 the evaluation criteria applicable, the so-called "dominance test".

This approach served mainly to the establishment or strengthening of a dominant position in the market or markets affected by the merger, in order to asses their compatibility with the common market. It was, therefore, an structuralist criterion of court strength focused on the injury that could cause the concentration in the competitive structure of the market.

In any case, the creation or strengthening of a dominant position, although prerequisite and inescapable, was not enough for a concentration to be declared incompatible with the common market. In addition, it was also necessary to prove that the new situation impeded significantly the competition. The new regulation incorporates, as proposal from the Commission, a more flexible approach, which allows focus the analysis of a concentration in the effects that the same produces on competition in the affected markets, criterion or test of "significant impediment of the competition". The establishment of this new criterion involves an approach to the test referred to in the American rules.

With the modification of the criterion that the Commission try to control those concentrations that could produce a significant decrease in the competition in the market, without create or strengthen a dominant position. It is, ultimately, that the rules should be applied to

certain anti-competitive effects that can damage the consumer welfare, that were not derived from the creation or strengthening of a dominant position. At the same time, the rule should facilitate the concentrations that are not problems arise for competition, although it is create or strengthen a dominant position (Prieto Kessler, 2005).

The criterion finally adopted in the article two of the Regulation 139/2004 can be considered a hybrid between the two evaluation criteria that we have exposed. The dominance and significant decrease of the competition. As a general principle, the new approach prohibits all concentrations susceptible to impede competition significantly; it seeks to maintain a sufficient level of competition after the merger. However, the Regulation 139/2004 maintains an explicit reference to the creation or strengthening of a dominant position as a relevant course for a significant impediment of the competition (Navarro and Baches, 2004).

**\*The Treatment of efficiencies**

Regulation 4064/1989 did not incorporate any reference to possible efficiencies arising from a merger as a factor to take into account when assessing these operations. In the new Regulation and in the Guidelines on horizontal mergers is recognized, however, that the efficiencies must be taken into account in the assessment of concentrations with four cumulative conditions: (i) that the efficiencies generate benefits to consumers; (ii) that are inherent in the concentration; (iii) that are capable of verification and (iv) that will materialize in a short period of time after the operation. It should be stressed that are the parties which should provide the necessary documents to prove the previously mentioned efficiencies, as well as the justification of the requirements indicated (Navarro and Baches, 2004).

#### **4. CONCLUSIONS. THE CHALLENGES OF THE COMPETITION POLICY IN A GLOBAL ECONOMY**

We can count four main conclusions that are derived from the extensive analysis that, of the competition as value and its promotion and defence along the process of building the European common market, we have carried out in the pages above.

First, the European Union is facing the challenge of the continuing improvement of the competition policy institutional framework. More than half a century endorses this community policy and the experience is continuing and the main point of reference of improvement to provide this crucial policy of rigor, both economic and legal, essential to optimize its results.

In clear connection with this first conclusion, we have a second challenge, which is to extend the competition policy to the new countries of the last two enlargements. The challenge implies the difficulty of some of these countries have carried out a process of transition from planned economies to market economies, which determines that these countries have a poor culture of competition, being in them key work for the promotion. As Nicholson, Sokol and Stiegert (2006) states, as a result of this structural economic transformation, these countries currently applied legal concepts and regulatory tools, which previously they had been outside, in order to monitor anti-competitive behaviour and eliminate market failures.

The third conclusion has to do with the stage of implementation of the competition policy, which cannot be another than the global economy. However, that scale is immune on many occasions to the implementation of the rules on competition, lacking the world economic order of an instance institutional competence in the matter.

In this context is essential the international cooperation in the field of competition policy. The European Union has established bilateral agreements on this matter, in particular with its main trading partners. It is also at the forefront of the efforts of multilateral cooperation, for example, to be the first to propose the inclusion of the competition policy as a topic of discussion in the World Trade Organization and to adopt a key role in the International Network of Competition and in the Competition Committee of the OCDE<sup>8</sup>.

Finally, the competition policy is with a great challenge arising from the technological complexity of the new products and the high sophistication of the new markets. This reality requires adjustment of the tools of economic analysis to understand these innovations and power properly calibrated to what extent incorporation to the economic system favours or restricts competition within it.

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<sup>8</sup>See the page on the international aspects of the competition policy of the European Commission: <http://ec.europa.eu/comm/competition/international/overview> . From this page we can visit other dedicated to the enlargement, bilateral relations and multilateral relations (consulted on 24/09/2007 and 23/10/2007).

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