Regionalization of competition law: Legal implications of the cooperation with the investigation of cartels in Latin America

CPI COMPETITION POLICY INTERNATIONAL

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The past few years have shown a growing trend for the regionalization of competition cases, particularly those relating to the cartels whose exposure and, mainly, whose media coverage in a given country attracts the attention of other regulators in the region. Authorities have begun – even *ex officio* – to conduct similar investigations into industries and even on companies involved in investigations or in public investigations and fines in other Latin American countries. Parallel to those investigations, we have also observed the creation of cooperative alliances among regulators in Argentina, Brazil, Chile and Mexico that might also be extended to Colombia and Peru. This indicates that the trend will only increase the inter-connection among regulators and, potentially, the relation that might be a case investigated in a country, in another, or others in the region. Such regionalization of cases brings a necessary analysis of the aspects of competition law and procedural rules existing in each country. This paper is mainly focused on the risk of judging a specific conduct in several jurisdictions as well as on the effects of the regionalization of investigations o leniency programs as well as over the confidentiality of the parties' information in Andean Community investigation records.

First of all, it is important to take into account that Ecuador is a signor of Andean Decision 608 for protection and promotion of free competition in the Andean Community. This norm was enacted in March 2005 and created a common legal framework, which promoted the member countries to establish local competition rules. The applicability of Andean Decision 608 is limited to cases where conducts occur in one or more member countries and their effects are occur in one or more member countries or, if occurring in other non-member countries, they produce effects in two or more member countries of the Andean Community. The Andean Community has been clear upon explaining the scope of that norm by stating that "*When the origin and effects of a practice occur in the same country, Decision 608 cannot be applied. Otherwise, the provisions of the national rules of the member country can be applied*"[2]. This had led the General Secretariat to refrain[3] from hearing cases in the past. Historically, Article 51 of the Andean rule granted a two-year extension for its application in Ecuador. Such extension was repealed by Andean Decision 616 enacted on

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[2] "Guidelines for Application of Decision 608." Andean Community Secretariat.

[3] According to Ruling No. 01.2007of March 2017, the Andean Community Secretariat refrained from hearing an accusation filed by a group of flower growers in Colombia due to the application of the Exchange Coverage Incentives Program (ICC by its Spanish initials) and establishment of Sanitary Incentives for Flowers (SF by its Spanish initials), where no sufficient proof of impacts on the sub-regional market was found.

June 15, 2005. That Decision specified that Ecuador may apply the provisions of Decision 608 eliminating the requirement of binational effects of community rules and also ordering that they would be applicable as of August 2005, thereby allowing Ecuador to designate a provisional national authority to implement Decision 608. This made it possible for the effects of the Andean norm to be implemented in keeping with principles of immediate application and direct effects and, for local purposes, Executive Decree 1614 of March 27, 2008, created the Office of the Under Secretary for Competition at the Ministry for Industries and Productivity which regulated procedures, precautionary measures, terms, corrective measures and sanctions established by Decision 608 and put the community norm into effect in Ecuador. Beyond the direct applicability of the norm while the Office of the Under Secretary for Competition was operating, it anticipated the existence of a community competition entity - the General Secretariat of the Andean Community – as well as an investigative procedure so that the General Secretariat may even impose precautionary measures, corrective measures and fines for up to 10% of the value of the infringer's total gross income corresponding to the year prior to the final decision. This has resulted in that the investigations conducted *ex officio* by the Superintendency for Market Power Control as a consequence of dissemination of news about the cartels in the region, to bring about specific requests from the authority to the General Secretariat to commence regional investigations. Such bifurcation of domestic investigations leads us to consider the impact of the possibility of conducting a community investigation on operators who - having resorted to the leniency regimes established in their local legislation – might still be subject to investigations and sanctions for their conducts in that specific case (and for which they were exempted from sanctions due to their cooperation with the national regulator) if the conduct had binational effects. Although Articles 27 to 30 of Decision 608 contemplate a commitments regime, commitments differ from a leniency regime. The Organization for Economic Cooperation and Development (OECD) has mentioned the following three elements in an efficient leniency program: "*(i) high risk of detection, (ii) significant sanctions, and (iii) legal security and transparency*"[4]. We will refer mainly to the third aspect because the above mentioned study states that "*Enterprises must be able to foresee, with a high degree of certainty, the benefits available and the obligations that they would assume in exchange for their total or partial exemption. Enterprises must know beforehand, among other things: (i) the requirements to access to the program and whether or not a marker system is available; (ii) if the benefits (total or partial exoneration) are automatic or if they are subject to some kind of assessment by the organization; (iii) the amount of information or proofs required by the organization in order to grant the benefits; (iv) the confidentiality guarantees available from the parties requesting leniency.*" If there are no sufficient guarantees for a the confidentiality of an operator testimonies and evidence, and knowing that they might subsequently be used by a national regulator as the basis for an accusation and even included as exhibits in a request for investigation filed with the General Secretariat of the Andean Community, a grave impairment on one of the three essential elements for the effective operation of a leniency regime.

Another element that ought to be taken into consideration is the national authority's cooperation with the General Secretariat and with any other competition authority in the region and in the world. In terms of cooperation with the General Secretariat, the "*Practical Guidelines for Application of Decision 608*"[5] were issued on October 23, 2007 regulating those aspects and determining that "*the general administration of a proceeding directly pertains to the General Secretariat which shall be involved in the fundamental decisions of the proceeding, i.e., admitting the accusation and assessing the means for charges and acquittals, submission and valuation of evidence, formulation of an investigative report as well as the establishment of sanctions and/or corrective measures on conducts resulting in an infringement pursuant to Decision 608*". A fundamental aspect of that norm is that, through an official delegated by the General Secretariat of the Andean Community, "*the cooperating authority must facilitate and cooperate with the cases being heard and managed by the*

[4] Document DAF/COMP/LACF(2016)5 of April 7, 2017, "Leniency Programs in Latin America and the Caribbean. Recent experiences and lessons learned".
http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)5&docLanguage=eEs . On-line access 28/06/2017.

[5] http://itranet.comunidadandina.org/Documentos/DTrabajo/SGdt396.doc. Access on-line 28/06/2017.

General Secretariat" and "*pursuant to that function, the national authorities carry out investigations, collect documents and information, summon and question individuals, request all kinds of documents - among other activities - on the basis of an 'investigation plan' previously prepared by the General Secretariat that keeps a permanent coordination with the national authority during the investigation period*."[6] The foregoing leads us to necessarily consider the scope of such cooperation vis-à-vis the evidentiary elements obtained while conducting a domestic investigation as well as the confidentiality aspects imposed by Article 47 of the Organic Law on Market Power Regulation and Control (LORCPM by its Spanish initials). That duty is complemented with the provisions of Article 3 of the Regulations to the LORCPM which states that "*the information and documents obtained by the Superintendency of Market Power Control during its investigations may be classified as secret or confidential, ex officio, or at the request of an interested party",* as well as by the Code of Ethics of the Superintendency of Market Power Regulation and Control that includes "*protection of the users' data and respect to the principles of confidentiality and secrecy*" among the values and principles set forth in Article 3. In line with the foregoing, the Superintendency of Market Power Regulation and Control would be limited to cooperating and exchanging information about its local investigations – on which indications of binational effects might arise - with regional authorities such as the National Secretariat of the Andean Community as well as with its international peers. For full cooperation and exchange of documents obtained during a specifically domestic investigation to exist, it would be necessary that the confidentiality and secrecy of documents be specifically waived by the parties, and that an exchange of such information and documentation with other authorities be consented.

All of the above examples demonstrate that an effective regionalization of the cartels and repeated efforts of the authorities to prosecute them make it necessary to consider aspects about the confidentiality of evidentiary elements submitted within the context of cooperation in a leniency regime, and the legitimacy of their use as grounds for bringing an accusation based on infringement of Andean norms, in which a leniency regime that could protect the interests of the operators involved in those agreements or practices restricting free competition is not in force.

[6] Decision 608, article 18.