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**CPFTR PAPER XVI: THE CONTRIBUTION OF BILATERAL
TRADE OR COMPETITION AGREEMENTS TO COMPETITION
LAW ENFORCEMENT COOPERATION BETWEEN THE EU
AND MEXICO**

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INTRODUCTION

This paper analyses the structure and operation of the cooperation agreement on competition matters between the EU and Mexico. It is one of three separate but related papers written by the authors which detail the contribution of bilateral trade or competition agreements to trans-national competition law enforcement cooperation.¹

Specifically, this paper identifies:

- (i) the factors bearing on the choice of cooperative instrument chosen by the EU and Mexico;
- (ii) the relative effectiveness and contribution to enhanced cooperation in competition matters of the competition provisions in the EU-Mexico Free Trade Agreement vs. the enforcement cooperation provisions in other agency-agency enforcement arrangements;
- (iii) the relative effectiveness and contribution of ‘competition cooperation’ provisions in the EU-Mexico FTA to formal enforcement cooperation, informal enforcement cooperation and non-enforcement related cooperation between the EU and Mexico;
- (iv) the factors which legitimately and illegitimately impede cooperation between the EU and Mexico; and
- (v) recommendations for European and Mexican policymakers about how to improve the effectiveness of their competition enforcement cooperation arrangement.

Very little literature exists at present on the EU-Mexico cooperation arrangement and there are as yet no publicly available official reports on its operation. The authors thus conducted their research by *inter alia* sending detailed questionnaires to and interviewing officials from the following departments or agencies:

¹ The other two papers are concerned with the cooperation frameworks established between Canada and Chile (CPFTR Paper XIV) and Canada and Costa Rica (CPFTR Paper XV).

- The Directorate General for Competition of the EU Commission;
and
- The Mexican Federal Competition Commission.

**PART I: LEGAL AND ECONOMIC CONTEXT OF THE COMPETITION
LAWS AND THE COOPERATION AGREEMENT**

The EU-Mexico Free Trade Agreement (FTA)² came into force on July 1st 2000, establishing as of that date and in conformity with Article XXIV of GATT³ a free trade zone for goods⁴ traded between the Republic of Mexico and the fifteen Member States of the European Union.⁵ This agreement is the first FTA to be negotiated between a Latin American country and the EU and has thus paved the first step towards substantial free trade between these two regions. For Mexico the agreement opened up an expansive market of almost 500 million European consumers, while for the EU and its Member States the FTA offered a preferential opening into the growing market of the North American Free Trade Area (NAFTA) that was unattainable in the absence of free trade agreements with the US or Canada.

The agreement covered many different aspects of trade (e.g. trade in goods; market access; customs; government procurement; intellectual property rights; cooperation; and competition policy to name a few). It also provided the necessary institutional framework and dispute settlement procedures required to ensure its effective administration and enforcement. Finally, some exceptions to the free trade regime were detailed relating to for example balance of trade; public morals; protection of life

² Decision No. 2/2000 of the EC/Mexico Joint Council of 23 March 2000, available at <http://www.europa.eu.int/comm/trade/bilateral/mex.htm>.

³ General Agreement on Tariffs and Trade, available at http://www.wto.org/english/docs_e/legal_e/06-gatt.doc.

⁴ A later agreement was concluded in 2000 that established a free trade zone between the EU and Mexico for trade in *services*: see <http://www.europa.eu.int/comm/trade/bilateral/mex.htm>.

⁵ After enlargement in 2004 the new Member States were invited to become parties to the agreement as *per* Article 6 of the Treaty of Accession (2003).

and of national treasures of artistic, historic, or architectural value. Specifically, in relation to the reduction of tariffs, the EU-Mexico FTA initiated an ambitious plan: the elimination of all tariffs on all industrial goods traded between the EU and Mexico by the year 2007. Until that date both jurisdictions will see the gradual reduction of these tariffs, reductions that are hoped will stimulate considerable trade between them, increasing as a result employment, investment, economic growth and of course consumer welfare. The development of further free trade in services will also ensure that additional benefits of free trade liberalisation are felt in both Europe and in the Republic of Mexico.⁶

In order to ensure that the advantages of the free trade regime were not undermined by private barriers to trade—established perhaps through anticompetitive business conduct—the parties agreed to include provisions on competition policy and cooperation and coordination thereof in the trade agreement. To this end, a cooperation mechanism was established as an annex to the agreement.⁷ This mechanism and its relatively detailed provisions provide for, *inter alia*, notifications, coordination of enforcement activity, consultations, avoidance of conflict through forms of positive and negative comity and technical assistance. Separate regimes of competition enforcement have been bridged through a pragmatic spirit and mechanism of cooperation and assistance.

This paper investigates the relative effectiveness of the provisions contained in the cooperation mechanism with the aim of making recommendations to improve effectiveness in trans-national competition enforcement and to ensure benefits of free trade are not eliminated through private anticompetitive action.

PART II: NEGOTIATION OF THE COOPERATION AGREEMENT

⁶ See note 4 above.

⁷ Annex XV of the EU-Mexico Free Trade Agreement.

The economic and political relationship between the EC and Mexico is not a recent phenomenon: both ‘second’ and ‘third generation agreements’ have been negotiated in the past between these two trading blocks, most notably in 1975⁸ and 1991.⁹ These agreements however did not establish either a free trade area in goods or services or “real privileges in commercial and investment matters”,¹⁰ something that the political and economic negotiations which started in 1995 tried to address. These negotiations resulted in the execution of three different instruments:

- The EU-Mexico Solemn Declaration of May 2 1995;
- The Economic Partnership, Political Coordination and Cooperation Agreement executed between the EC and its Member States and the United Mexican States (“the Global Agreement”); and
- The Interim Agreement related to Commerce and Related Matters executed between the EC and its Member States and the United Mexican States (“the Interim Agreement”).

The Solemn Declaration highlighted the parties’ wish to further develop their economic and political relationship; this wish encompassed the conclusion of a new agreement favourable to the liberalisation of goods, services and investments in conformity with WTO rules. The Global Agreement, signed on December 8 1997, with its chapters on political coordination, cooperation and commercial matters, provided the substance of such development. With respect to trade, the Global Agreement set out the following objectives:

- the creation of a free trade area in goods and services;
- the mutual opening of the procurement markets;
- the liberalization of capital movements and payments; and
- the adoption of rules in relation to both competition law and intellectual property rights.

⁸ Agreement between the United Mexican States and the EEC, July 15, 1975, 1975 OJ (L247).

⁹ Third Generation Agreement, Mexico-EEC, April 26 1991, “Cooperation Scheme Agreement”, available at <http://www.europa.eu.int>.

¹⁰ *The EU-Mexico Free Trade Agreement*, (Eds. Holbein and Ranieri) 2002, Trans-national Publishers, NY, at p.10. The main achievements of these agreements included a fostering of political dialogue and a strengthening of entrepreneurial cooperation: *ibid.*

Due to a complex ratification process this agreement would not come into force until late 2000.¹¹ In the mean time an Interim Agreement, which entered into force on July 1 1998, provided a “fast track” way towards the liberalisation of goods, services and investments without having to wait for this ratification process to be completed.¹² A Joint Declaration was also signed in July 1998 stating that the parties would negotiate issues relating to services, capital movements and intellectual property on a parallel basis with its negotiations for a free trade area relating to goods.¹³

Pursuant to the Interim Agreement, an Interim Joint Council was established composed of representatives of Mexico, the EC and the Member States. This body would be responsible for the decision-making under the Interim Agreement until a Joint Council could be established under the more comprehensive Global Agreement. Between September 30 and October 2 1998 this body set the agenda for the nine rounds of negotiations that would be concluded by the 25 November 1999. Competition matters were discussed and finalised during the first,¹⁴ second,¹⁵ third,¹⁶ and fifth¹⁷ rounds of trade negotiations.¹⁸

On the 23rd of March 2000 the Joint Council enacted decision 2/2000 establishing a free trade area in goods between the EU and Mexico from July 1st of that year. Article 39 of that decision formally incorporated the Cooperation Mechanism into the free trade agreement between the parties.

PART III: OBJECTIVES OF THE COOPERATION AGREEMENT

¹¹ The agreement needed to be ratified by the Mexican Senate, the European Parliament and the fifteen governments of the Member States.

¹² As the Interim Agreement did not contain provisions within the competency of the national Member States, it only had to be ratified by the European Parliament and the Mexican Senate.

¹³ This agreement was eventually enacted with Decision N. 2/2001 of the Joint Council.

¹⁴ November 9-13, 1998 (Mexico).

¹⁵ January 18-22, 1999 (Brussels).

¹⁶ March 8-12, 1999 (Brussels).

¹⁷ May 17-21, 1999 (Brussels).

¹⁸ This information is available from the Ministry of Commerce and Industrial Development: http://www.secofi-snci.gob.mx/Negociación/UniónEuropea/Avances_neg/avances_neg.htm.

The general objectives of the Free Trade Agreement are to be found in Article 1 of the EU-Mexico Free Trade Agreement. The more specific objectives of the competition provisions of this agreement can be found in Article 1 of Annex XV to the agreement.

Objectives of the Free Trade Agreement

The general purpose of the EU-Mexico Free Trade Agreement¹⁹ was the establishment of a free trade area between Mexico and the fifteen Member States of the European Union.²⁰ To achieve this aim the EU-Mexico FTA attempted to lay down the necessary arrangements for the implementation of the objectives of the EU-Mexico Interim Agreement. These objectives include:

- (a) the progressive and reciprocal liberalisation of trade in goods, in conformity with Article XXIV of GATT 1994;
- (b) opening the agreed government procurement markets of the parties;
- (c) establishing a cooperation mechanism in the field of competition;
- (d) setting up a consultation mechanism in respect of intellectual property matters; and
- (e) establishing a dispute settlement mechanism.²¹

The above arrangements were contemplated as the essential elements of a free trade regime that would strive to achieve the following long-term aims: greater dynamism in commercial and economic activity; the attraction of inputs and technology for European and Mexican firms; the creation of employment; the fostering of investment; and the increasing of opportunities and possibilities for strategic alliances for both Mexican and European firms.²²

Objectives of the Competition Cooperation Mechanism (Annex XV)

Both parties recognise that the benefits of free trade may be undermined by private anticompetitive behaviour carried out by firms within—and indeed in some cases outside of—the free trade zone. As a result the parties have agreed to apply their respective antitrust laws so as to avoid such a situation arising. In other words,

¹⁹ As *per* Decision Nr. 2/2000 of the EC-Mexico Joint Council of the 23rd of March 2000.

²⁰ The enlargement of the EU on 1 May 2004 had a direct bearing on the EU-Mexico FTA. EU Law explicitly states that a country becoming a member of the EU shall also apply for membership of the bilateral agreement: see Article 6 of the Treaty of Accession signed in 2003.

²¹ Article 1 EU-Mexico FTA. Objectives (a) to (e) above are found in Articles 3, 4, 5, 6 and 12 of the Interim Agreement between the EU and Mexico, respectively.

²² Source: www.economia.gob.mx.

competition provisions have been included in this agreement in order to ensure that anticompetitive behaviour does not diminish or cancel out any of the trade advantages granted by the FTA.²³

Specifically, the cooperation mechanism created by Annex XV aims:

- (a) to promote *cooperation* and *coordination* between the parties regarding the application of their competition laws in their respective territories and to provide mutual assistance in any fields of competition they consider necessary;
- (b) to *eliminate anticompetitive activities* by applying the appropriate legislation, in order to avoid adverse effects on trade and economic development, as well as the possible negative impact that such activities may have on the other party's interests; and
- (c) to promote *cooperation* in order to clarify any differences in the application of their respective competition laws.²⁴

No separate agency-to-agency agreement exists as of yet between the competition authorities of the EU and of Mexico, although they are of course the principal enforcement agencies responsible for the operation of the competition sections of the FTA. As a result, the provisions contained in the FTA must act as the principal guide for these agencies in the coordination of their competition law enforcement activities.

PART IV: MAIN PROVISIONS IN THE COOPERATION AGREEMENT

Article 39 of the EU-Mexico Free Trade Agreement established a cooperation mechanism for competition matters. Due to the highly specific nature of the contents of the arrangement its particular details were contained in an annex to the FTA,

²³ See Article 1.1 of Annex XV.

²⁴ Article 1.2 of Annex XV.

Annex XV. This annex forms an “integral”²⁵ part of the free trade agreement and can be amended by the Joint Committee.²⁶ Both parties must submit an annual report on the implementation of the cooperation mechanism to this committee.²⁷

The mechanism of Annex XV (‘the Annex’) is divided into two chapters containing ten articles in total. Chapter I deals with general provisions including the mechanism’s objectives²⁸ and certain definitions²⁹ while Chapter II concerns itself with the concepts of cooperation and coordination as they apply to competition matters. In particular, Chapter II contains provisions relating to notifications,³⁰ exchange of information,³¹ coordination of enforcement activities,³² consultations,³³ avoidance of conflicts,³⁴ confidentiality³⁵ and technical cooperation.³⁶

This mechanism, in contrast to the remainder of the EU-Mexico FTA, can be described as a form of ‘soft law’: unlike the obligations created under the FTA proper, the obligations concerning the cooperation mechanism are not enforceable³⁷; rather they establish detailed guidelines for competition authorities to follow in the execution of enforcement activities that have an effect on the important interests of other parties.

Notification

Article 3 of the Annex provides comprehensive provisions relating to the process of notification. According to this article each competition authority will notify its counterpart abroad of its enforcement activity if:

- (a) it is relevant to enforcement activities of the other party;
- (b) it may affect the other party's important interests;

²⁵ Article 50 EU-Mexico FTA.

²⁶ Article 10 of Annex XV.

²⁷ It is the competition authorities who present the report: Article 39.2 EU-Mexico FTA. The authorities were unable to share with the authors a copy of any competition-related matters contained in the annual reports.

²⁸ Article 1 of the Annex. Dealt with in Part III *supra*.

²⁹ Article 2 of the Annex. See ‘Definitions and Scope’ *infra*.

³⁰ Article 3 of the Annex.

³¹ Article 4 of the Annex.

³² Article 5 of the Annex.

³³ Article 6 of the Annex.

³⁴ Article 7 of the Annex.

³⁵ Article 8 of the Annex.

³⁶ Article 9 of the Annex.

³⁷ See footnote 109 *infra*.

- (c) it relates to restrictions on competition which may affect the territory of the other party; and
- (d) decisions may be adopted conditioning or prohibiting action in the territory of the other party.³⁸

Notification should take place during “the initial phase” of investigation. This requirement is subject to both the notifying party’s laws and to the practical constraints of the investigation.³⁹ The purpose of notification is to allow the notified party to express its opinion on the proposed enforcement action so that the notifying party may—to the extent possible—take this information into account when it makes its decisions.

Notifications should be detailed enough to permit the notified party to make an informed evaluation of the effects of the proposed action on that party’s interests.⁴⁰ It should include the following information:

- (a) a description of the restrictive effects of the transaction on competition and the applicable legal basis;
- (b) the relevant market for the product or service and its geographical scope, the characteristics of the economic sector concerned and data on the economic agents involved in the transaction; and
- (c) the estimated deadlines for resolution, in cases in which the procedure has been initiated, and to the extent possible an indication of its probable outcome, and of the measures which may be taken or provided for.⁴¹

The parties are not only to notify each other of any pending enforcement action, they must also notify each other of any “measures” other than enforcement activities that could affect the other party’s interests.⁴² Two examples are given as being particularly deserving of notification:

- (a) administrative or judicial proceedings; and

³⁸ Article 3.1 of the Annex.

³⁹ Article 3.2 of the Annex.

⁴⁰ Article 3.3 of the Annex.

⁴¹ *Ibid.*

⁴² Article 3.4 of the Annex.

(b) measures taken by other governmental agencies, including current or future regulatory bodies, which may have an impact to enhance competition in specific-regulated sectors.⁴³

Exchange of Information

Article 4 of the Annex is devoted to the exchange of information. Information exchange facilitates improved understanding of foreign legal frameworks and culture as well as facilitating the effective implementation of competition policy.⁴⁴ According to the Annex the competition authorities should exchange the following types of information:

- a) to the extent practicable, texts on legal theory, case-law or market studies in the public domain, or in the absence of such documents, non-confidential data or summaries;
- (b) information related to the application of competition legislation provided that it does not adversely affect the person providing such information, and for the sole purpose of helping to resolve the procedure; and
- (c) information concerning any known anticompetitive activities and any innovations introduced into the respective legal systems in order to improve the application of their respective competition laws.⁴⁵

Further, if circumstances so require, the competition authorities should help each other “to collect other types of information in their respective territories”.⁴⁶ What exactly is contemplated by this article is not completely clear, but it is understood—especially given the article relating to ‘confidentiality’⁴⁷—that such information collection or exchange should not involve violation of either party’s national laws.

The promotion of knowledge and understanding of each party’s competition law and policy and the evaluation of the cooperation mechanism is also to be achieved through meetings—both formal and informal—of “representatives” of each party.⁴⁸

⁴³ *Ibid.*

⁴⁴ Article 4.1 of the Annex.

⁴⁵ *Ibid.*

⁴⁶ Article 4.2 of the Annex.

⁴⁷ Article 8 of the Annex.

⁴⁸ Article 4.3 of the Annex.

Coordination of Enforcement Activities

Article 5 allows the competition authorities to coordinate their enforcement activities with respect to specific cases. Such coordination does not prevent either authority from taking independent, “autonomous” decisions.⁴⁹ The parties will consider the following in determining the extent of their coordination:

- (a) the effective results which coordination could produce;
- (b) the additional information to be obtained;
- (c) the reduction in costs for the competition authorities and the economic agents involved; and
- (d) the applicable deadlines under their respective legislation.⁵⁰

Consultations

Article 6 of the Annex provides for the use of both negative and (a form of abbreviated) positive comity when the interests of a party are affected by either enforcement activity⁵¹ or by anticompetitive activity in the territory of the other party.⁵²

Article 6.1 allows the competition authorities of a party to transmit its views to or request a consultation with the competition authorities of the other party when their investigations or proceedings have an impact on the first party’s important interests. The other party is then to give “full and sympathetic consideration” to those views and in particular to any “alternative means” of achieving the objective sought by the enforcement action.⁵³

In a similar vein, when the competition authorities of one party believe that its interests are being “substantially and adversely affected” by anticompetitive behaviour by firms situated in the other party’s territory they may request consultation with the competition authorities of that party. The second party should then give “full and sympathetic consideration” to *inter alia* the factual situation, to the

⁴⁹ Article 5.1 of the Annex.

⁵⁰ Article 5.2 of the Annex.

⁵¹ In the case of negative comity.

⁵² In the case of positive comity.

⁵³ Article 6.1 of the Annex.

anticompetitive behaviour under discussion and to the views of the party that requested consultation.⁵⁴

Avoidance of Conflicts

To avoid conflicts each party should, wherever possible, take the important interests of the other party into consideration when taking enforcement action under its competition law.⁵⁵ The parties must seek a “mutually acceptable solution” to any “adverse effects” experienced by the non-enforcing party as a result of this enforcement activity, even if such effects are suffered after the above consideration has been made.⁵⁶ In such a case the authorities will examine the following:

- (a) the importance of the measure and the impact which it has on the interests of one party, by comparing the benefits to be obtained by the other party;
- (b) the presence or absence, in the actions of the economic agents concerned, of the intention to affect consumers, suppliers or competitors;
- (c) the degree of any inconsistencies between the legislation of one party and the measures to be applied by the other party;
- (d) whether the economic agents involved will be subject to incompatible requests by both parties;
- (e) the initiation of the procedure or the imposition of penalties or remedies;
- (f) the location of the assets of the economic agents involved; and
- (g) the importance of the penalty to be imposed in the territory of the other party.

Confidentiality

Any information exchanged under the agreement is subject to the confidentiality laws of both parties. Nothing in the agreement changes the application of these laws within their respective jurisdictions. The FTA requires the express consent of the *source* of the information exchanged in two situations:

- (a) with confidential information whose dissemination is expressly prohibited;
- and

⁵⁴ Article 6.2 of the Annex.

⁵⁵ Article 7.1 of the Annex.

⁵⁶ Article 7.2 of the Annex.

(b) with confidential information whose dissemination could adversely affect either of the parties.⁵⁷

The competition authority must maintain the confidentiality of any information it has received in confidence and must also oppose disclosure to third parties who are denied access by the competition authority that supplied the information.⁵⁸

Technical Cooperation

Article 9 of the Annex underlines the importance of technical assistance to the parties. The competition authorities of both the EU and Mexico agree to provide each other the technical assistance so that they can both “take advantage of their respective experience and ... strengthen the implementation of their competition laws and policies”.⁵⁹ Technical assistance will include *inter alia* the training of officials,⁶⁰ the holding of seminars,⁶¹ the administration of joint studies of competition laws and policies,⁶² and the utilisation of developments in communication and computer systems.⁶³

Definitions and Scope

The following terms are defined in the cooperation mechanism and thus affect the scope of the arrangement accordingly:

(a) "competition laws" include:

- (i) for the Community, Articles 81, 82, 85 and 86 of the Treaty establishing the European Community, Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations, including High Authority Decision No 24/54;
- (ii) for Mexico, the Ley Federal de Competencia of December 24, 1992, Reglamento Interior de la Comisión Federal de Competencia of

⁵⁷ Article 8 of the Annex.

⁵⁸ *Ibid.*

⁵⁹ Article 9.1 of the Annex.

⁶⁰ Article 9.2 of the Annex.

⁶¹ *Ibid.*

⁶² Article 9.3 of the Annex.

⁶³ Article 9.4 of the Annex.

August 28, 1998 and the Reglamento de la Ley Federal de Competencia of March 4, 1998;

(iii) any amendments that the above mentioned legislation may undergo; and

(iv) it may also include additional legislation to the extent it may have implications for competition in terms of this mechanism;

(b) "competition authority" means:

(i) for the Community: the Commission of the European Communities, and

(ii) for Mexico: Comisión Federal de Competencia;

(c) "enforcement activities" means any application of competition law by way of investigation or proceeding conducted by the competition authorities of a party, which may result in penalties or remedies;

(d) "anticompetitive activities" and "conduct and practices which restrict competition" mean any conduct, transaction or act as defined under the competition laws of a party, which is subject to penalties or remedies.⁶⁴

It should also be noted that the parties agreed to pay particular attention to the following concepts when implementing the cooperation mechanism:

(a) for the Community: the agreements between companies, decisions to form an association between companies and concerted practices between companies, the abuse of a dominant position and mergers; and

(b) for Mexico: absolute or relative monopolistic practices and mergers.⁶⁵

Finally, it should be obvious from the above that no definition as to "the important interests" of a party has been provided by the agreement.

**PART V: COMPARISON TO, AND RELATIVE CONTRIBUTION OF,
MORE RIGOROUS COOPERATION ARRANGEMENTS, OR SIMPLER
INFORMAL COOPERATION ARRANGEMENTS**

⁶⁴ The above is quoted from Article 2 of Annex XV.

⁶⁵ Article 1.3 of the Annex. These subparagraphs represent the main concepts in competition law in both the EU and Mexico respectively. See Annex II of this paper *infra*.

The EU-Mexico Cooperation Mechanism of June 2000 follows a long line of similar bilateral (and sometimes trilateral) agreements concluded between countries wishing to cooperate in trans-national competition law enforcement. In fact, since the first OECD Recommendation in 1967⁶⁶ over twenty cooperation agreements have been signed between countries as diverse as Iceland, Australia, Chile and even Papua New Guinea.⁶⁷ These agreements invariably aim (a) to promote cooperation and coordination between the parties; (b) to reduce the possibility and or impact of differences in the parties' competition law and policy; and (c) more recently, to protect free trade areas from the effects of anticompetitive activities. The EU-Mexico agreement is no different: as Article 1 of the Cooperation Mechanism makes clear, the parties have concluded such an arrangement so that the benefits of free trade may not "be diminished or cancelled out by anti-competitive activities".⁶⁸

Although the EU-Mexico Cooperation Mechanism was agreed as part of an FTA between these two jurisdictions, it is submitted that in substance it resembles very closely the kind of specialised agreement envisaged by the OECD Recommendation. In fact, the mechanism bears a striking resemblance to the competition cooperation arrangement established between the EU and the US. It is for these reasons that the authors wish to highlight in this short section the substantial contribution of both the OECD Recommendation in general and the EU-US Cooperation Agreement⁶⁹ in

⁶⁶ This was a rather vague yet useful document that attempted to establish norms of cooperation in international antitrust enforcement. Its recommendations were voluntary. It has been modified on various occasions, most recently in 1995: Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)].

⁶⁷ These agreements are agreements specific to competition cooperation. They do not include competition cooperation provisions contained within FTAs. They include 'state-to-state' as well as 'agency-to-agency' cooperation agreements. As state-to-state agreements are concluded between governments as opposed to competition authorities, it is axiomatic that they may sometimes reflect governmental priorities, policies and interests that are not usually expressed in pure agency-to-agency arrangements. Free trade agreements have also incorporated detailed competition provisions similar to those included in specific cooperation agreements e.g. the Canada-Costa Rica FTA. It should be noted that the EU-Mexico Cooperation Mechanism is in fact an annex to their Free Trade Agreement in Goods (2000): Annex XV.

⁶⁸ Article 1.1 of Annex XV.

⁶⁹ In fact there are two EU-US Agreements: one signed in 1991 and the other in 1998. See Agreement between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 Sept. 1991, [1991] 4 CMLR 823, 30 ILM 1487; EU-US Positive Comity Agreement, 4th June 1998, [1998] OJ L173/28, [1999] 4 CMLR 502. For our purposes the 1991 Agreement is pertinent, unless otherwise stated.

particular to the composition of the antitrust cooperation mechanism between the EU and Mexico.

The OECD Recommendation

As stated above the OECD adopted its first Recommendation in 1967.⁷⁰ Since then it has been modified four times: in 1973,⁷¹ 1979,⁷² 1986⁷³ and 1995.⁷⁴ At its most basic the Recommendation acknowledges that competition law enforcement cooperation between countries must be encouraged but that such cooperation must not be construed so as to affect or undermine any country's idea of sovereignty or in particular any country's use of extraterritoriality with respect to competition law.⁷⁵ Significantly, the type of agreement envisaged under the Recommendation does not have any bearing or direct effect on competition law harmonization. Instead, a mutual understanding or rather a nonbinding guide for conflict avoidance seems to be contemplated. According to the latest Recommendation, cooperation may take the following forms:

1. The notification of the competition authorities of the other party when the “important interests” of that party's country may be affected by enforcement (or other) activity taken within the notifying jurisdiction;⁷⁶
2. The coordination of parallel investigations where “appropriate and practicable”;⁷⁷
3. The sharing of information in order to permit the party whose important interests are affected to comment to, and consult with, the notifying party;⁷⁸
4. Consultations aimed at developing or applying “mutually satisfactory and beneficial measures” for dealing with anticompetitive practices that affect international trade;⁷⁹

⁷⁰ Recommendation of the Council concerning cooperation between member countries on restrictive business practices affecting international trade of 5 October 1967 [C (567)53(Final)].

⁷¹ Recommendation of the Council of 3rd July 1973 [C (73) 99 (Final)].

⁷² Recommendation of the Council of 25th September 1979 [C (79) 154 (Final)].

⁷³ Recommendation of the Council of 21st May of 1986[C (86) 44 (Final)].

⁷⁴ Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)].

⁷⁵ See the Preamble to the 1995 Recommendation at recital 11.

⁷⁶ 1995 Recommendation at Article I. A. 1.

⁷⁷ *Ibid* at Article I. A. 2.

⁷⁸ *Ibid* at Article I.A. 1.

⁷⁹ *Ibid* at Article I. A. 3.

5. The supply of relevant information on anticompetitive activity in order to further the objective of point 4 above, subject of course to confidentiality laws and the restrictions imposed by their respective interests;⁸⁰
6. The use of the principle of “negative comity” when the interests of another party are affected by enforcement activity;⁸¹ and
7. The use of “positive comity”.⁸²

Number 7 above was added by the 1973 Recommendation. It is perhaps the most progressive element of the Recommendation and has been included in many bilateral cooperation agreements, including in an abbreviated form in the EU-Mexico Cooperation Mechanism.⁸³ Essentially a full positive comity provision allows one party, whose interests are affected by anticompetitive activity occurring in whole or in part within the territory of the other party, to request that party to take enforcement action against such anticompetitive behaviour.

The proposals of the OECD were left deliberately vague: they can thus be adapted to suit the various purposes or needs of the contracting parties. However, the basic elements (notifications, exchange of information, consultations, coordination, negative and positive comity etc.) find expression in most if not all of the twenty plus competition cooperation agreements mentioned above, including the EU-Mexico Cooperation Mechanism. The OECD was the frontrunner in encouraging jurisdictions to conclude these kinds of arrangements in competition matters and as a result its influence on the EU-Mexico agreement should not be forgotten. It should also be noted however that the rather traditional nature of the OECD Recommendation has also informed the philosophy behind the EU-Mexico approach: the mechanism does not affect domestic law in any way, confidential information cannot be exchanged and the obligations it establishes are essentially non-binding. In effect, the Recommendation envisages an agreement that utilises a form of ‘soft’ law. As will become apparent in the next section⁸⁴ this is exactly the form of law dictating the operation of the EU-Mexico mechanism.

⁸⁰ *Ibid.*

⁸¹ *Ibid* at Recital 7 of the Preamble.

⁸² *Ibid* at Article I.B.5.a) and Article I.B.5.c).

⁸³ See Article 6. 2 of the Annex to the EU-Mexico FTA.

⁸⁴ Part VI *infra*.

The EU-US Cooperation Agreement⁸⁵

While the OECD Recommendation sets out in broad brush strokes the various methods of cooperation and coordination that may be employed between the EU and Mexico, the EU-US Agreement informs the *details* of their cooperation mechanism.

Even a cursory glance at both the EU-US and the EU-Mexico agreements reveals their similarities: common provisions include objectives, definitions, notifications, exchange of information, coordination, consultations, positive comity, avoidance of conflicts and confidentiality. The EU-Mexico mechanism contains two provisions that are absent from the EU-US agreement *viz.* Technical Cooperation and Amendments. Apart from these provisions and the express statement in the latter document that the agreement does not effect any change in either US or EU law, both arrangements resemble one another to a very high degree.

Notifications: Both agreements require parties to notify the other side of any enforcement activity that may affect their “important interests”.⁸⁶ Prior to 1991 cooperation agreements that contained this provision did not specify what these interests might include. The EU-US Agreement changed this. Article II.2 of the agreement provided a list of enforcement activities that would be appropriate for notifications. The EU-Mexico mechanism follows the EU-US example and details those situations which are suitable for notification; all four of its examples are taken from the EU-US Agreement.⁸⁷ Both agreements require that enough information be included in the notification to permit an effective evaluation.⁸⁸ Both agreements also provide for notification of non-enforcement activity that affects the other party’s important interests.⁸⁹

Exchange of Information: The exchange of information between competition authorities under both agreements is deemed to be within the parties’ common interest

⁸⁵ This agreement is in fact a ‘state-to-state’ agreement. It is an agreement specific to cooperation between the antitrust/competition law enforcement agencies of the EU and the US.

⁸⁶ At Article II.1 of the EU-US Cooperation Agreement (hereafter EU-US) and Article 3.1 (b) of Annex XV (hereafter EU-Mexico).

⁸⁷ Compare Article II.2 EU-US with Article 3.1 EU-Mexico.

⁸⁸ Article II.6 EU-US; Article 3.6 EU-Mexico.

⁸⁹ Article II.5 EU-US; Article 3.4 EU-Mexico.

when such information facilitates the effective application of their respective competition laws and promotes understanding of their respective legal systems, cultures and theories.⁹⁰ The wording of the information exchange provisions in both agreements may indeed be quite different, but their substance is very similar. What is important with both agreements is not what information they *allow* for, but rather what information they *do not permit* to be exchanged. In this respect both agreements are identical: both prohibit (a) the exchange of confidential information; and (b) the exchange of information which would be contrary to the interests of the party in possession of the information.⁹¹ Further, any confidential information received must remain confidential and the receiving party must oppose its disclosure to unauthorised third parties.⁹² At interview it was stated that information exchange of non-confidential information could happen at any time without the need to rely on (or even create) a cooperation arrangement, whether in an FTA or MOU.

Coordination: Both documents allow the parties involved to coordinate their enforcement activities and to this end both detail factors to be considered when determining whether to cooperate in such a manner.⁹³

Consultations: The EU-US Agreement states that the parties agree to consult promptly with one another upon request: Article VII. The EU-Mexico Agreement contains a similar obligation in Article 6, the article that deals with both negative and (a form of abbreviated) positive comity, as detailed *infra*.

Negative/Traditional Comity: Negative comity is a doctrine of politeness and good manners between states; it involves the consideration and balancing of numerous factors by one state before deciding to take enforcement or judicial action. The importance of this concept has been reduced somewhat by the jurisprudence of US courts: essentially it is applied only in very exceptional circumstances i.e. in the case of a “true conflict”⁹⁴ between jurisdictions.⁹⁵ Despite this jurisprudence the EU-US

⁹⁰ Article III.1 EU-US; Article 4.1 EU-Mexico.

⁹¹ Article VIII.1 EU-US; Article 8 EU-Mexico.

⁹² *Ibid.*

⁹³ See Article IV EU-US and Article 5 EU-Mexico.

⁹⁴ This is when full compliance with the laws of both jurisdictions is impossible or if the foreign law requires conduct contrary to the Sherman Act. See the following cases: *Timberlane Lumber Co. v.*

Agreement provides a list of factors to be considered when applying the comity principle.⁹⁶ Article 6.1 of the Annex provides for the concept of negative comity: an enforcing party is to give “full and sympathetic consideration” to the views of the other party when enforcement action has an effect on that party’s important interests. Like the EU-US Agreement a list of factors to be considered when avoiding conflicts is provided in the Annex: Article 7.2. In both cases the list is non-exhaustive.

Positive Comity: Both agreements provide for the use of positive comity.⁹⁷ The EU and the US signed an agreement in 1998 that expanded on the concept of positive comity as contained in its earlier agreement. However, despite the comprehensiveness of these provisions and their obvious (theoretical) usefulness in preventing conflict, the concept was only briefly stated in the EU-Mexico Cooperation Mechanism: Article 6.2. This may have been due to the fact that in the fourteen years since the first EU-US Agreement positive comity has only been officially resorted to on one occasion.⁹⁸ Indeed, it may be that the limited utility of, or need for, positive comity in practical terms in EU-US practice to date may have reduced its importance in any subsequent cooperation agreement as a result, including of course the EU-Mexico Cooperation Mechanism. Of course, it could also be that a full positive comity provision can only be negotiated between parties with a longer history of informal case cooperation, or strong export interests (i.e. in accessing their partner’s market). At interview it was confirmed that abbreviated form of positive comity present in the EU-Mexico agreement was primarily due to the latter explanation. It was also suggested that authorities be wary of negotiating positive comity commitments bilaterally, which may provide for different degrees of cooperation, and which may in some global cases involve fielding myriad requests among the agencies: instead it was suggested that they work on and await the

Bank of America, 549 F. 2d 597 (9th Circuit, 1976); *Hartford Fire Insurance Co. v. California*, 509 US 764, 113 S. Ct. 2891 (1993).

⁹⁵ A distinction can be made however between ‘judicial comity’ (the use of comity to determine whether extraterritorial jurisdiction can be asserted in order to enforce the antitrust laws) and ‘agency-to-agency comity’ (the use of comity by the antitrust agencies both in its dealings with other agencies and in determining the appropriate enforcement action to be taken in the case of a violation of the antitrust laws). In the former case comity is only used in the context of a ‘true conflict’ between jurisdictions. However its application between antitrust agencies may be much more extensive.

⁹⁶ Article VI.3 of the EU-US Agreement.

⁹⁷ Article V EU-US; Article 6.2 EU-Mexico.

⁹⁸ The *Sabre/Amadeus* review in 1999, where the US Department of Justice requested the Commission to investigate allegations of discrimination between Amadeus and Sabre airline reservation systems. The case was settled in July 2000. See: European Commission Report, COM (2000) 618, p. 6.

negotiation of an international positive comity accord of basic consensus principles, to which individual authorities could then accede or sign up.

Cooperation Agreements that Provide for the Exchange of Confidential Information

Annex XV of the EU-Mexico FTA does not allow either of the parties to exchange confidential business information with their counterparts abroad. Like almost all competition enforcement cooperation arrangements established to date the effectiveness of the EU-Mexico mechanism is limited by the fact that the exchange of confidential business information is prohibited under the national laws of the parties. Nevertheless there are two agreements that do provide for the exchange of confidential information, although both are subject to a commitment that they will use the confidential information only for the purposes stipulated in the agreement: the bilateral agreement established between the US and Australia⁹⁹ and the trilateral agreement established between Iceland, Norway and Denmark.¹⁰⁰ All five parties to the above agreements had already passed national legislation allowing for the exchange of confidential information before negotiating the agreement.

As should be obvious from the above, both the OECD Recommendation and the EU-US Agreement appear to have had an enormous effect on the composition of the EU-Mexico arrangement: not only has its philosophy followed that of the former documents but its provisions are strikingly similar to both, in particular to those of the EU-US Agreement. At their most basic, both cooperation agreements strive to avoid conflict in the application of different competition laws by encouraging cooperation in its many forms and in particular by allowing their authorities to share any information not prohibited by their laws. Of course due to the soft law nature of the obligations and the *de facto* absence of any dispute settlement procedures the success of both agreements depends to a very high degree on the goodwill of the parties involved, a point that is highlighted in the section that follows.

⁹⁹ Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, available at www.apeccp.org.tw/doc/USA/Cooperation/usaus7.htm.

¹⁰⁰ Agreement between Denmark, Iceland and Norway on Co-operation in Competition Cases: www.globalcompetitionforum.org/regions/europe/Denmark/Agreement1.pdf.

**PART VI: A SUBSTANTIVE ANALYSIS OF BOTH THE PRACTICAL USES
AND THE LIMITATIONS OF THE COOPERATION MECHANISM**

Before any substantive analysis of the cooperation mechanism is undertaken it must first be noted that as the free trade agreement between the EU and Mexico is a document of relatively recent origin it may be too early as of yet to measure the real extent of any benefits or limitations of its reasonably detailed provisions. With that caveat established, the following two sections will detail respectively both the perceived benefits (Section 1) and limitations (Section 2) of the competition enforcement cooperation arrangement developed between these countries as a result of their free trade agreement.

Section 1: The Perceived Benefits of the Cooperation Mechanism

The philosophy behind the inclusion of competition provisions in free trade agreements indicates to a high degree the need for trans-national competition enforcement cooperation. National competition law aims *inter alia* to prevent the elimination of the benefits of trade liberalisation by private anticompetitive conduct; the inclusion of competition provisions in FTAs recognises and highlights its importance in this regard. Cooperation between the antitrust agencies of the countries forming a free trade area is seen as vital in order to ensure that one country's antitrust policy (or lack thereof) does not undermine the advantages of the free trade arrangement for the other parties involved. In short, competition law and competition law enforcement cooperation is believed to play an important role in the fulfilment of the objectives of an FTA. The question that has to be asked, and the issue that is under discussion in this section of the paper, is to what extent do the provisions of the EU-Mexico Free Trade Agreement discharge their duties in this respect. In other words, to what extent has the cooperation mechanism of Annex XV of the EU-

Mexico FTA succeeded in (1) helping to lead to increased effective cooperation and coordination of competition enforcement between the European and Mexican competition agencies; (2) providing an effective mechanism should the need for such cooperation and coordination arise; and (3) ensuring that anticompetitive business practices do not undermine the benefits of trade liberalisation.

The EU-Mexico FTA established a relatively comprehensive framework for both cooperation and coordination in relation to antitrust enforcement activity. Annex XV of this agreement provides for the practical implementation of such cooperation and coordination through notifications, consultations and the exchange of (non-confidential) information.¹⁰¹ This annex does not expressly state that other cooperation and mutual legal assistance agreements may be concluded by the parties, however as the purpose of the annex is to encourage cooperation between the EU and Mexico it is understood that the agreement does not prevent such agreements being made either. No such specific cooperation agreements have yet been concluded between the EU and Mexico: their free trade agreement comprises the totality of their competition enforcement cooperation framework.

In broad terms Annex XV has consolidated a working relationship between the respective antitrust agencies of the EU and Mexico, allowing both these agencies the opportunity to benefit from an increased awareness of each other's existence and importance. At its most basic the agreement has put in place a mechanism that can be used by the antitrust authorities of the parties to address any future anticompetitive behaviour that may impact on the important interests of either party in this free trade area. It is not suggested that the signing of the EU-Mexico FTA will *inevitably*¹⁰² increase interaction between these agencies only that should contact become necessary a framework is now in place that can direct and improve such interaction. It is hoped, nevertheless, that this mechanism will lead to an increased focus on the

¹⁰¹ Articles 3, 6, and 4 of Annex XV respectively.

¹⁰² Notifications for example will increase interaction between the agencies if certain conditions are satisfied e.g. that the important interests of the party to be notified are affected by (prospective) enforcement action. Annex XV does not ensure the inevitability of the existence of such circumstances.

significance¹⁰³ of effective cooperation between the competition enforcement agencies of both the EU and Mexico—at least when the important interests of one or more of the parties is at issue—helping to promote a culture of cooperation and perhaps more contact between the agencies involved. It is helpful to note that the competition provisions of Annex XV are general in nature and could relate to *any* competition issue impacting on important competition law and policy interests of both jurisdictions. Thus potential for cooperation is great. Further, it is expected that any future communication or cooperation will lead to a deeper understanding of each other’s regime, developing in the process mutual trust and confidence between the agencies involved. It was also confirmed however by a variety of competition officials that such trust and confidence is also developed by the informal meetings of competition officials at various multilateral fora such as the Organisation for Economic Cooperation and Development (OECD) or the International Competition Network (ICN).¹⁰⁴

The provisions dealing with notifications are particularly important for a number of reasons. Notification of imminent enforcement action can act as an early warning of anticompetitive activities, perhaps bringing the existence of such activities to the notified competition agency for the first time. This early warning provides the authorities with an opportunity to react to anticompetitive activities that it may not have had otherwise. Notification of course also helps to establish and develop channels of communication between competition agencies. Finally, the fact that cooperation agreements contain provision for notifications sends a clear signal to undertakings that competition authorities are both willing and able to communicate with one another and thus that national borders can no longer be relied upon as protection against enforcement activities. Consultations between antitrust agencies are also important, presenting as they do the opportunity for one agency to offer its support, advice and experience to its foreign counterpart. Information exchange, even

¹⁰³ One competition official commented that the inclusion of cooperation principles in FTAs provides an important government-to-government policy statement (i.e. that competition agencies should or will cooperate with one another).

¹⁰⁴ A fact that arguably undermines somewhat the need for formal written arrangements. It could also be argued however that cooperation agreements provide a framework for officials with respect to how they should conduct such informal meetings. In fact, at least one competition official admitted that cooperation agreements function best when approached in an informal manner.

if it only concerns non-confidential information, is also important for the same reasons.

EU-Mexico cooperation has become more official, more open and more intense since the agreement has been signed, at least on the Mexican side. Generally, the cooperation mechanism has served the purpose of closer cooperation by means of the notification obligation and by day-to-day information exchanges,¹⁰⁵ which are very important for decision making processes. The Mexicans have notified the EU of their enforcement activity on 31 occasions; they have only been notified of European enforcement activity on one occasion. As for requests for consultation, 14 have been made: 2 by the EU and 12 by Mexico. It is unclear what conclusions can be drawn from these statistics, apart from the fact that the parties have been cooperating in a manner advocated by the cooperation mechanism i.e. through consultation and notifications.¹⁰⁶ The difference in volume between notifications received by the EU and those received by Mexico was explained somewhat at interview by the following:

1. There are more European investors in Mexico than there are Mexican investors in Europe, and as a result European companies are more likely to be the subject of investigations in Mexico than Mexican companies may be the subject of investigations in Europe.
2. Perhaps some activities are not being notified because the notifying party assumed that the recipient party was already well-aware of the activity.

To this it was also added at interview that notifications do not play merely a 'notifying' role anyway, as authorities are often already aware of each other's cases; notifications also help authorities to 'compare notes' about particular cases. The provisions on technical assistance¹⁰⁷ have also been useful: an important technical

¹⁰⁵ These day-to-day exchanges generally involve technical aspects of competition enforcement; confidential information is not being exchanged.

¹⁰⁶ Nevertheless, some officials opined that the cooperation could be *more intense*. For example, the provisions on coordination or parallel enforcement have not yet been used. Further there have been no requests for positive comity between the EU and Mexico. This may be due to the fact that the type of case where these provisions should be resorted to has not yet arisen, rather than to a conscious decision on behalf of one or both parties to deprive such methods of cooperation of their usefulness.

¹⁰⁷ The Mexican authorities are in the process of revising their competition law. Some officials believed that this could potentially be an area where the EU could provide the Mexicans with substantial technical assistance. (It was also noted however that Mexico should first complete the planned overhaul of their legal system before seeking such technical assistance in relation to competition law.)

assistance program is expected to take-off soon. It addresses competition policy matters as well as another six topics covered by the FTA.

When discussing the perceived benefits of the cooperation mechanism a final issue is whether the instrument used, i.e. an annex to an FTA, was the most effective one for their purposes. At issue here is whether a *annex to an FTA* that contains usually generally worded obligations in relation to competition law enforcement cooperation (which may or may not be subject to dispute settlement procedures) is any more or less effective than a specific *agency-to-agency* competition cooperation agreement concluded between the antitrust agencies themselves which contains detailed commitments not subject to dispute settlement.

To answer this question the following thesis from the study's terms of reference has to be considered:

The fundamental question that all the case studies in this work package will be asking is: what value-added do formal cooperation agreements have over and above the natural evolution of inter-agency cooperation?

The core question can be expressed in terms of comparing two hypotheses:

1. Competition arrangements in bilateral trade arrangements do not create significant value added over and above the spontaneous co-operation that evolves between competition agencies, and that agreements initiated and negotiated directly by competition agencies are likely to be more effective, especially in terms of achieving the objectives of the agencies.
2. Alternatively, that because international competition cooperation is likely to involve trade, there is value added in putting competition cooperation agreements into trade agreements and that this is likely to assist the evolution of natural cooperation including follow-on inter agency agreements.

We find that the provisions of Annex XV are practically as useful and effective as those that could have been included in an agency-to-agency agreement¹⁰⁸ between the competition authorities of the EU and Mexico. There is *almost no difference in substance* between the cooperation framework established by Annex XV EU-Mexico and that established by for example the EU-US Cooperation Agreement or the Canada-Chile MOU¹⁰⁹: this annex establishes a framework that seeks to avoid conflict

¹⁰⁸ Or indeed a state-to-state agreement dealing only with competition law enforcement cooperation.

¹⁰⁹ In fact Annex XV goes further than the MOU in some respects e.g. by providing for positive comity.

and improve cooperation by creating soft law, non-binding obligations in relation to notification, consultation, exchange of (non-confidential) information and the provision of technical assistance; such a (non-binding) framework, like almost all agency-to-agency agreements, depends to a very high degree on the goodwill of the parties involved. In actual fact, the annex is considered sufficient by both the European and Mexican authorities and there are no plans for the conclusion of any agency-to-agency agreements between their respective competition authorities in the future. It is submitted here that unless such an agreement would include provision for the exchange of confidential information—something that is unlikely to occur in the near future—there is currently no need for an agency-to-agency cooperation agreement to be concluded between the antitrust authorities of the EU and Mexico.

Section 2: Limitations of the Cooperation Mechanism

Limitations on the actual *scope* of the provisions of Annex XV of the EU-Mexico Free Trade Agreement have been detailed in the section of this paper that deals specifically with the content of this agreement.¹¹⁰ In this section, the authors wish to consider the *institutional* and *operational* limitations of these provisions, paying particular attention to the cooperation mechanism they attempt to establish.

Annex XV of the EU-Mexico FTA creates obligations for the parties in relation to competition law and cooperation. As detailed above, this chapter obliges the parties to adopt or maintain measures that aim to prevent or eliminate anticompetitive conduct; to take enforcement action with respect to such measures; and to cooperate with one another in competition matters through notifications, consultations and information exchange. Provision is also made for technical assistance. It has already been stated that these ‘obligations’ are not exactly commitments of the ‘hard law’ variety: they are characterised more accurately as ‘soft law’ obligations. Hard law obligations can be identified by the following three characteristics:

- (a) they are legally binding;

¹¹⁰ *Viz.* Part V *supra*.

- (b) they are relatively precise (or are capable of being made precise by adjudication or regulation); and
- (c) they delegate legal authority to interpret and implement their scope and substance.¹¹¹

‘Soft law’ by contrast is the term used to refer to obligations that lack one or more of these elements; it is a term used to describe legal provisions that are weakened by an absence of sanctions, precision, or delegation of authority.¹¹² The obligations created by Annex XV are soft law obligations as they are not legally binding on the parties: the parties suffer no legal sanctions for refusal to comply with the provisions of this chapter; the parties will not have recourse to the dispute settlement procedures of the FTA for an alleged breach of any of the competition provisions.¹¹³

It could be argued that the absence of sanctions and dispute resolution procedures deprives the competition provisions and the cooperation framework of its effectiveness, as parties are free to decide whether or not to comply with their obligations or not.¹¹⁴ On the other hand, it can also be argued that cooperation agreements with nonbinding obligations allow parties the flexibility and autonomy to delineate their own competition policy—within very broad core principles such as non-discrimination and transparency— while at the same time existing as guides to help the parties to cooperate when appropriate.¹¹⁵ Further, as has been opined by some officials, the use of dispute settlement mechanisms in the case of trans-national

¹¹¹ See: K.Abbott, R. Keohane, A. Moravcsik and A-M Slaughter, “The Concept of Legalisation” 54:3 International Organisation, (2000), 401.

¹¹² *Ibid* at 421.

¹¹³ It should be noted at this point that—unlike with the competition provisions of the Canada-Chile FTA or the Canada-Costa Rica FTA—there is no *express* prohibition on the use of dispute settlement procedures in the case of an alleged violation of Annex XV: however it has been conceded by these authorities at interview that either (1) the chances of sanction under the EU-Mexico FTA dispute settlement procedures for alleged ‘violation’ of Annex XV is so remote as to be a non-issue; or (2) that as a matter of interpretation the dispute settlement procedures in question do not apply to Annex XV. In either case, the EU-Mexico cooperation mechanism would thus appear to only create ‘soft law’ obligations which are legally unenforceable.

¹¹⁴ It was also conceded by one official that the EU-Mexico cooperation mechanism may have some elements of ‘image-building’ to it. By this it is meant that the mechanism alone—due to the fact that it does not have any legally binding effects— was used as an opportunity to improve the status, profile or reputation of the competition agencies involved, especially the Federal Competition Commission of Mexico.

¹¹⁵ Of course the imposition of formal legal sanctions is not the only way to discipline a non-complying party: informal sanctions might take the form of a refusal to cooperate in the future. In other words, a non-complying party might find that his actions have put in motion a process of tit-for-tat non-cooperation in which the non-compliance of his counterpart acts as an informal punishment for his previous behaviour.

competition enforcement cooperation could undermine this discretion of national competition authorities, with the potential creation of mutual resentment between agencies, and a souring of their working relationship. It is submitted here that the nonbinding nature of the provisions is not a major problem. In fact, it may be a necessary condition for the acceptance and thus conclusion of reasonably detailed cooperation agreements in the first place as well as for the development of trust and confidence between the competition agencies of the parties.

Problems associated with discretion and the concept of soft law obligations are not the only perceived limitations of the cooperation arrangement between the EU and Mexico: ensuring the confidentiality of business information imposes limitations on enforcement cooperation. Like almost all cooperation agreements, Annex XV of the EU-Mexico FTA recognises concerns about the exchange of confidential information: its provisions are subject to the confidentiality laws of each of the parties to the agreement; nothing in this annex requires the exchange of information either by a party or its competition authority contrary to these laws.¹¹⁶ As a result the FTA does not require any information exchange that would otherwise—in the absence of such an agreement—be inaccessible.

The ‘confidentiality clause’ of Article 8 highlights the traditional conflict between the competition authorities, who want to have as much information at their disposal so that they can enforce the national competition law effectively,¹¹⁷ and the business community who possess anxieties not only about the protection of their business secrets but also about the purpose for which such information will be used. In effect, the conflict has been resolved in favour of the business community and the confidentiality of their business secrets will be respected in the absence of a waiver on the part of the possessor of such information. It is conceded that undertakings may have a strong incentive to consent to waive their confidentiality rights¹¹⁸ in order to facilitate a timely merger approval, but such an incentive appears to be absent in the other perceivable cases of alleged anticompetitive conduct, including alleged

¹¹⁶ Article 8 of Annex XV of the EU-Mexico FTA.

¹¹⁷ It must also be remembered however that the exchange of confidential business information has a potential to harm competition, especially if the information were to fall into the hands of the information holder’s business rivals.

¹¹⁸ Under the condition of course that the information retains its status as confidential information in relation to third parties and that the information is only used for the purpose for which it was provided.

collusive behaviour.¹¹⁹ In any case, the decision to waive of course remains with the possessor of the confidential information, undermining somewhat the cooperation mechanism and hence the ability of the competition agencies to investigate alleged anticompetitive behaviour of foreign firms. Most officials believe that the issue of confidentiality is the *chief limitation* of enforcement cooperation agreements and hence it is submitted that the majority of effort should be concentrated on overcoming this particular obstruction to effective cooperation between antitrust agencies.

In sum, the benefits of the cooperation arrangement between the EU and Mexico can be summarised as follows:

- Competition provisions in FTAs are themselves important government-to-government policy statements concerning the significance of competition policy and competition enforcement cooperation for the achievement of the objectives of free trade areas.
- The benefits of free trade areas will be less likely to be undermined by private anticompetitive practices, by virtue of the existence of the laws of the parties and growing awareness that the authorities will exchange information and otherwise cooperate with one another, particularly where the parties use the cooperation mechanism to work together on actual cases to prevent (private) anticompetitive behaviour within their respective jurisdictions.
- The cooperation arrangement consolidates a working relationship between the antitrust agencies of the parties.
- Cooperation agreements promote trust and confidence between the competition agencies of the parties.
- The framework established by such arrangements can be relied on in the future to avoid potential conflicts in trans-national competition enforcement.
- Notifications are important for three reasons: (a) they can act as an early warning to the notified party of anticompetitive behaviour; (b) they establish channels of communication between the agencies of the parties; and (c) they send a clear signal to undertakings that agencies are communicating and that

¹¹⁹ Another possible exception may be a waiver given in the course of a leniency application.

national borders can no longer be relied upon as protection against enforcement activities.

- Consultations and exchanges of information provide the opportunity for one agency to offer its support, advice and experience to its foreign counterpart.

The limitations of the cooperation arrangement can be summarised as follows:

- The obligations it creates are of the ‘soft law’ variety and thus are unenforceable in law between the parties.
- There are arguably no dispute settlement procedures which apply in the case of conflict between the competition agencies.
- The parties effectively decide the extent of their obligations.
- The agreement does not allow the exchange of confidential business information between the competition agencies of the parties, even if such information was still to remain confidential *vis-à-vis* third parties and could only be used for the purpose for which it was provided.
- The agreement does not require or permit any information exchange that would otherwise not be accessible.

PART VII: RECOMMENDATIONS

- General:

The authors agree that despite the obvious limitations of cooperation agreements due to their prohibition on the exchange of confidential information, they are useful and valuable documents. Nevertheless it *could be argued* that there is *less need* for these formal agreements now than before (unless some parties get to the point where they wish to change their confidentiality laws) as (1) a lot is already possible through informal bilateral cooperation, although of course confidential information cannot be exchanged; (2) the agreements that have already been

concluded, especially between the EU and the US, provide guidance to other agencies on how to conduct their (informal) cooperation; and (3) the development of the ICN provides a forum for (formal and informal) competition cooperation on both a bilateral and multilateral basis. However, in relation to point three, it was highlighted at interview that although the ICN serves an extremely valuable and efficient networking purpose among competition authorities—who cannot all visit one another on a bilateral basis due to resource constraints—it could not be stated with certainty if the informal networking of this arrangement could/would replace the detail of cooperation agreements, and indeed the authors doubt that the ICN could (or even should) evolve in such a case-specific manner.

- Specific:

- (1) An agency-to-agency agreement between the EU and Mexico is not required: the cooperation mechanism is sufficient; most agency-to-agency cooperation agreements go no further than this arrangement.
- (2) If the agencies decided to conclude any further agreements, they would only be worthwhile if they provided for the exchange of confidential information. A change in the domestic law of both parties would be required before such a provision could be negotiated.
- (3) This next step could arguably require a “worldwide” solution as a precursor to a bilateral approach. The OECD may be the better place to deal with such a task than two parties, as the issue of the exchange of confidential information is not specific to any one nation or trading relationship, and this body has the greatest degree of representation by agencies with a long history of enforcement, and of enforcement cooperation, including formal Recommendations. Indeed, it is unlikely that any one bilateral relationship will advance to permitting exchange of confidential information absent a more general consensus to do so.¹²⁰ This solution must include provision for the exchange of confidential information if progress is to be made in international competition cooperation. Of course, there may be disagreements concerning such an

¹²⁰ See how such an approach has evolved within the European Competition Network for example.

approach: (a) between what some jurisdictions would allow to be included in a definition of confidential information; and (b) what some jurisdictions would ultimately do with the information (e.g. some jurisdictions may allow criminal sanctions against those who commit anticompetitive behaviour while others may not; the use of confidential information in criminal cases may be a move too far for those jurisdictions that do not have criminal sanctions).

PART VIII: REFERENCES/SOURCES

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Free Trade Agreements

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ANNEX I: ANNEX XV OF THE EU-MEXICO FTA

CHAPTER I

GENERAL PROVISIONS

Article 1

Objectives

1. The Parties undertake to apply their respective competition laws so as to avoid that the benefits of this Decision may be diminished or cancelled out by anti-competitive activities.
2. The objectives of this mechanism are:
 - (a) to promote cooperation and coordination between the Parties regarding the application of their competition laws in their respective territories and to provide mutual assistance in any fields of competition they consider necessary;
 - (b) to eliminate anticompetitive activities by applying the appropriate legislation, in order to avoid adverse effects on trade and economic development, as well as the possible negative impact that such activities may have on the other Party's interests; and
 - (c) to promote cooperation in order to clarify any differences in the application of their respective competition laws.
3. The Parties shall give the following aspects particular attention in implementing the present mechanism, with a view to preventing distortions or restrictions on competition which may affect trade conducted between the Community and Mexico:
 - (a) for the Community: the agreements between companies, decisions to form an association between companies and concerted practices between companies, the abuse of a dominant position and mergers; and
 - (b) for Mexico the absolute or relative monopolistic practices and mergers.

Article 2

Definitions

For the purpose of this Annex:

(a) "competition laws"; include:

(i) for the Community, Articles 81, 82, 85 and 86 of the Treaty establishing the European Community, Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations, including High Authority Decision No 24/54;

(ii) for Mexico, the Ley Federal de Competencia of December 24, 1992, Reglamento Interior de la Comisión Federal de Competencia of August 28, 1998 and the Reglamento de la Ley Federal de Competencia of March 4, 1998; and

(iii) any amendments that the above mentioned legislation may undergo; and

(iv) it may also include additional legislation to the extent it may have implications to competition in terms of this mechanism;

(b) "competition authority" means:

(i) for the Community, the Commission of the European Communities, and

(ii) for Mexico, Comisión Federal de Competencia;

(c) "enforcement activities" means any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party, which may result in penalties or remedies;

(d) "anticompetitive activities" and "conduct and practices which restrict competition" mean any conduct, transaction or act as defined under the competition laws of a Party, which is subject to penalties or remedies.

CHAPTER II

COOPERATION AND COORDINATION

Article 3

Notification

1. Each competition authority shall notify the competition authority of the other Party an enforcement activity if:

(a) it is relevant to enforcement activities of the other Party;

(b) it may affect the other Party's important interests;

(c) it relates to restrictions on competition which may affect the territory of the other Party; and

(d) decisions may be adopted conditioning or prohibiting action in the territory of the other Party.

2. To the extent possible, and provided that this is not contrary to the Parties' competition laws and does not adversely affect any investigation being carried out, notification shall take place during the initial phase of the procedure, to enable the notified competition authority to express its opinion. The opinions received may be taken into consideration by the other competition authority when taking decisions.

3. The notifications provided for in paragraph 1 shall be detailed enough to permit an evaluation in the light of the interests of the other Party. Notifications shall include inter alia the following information:

(a) a description of the restrictive effects of the transaction on competition and the applicable legal basis;

(b) the relevant market for the product or service and its geographical scope, the characteristics of the economic sector concerned and data on the economic agents involved in the transaction; and

(c) the estimated deadlines for resolution, in cases in which the procedure has been initiated, and to the extent possible an indication of its probable out-come, and of the measures which may be taken or provided for.

4. Each competition authority shall notify the competition authority of the other Party as soon as possible of the existence of measures, other than enforcement activities, which could affect that other Party important interests, bearing in mind the provision laid down in paragraph 1. In particular they shall do so in the following cases:

(a) administrative or judicial proceedings; and

(b) measures taken by other governmental agencies, including current or future regulatory bodies, which may have an impact to enhance competition in specific-regulated sectors.

Article 4

Exchange of information

1. With a view to facilitating the effective application of their respective competition laws and promoting a better understanding of their respective legal frameworks, the competition authorities shall exchange the following types of information:

(a) to the extent practicable, texts on legal theory, case-law or market studies in the public domain, or in the absence of such documents, non-confidential data or summaries;

(b) information related to the application of competition legislation provided that it does not adversely affect the person providing such information, and for the sole purpose of helping to resolve the procedure; and

(c) information concerning any known anticompetitive activities and any innovations introduced into the respective legal systems in order to improve the application of their respective competition laws.

2. The competition authorities shall help each other to collect other types of information in their respective territories, if circumstances so require.

3. Representatives of each Party's competition authorities shall meet in order to promote knowledge on both sides of their respective competition laws and policies, and to evaluate the results of the cooperation mechanism. They may meet informally, as well as at institutional meetings in a multilateral context, when circumstances allow.

Article 5

Coordination of enforcement activities

1. A competition Authority may notify its willingness to coordinate enforcement activities with respect to a specific case. This coordination shall not prevent the Parties from taking autonomous decisions.

2. In determining the extent of coordination, the Parties shall consider:

(a) the effective results which coordination could produce;

(b) the additional information to be obtained;

(c) the reduction in costs for the competition authorities and the economic agents involved; and

(d) the applicable deadlines under their respective legislation.

Article 6

Consultations when important interests of one Party are adversely affected in the territory of the other Party

1. A competition authority which considers that an investigation or proceeding being conducted by the competition authority of the other Party may affect such Party's

important interests should transmit its views on the matter to, or request consultation with, the other competition authority. Without prejudice to the continuation of any action under its competition law and to its full freedom of ultimate decision, the competition authority so addressed should give full and sympathetic consideration to the views expressed by the requesting competition authority, and, in particular, to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding.

2. The competition authority of a Party, which considers that the interests of that Party are being substantially and adversely affected by anticompetitive practices of whatever origin that are or have been engaged in by one or more enterprises situated in the other Party may request consultation with the other competition authority, recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the competition authority concerned. A competition authority so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting competition authority and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting competition authority.

Article 7

Avoidance of conflicts

1. Each Party shall, wherever possible, and in accordance with its own legislation, take into consideration the important interests of the other Party in the course of its enforcement activities.

2. If adverse effects for one Party result, even if the above considerations are respected, the competition authorities shall seek a mutually acceptable solution. In this context, the following may be considered:

- (a) the importance of the measure and the impact which it has on the interests of one Party, by comparing the benefits to be obtained by the other Party;
- (b) the presence or absence, in the actions of the economic agents concerned, of the intention to affect consumers, suppliers or competitors;
- (c) the degree of any inconsistencies between the legislation of one Party and the measures to be applied by the other Party;

- (d) whether the economic agents involved will be subject to incompatible requests by both Parties;
- (e) the initiation of the procedure or the imposition of penalties or remedies;
- (f) the location of the assets of the economic agents involved; and
- (g) the importance of the penalty to be imposed in the territory of the other Party.

Article 8

Confidentiality

The exchange of information shall be subject to the standards of confidentiality applicable in each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the Parties, shall not be provided without the express consent of the source of the information. Each competition authority shall maintain the confidentiality of any information provided to it in confidence by the other competition authority under this mechanism, and oppose any application for disclosure of such information by a third party that is not authorised by the competition authority that supplied the information.

Article 9

Technical Cooperation

1. The Parties shall provide each other technical assistance in order to take advantage of their respective experience and to strengthen the implementation of their competition laws and policies.
2. The cooperation shall include the following activities:
 - (a) training of officials of both Parties' competition authorities, to enable them to gain practical experience; and
 - (b) seminars, in particular for civil servants.
3. The Parties may carry out joint studies of competition or competition laws and policies, with a view to supporting their development.
4. The Parties acknowledge that developments in communication and computer systems are relevant to the activities they wish to develop and that they should be used to promote communication and facilitate access to information on competition policies as far as possible. To this end they shall seek to:
 - (a) extend their respective home pages so as to provide information on developments in their activities;

- (b) promote the dissemination of subjects relating to competition studies through publications such as the Boletín Latinoamericano de Competencia, the Competition Policy Newsletter of the Directorate General for Competition of the European Community, and the annual reports and the Gaceta de Competencia Económica published by the Comisión Federal de Competencia of Mexico; and
- (c) develop an electronic archive of case-law pertaining to the cases investigated, which would enable the identification of individual cases, the nature of the practice or conduct analysed, its legal framework and the outcomes and dates of resolution.

Article 10

Amendments

The Joint Committee may amend this Annex.

**ANNEX II: DESCRIPTION OF THE DOMESTIC COMPETITION LAW
ENFORCEMENT REGIMES**

Section 1: Competition Law in the EC

Introduction

Competition law and policy have been part of the supranational EC regime ever since the very beginnings of the European project in the mid-1950s. The competition rules of the Treaty of Rome¹²¹ however were not enforced until the passing of Regulation 17 in 1962¹²² which installed a rather centralised enforcement regime that remained in force until May 2004.¹²³ From that date the enforcement duties of the European institutions have been devolved somewhat to the national courts and competition authorities. From May 1st 2004, for example, exemptions from the operation of

¹²¹ For a consolidated version of the Treaty of Rome as amended see: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_325/c_3250021224en0000184.pdf.

¹²² [1959-62] OJ Spec. Ed. 87.

¹²³ See Regulation 1/2003 [2003] OJ L1/1.

Article 81 (1) EC can also be granted by the national competition authorities. The Commission, in the form of enhanced investigation powers, has also benefited from the reform. In addition, a European network of competition authorities has been recently established to enable the national competition authorities and the Commission to cooperate and coordinate their enforcement activities.

This short article will highlight the main provisions of this modernised competition law in order to provide a general outline of the European competition regime. It is the author's purpose to describe briefly this regime so that deeper and more meaningful analysis of the EU-Mexico Cooperation Mechanism will be possible.

It should be stated at the very outset that EC Competition Law¹²⁴ consists *inter alia* of the following sources:

1. Article 81 of the EC Treaty;
2. Article 82 of the EC Treaty;
3. Articles 87, 88 and 89 of the EC Treaty;
4. The European Community Merger Regulation;¹²⁵
5. Regulation 1/2003;¹²⁶
6. Council Regulations; and
7. Various other Commission Regulations, Guidelines and Notices affecting a plethora of competition issues.¹²⁷

Purpose of the Competition Law

Article 3 (1) (g) of the EC Treaty states that one of the activities of the Community should be the establishment of “a system ensuring that competition in the internal market is not distorted”. Article 4 (1) of the same Treaty assumes that the Community's economic policies will be conducted in accordance with “the principle of an open market economy with free competition”. Further, the EU shall “offer its

¹²⁴ It should also be mentioned that the European Coal and Steel Community Treaty has competition provisions which are identical to those under the EC Treaty and thus the jurisprudence that applies to Articles 81 and 82 EC may also be applied to ECSC cases.

¹²⁵ Reg. 139/2004 [2004] OJ L24/1 (‘the ECMR’).

¹²⁶ *Loc. cit.* n. 2.

¹²⁷ For a comprehensive list of such measures see: http://europa.eu.int/comm/competition/index_en.html.

citizens...a single market where competition is free and undistorted” according to its new constitution.¹²⁸ European competition law was created and developed in order to ensure that this system of free competition could be established and maintained.

Bishop and Walker argue that EC competition law is primarily striving to protect ‘effective competition’¹²⁹ in the common market: the goal of EC competition law is to achieve maximum *efficiency* in the allocation of scarce resources thereby ensuring (European) consumer welfare is likewise at its maximum. Competition law is also used as an instrument of *single market integration*. The goal of completing an internal market between the twenty-five Member States of the EC would be undermined if private entities could establish barriers to trade (through anticompetitive activities) to replace those barriers removed due to the process of integration required by this objective. EC Competition Law is thus used to prevent compartmentalization of the common market and to promote economic efficiency and integration.

The Institutions Regulating Competition

The main institutions responsible for enforcement of EC Competition Law are:

1. The EC Commission: This twenty-five member collegiate body is supported by a civil service divided into twenty-five departments or Directorates-General. A specific Directorate General of Competition (DG Competition or as it’s more commonly known DG Comp.), under the responsibility of a Commissioner, is entrusted with the task of enforcing EC Competition Law for the EC.¹³⁰ It shares this task with the national courts and competition authorities. It has exclusive competence to review mergers, acquisitions and full-function joint ventures that have a ‘community dimension’.¹³¹ The Commission may impose structural or behavioural remedies¹³² on

¹²⁸ Article 3 (2) of the Constitution of the European Union.

¹²⁹ Bishop and Walker, *The Economics of EC Competition* (2nd Ed., Sweet and Maxwell, 2000) at 16. The words ‘effective competition’ appear in Article 82 EC and in Article 2 (3) of the Merger Regulation.

¹³⁰ Its powers for this purpose are enumerated in Regulation 1/2003.

¹³¹ The concept of ‘community dimension’ is defined by the ECMR. Essentially it depends on the merged entity meeting certain size thresholds. See Article 1 ECMR.

¹³² These remedies must be both proportionate to the infringement committed and necessary to bring it to an end: Article 7 of Regulation 1/2003.

undertakings when it finds that there has been a breach of EC competition provisions.¹³³ It may also impose interim measures or commitments on the undertakings involved.¹³⁴ The Commission also has extensive powers of investigation. It may *inter alia* make requests for information,¹³⁵ take statements,¹³⁶ and conduct inspections.¹³⁷

2. The National Courts and Competition Authorities: EC Law is directly applicable in Member States. Since May 1, 2004 both Article 81 and 82 EC are directly applicable in their entirety in the Member States and as a result both national courts and national competition authorities are responsible for the enforcement of both articles in their entirety. The national competition authorities have the power, whether on their own initiative or upon complaint, to make decisions:

- (a) requiring that an infringement be brought to an end;
- (b) ordering interim measures;
- (c) accepting commitments; or
- (d) imposing fines, periodic penalty payments or any other penalty provided for in their national law.¹³⁸

3. The Court of First Instance (CFI) and the European Court of Justice (ECJ): The CFI is competent to hear appeals from Commission decisions; its judgments may be appealed to the ECJ. Member States can refer questions to the ECJ for a preliminary ruling by virtue of Article 234 EC, including questions relating to EC competition law. The ECJ is also the final court of appeal in (national) cases involving EC Law, including of course EC Competition Law.

Prohibitions

Article 81 EC, Article 82 EC and the EC Merger Regulation (ECMR) respectively prohibit:

1. Restrictive agreements and concerted practices;

¹³³ Article 7 (1) of Regulation 1/2003.

¹³⁴ Articles 8 and 9 of Regulation 1/2003.

¹³⁵ Article 18 of Regulation 1/2003/

¹³⁶ Article 19 of Regulation 1/2003.

¹³⁷ Articles 20 and 21 of Regulation 1/2003.

¹³⁸ Article 5 of Regulation 1/2003.

2. Abuse of a dominant position; and
3. Mergers, acquisitions and full-function joint ventures which will “significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.”¹³⁹

Article 87 also prohibits certain types of aid given to companies by the Member States themselves i.e. state aid which “distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods”. This is one of the unique aspects of EC Competition Law.

A. Restrictive Agreements and Concerted Practices (Article 81 EC):

Article 81 EC is divided as follows: Article 81 (1) EC sets out the prohibition; Article 81 (2) EC states that the prohibition is automatic; and Article 81 (3) EC provides for a very limited exemption to the prohibition.¹⁴⁰

Article 81 (1) EC prohibits collusion between undertakings which has as its object or effect the “prevention, restriction or distortion of competition within the common market and which may affect trade between Member States”. A non-exhaustive list of examples of such collusion is provided by Article 81 (1). The ECJ has ruled that for Article 81 (1) to apply the effect of the collusion on both competition and trade must be an “appreciable” one.¹⁴¹

The burden of proving an infringement of Article 81 (1) EC in both national and community proceedings rests on the party alleging an infringement.¹⁴² The burden of proving that the conditions of Article 81 (3) EC have been fulfilled rests with the party seeking the exemption.¹⁴³

Prohibited activity includes restrictive agreements and concerted practices which:

¹³⁹ ECMR Articles 2 (2) and 2 (3). See Also ‘Mergers’ *infra*.

¹⁴⁰ For Article 81 (3) EC see ‘Exemptions’ *infra*.

¹⁴¹ *Béguelin Import Company v. GL Import-Export SA* [1971] ECR 949.

¹⁴² Article 2 of Regulation 1/2003.

¹⁴³ *Ibid*.

- (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; or
- (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.¹⁴⁴

B. Abuse of a Dominant Position (Article 82 EC):

Article 82 EC prohibits abuses of a dominant position. Once an abuse has been established there can be no exemption unlike the position under Article 81 EC. To establish violation of this article the authorities must prove the existence of the following five elements:

- (1) one or more undertakings;
- (2) a dominant position;
- (3) the dominant position must be held on the common market or a substantial part thereof;
- (4) an abuse; and
- (5) an effect on inter-State trade.

The burden of proving a violation of Article 82 rests with the party alleging such a violation.

The following examples are given by Article 82 as non-exhaustive examples of 'abuse':

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;

¹⁴⁴ Article 81 (1) EC.

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making 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.

Remedies/Sanctions

The Commission may impose structural or behavioural remedies¹⁴⁵—including fines and periodic penalties¹⁴⁶—on undertakings when it finds that there has been a breach of the EC competition provisions.¹⁴⁷ It may also impose interim measures or commitments on the undertakings involved.¹⁴⁸

The national competition authorities have the power, whether on their own initiative or upon complaint, to make decisions:

- (a) requiring that an infringement be brought to an end;
- (b) ordering interim measures;
- (c) accepting commitments; or
- (d) imposing fines, periodic penalty payments or any other penalty provided for in their national law.¹⁴⁹

Procedures

The Commission is entitled to instigate investigations either on complaint or on its own initiative.¹⁵⁰ Those who may complain to the Commission are natural or legal persons who can show a legitimate interest and the Member States.¹⁵¹ Likewise the national authorities may initiate proceedings upon complaint or *sua sponte*. Where the competition authorities of two or more Member States have received a complaint

¹⁴⁵ These remedies must be both proportionate to the infringement committed and necessary to bring it to an end: Article 7 of Regulation 1/2003.

¹⁴⁶ See Articles 23 and 24.

¹⁴⁷ Article 7 (1) of Regulation 1/2003.

¹⁴⁸ Articles 8 and 9 of Regulation 1/2003.

¹⁴⁹ Article 5 of Regulation 1/2003.

¹⁵⁰ Article 7.1 of Regulation 1/2003.

¹⁵¹ Article 7.2 of Regulation 1/2003.

or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint.¹⁵² The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.¹⁵³ Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.¹⁵⁴

Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission gives the undertakings or associations of undertakings which are the subject of its proceedings the opportunity of being heard on the matters to which the Commission has taken objection.¹⁵⁵ The rights of defence of the parties concerned are fully respected in the proceedings.¹⁵⁶ If the Commission considers it necessary it may also hear other natural or legal persons.¹⁵⁷ Where the Commission intends to adopt a decision pursuant to Article 9 (Commitments) or Article 10 (Findings of Inapplicability), it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action.¹⁵⁸ Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month.¹⁵⁹

The Commission shall also consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision provided for in Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1)¹⁶⁰: Article 14.1 of Regulation 1/2003. This Committee does not give opinions on cases being heard by the national authorities.

¹⁵² Article 15.1 of Regulation 1/2003.

¹⁵³ *Ibid.*

¹⁵⁴ Article 15.2 of Regulation 1/2003.

¹⁵⁵ Article 27.1 of Regulation 1/2003.

¹⁵⁶ Article 27.2 of Regulation 1/2003.

¹⁵⁷ Article 27.3 of Regulation 1/2003.

¹⁵⁸ Article 27.4 of Regulation 1/2003.

¹⁵⁹ *Ibid.*

¹⁶⁰ Article 29.1 involves decisions withdrawing the benefits of an (automatic) block exemption.

When applying Articles 81 or 82 the Commission and the national authorities have the power to “provide one another with and use in evidence any matter of fact or of law, including confidential information”.¹⁶¹

The Commission may, upon request or on its own initiative, reopen the proceedings:

- (a) where there has been a material change in any of the facts on which the decision was based;
- (b) where the undertakings concerned act contrary to their commitments; or
- (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.¹⁶²

Procedures are slightly different in relation to the workings of the Merger Regulation: mergers, acquisitions and full-function joint ventures with a ‘community dimension’ must be notified to the Commission.¹⁶³ It is possible for transactions with a community dimension to be referred to the competition authorities of the Member States for adjudication.¹⁶⁴ Likewise, a Member State may request that the Commission rule on a merger, acquisition or full-function joint venture that does not have a community dimension.¹⁶⁵ The Commission must rule within a certain period of time whether the transaction can be allowed.¹⁶⁶ Failure to rule on time results as clearance for the merger, acquisition or full-function joint venture.¹⁶⁷

Appeals from Commission decisions may be brought before the Court of First Instance of the European Communities in Luxembourg. The decision of the CFI may be appealed to the ECJ.

Mergers

All mergers, acquisitions or full-function joint ventures with a “community dimension” which “significantly impede effective competition in the common market

¹⁶¹ Article 12.1 of Regulation 1/2003.

¹⁶² Article 9.2 of Regulation 1/2003.

¹⁶³ Article 4 of ECMR.

¹⁶⁴ Article 9 of the ECMR.

¹⁶⁵ Article 4.5 of the ECMR.

¹⁶⁶ Article 10 ECMR.

¹⁶⁷ See Article 10.6 of the ECMR.

or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position”¹⁶⁸ are prohibited under the Merger Regulation.

Exemptions

The prohibitions in Articles 81 and 82 apply to ‘undertakings’. The concept of undertaking is broad: it includes “every entity engaged in economic activity, regardless of its legal status or the way in which it was financed”.¹⁶⁹ These undertakings may be either public or private. If they are performing tasks of a public nature, or are performing tasks connected with the exercise of a public function they will not be considered an “undertaking”.¹⁷⁰ However, if they are public (or are private but have been granted a special or exclusive right by the state) and have been entrusted with “services of a general economic interest” or have the character of a “revenue-producing monopoly” they shall be subject to EC Competition Law but only in so far as the application of such law does not “obstruct them in the performance, in law or fact, of the particular tasks assigned them”: Article 86 EC.

Exemptions may also be granted to those undertakings that have violated Article 81 (1) EC: Article 81 (3) EC. Both the Commission and the national competition authorities have the competence to grant such exemptions. Block exemptions have been passed by the Commission which grant an automatic exemption to those who fall within their scope, e.g. the ‘Vertical Agreements Block Exemption.’ To be eligible for an exemption in any given case, activity violating Article 81 (1) EC must contribute to “improving the production or distribution of goods or promoting technical or economic progress while allowing the consumers a fair share of the resulting benefits.”¹⁷¹ The activity must not: (a) impose restrictions which are not indispensable to achieving these objectives; or (b) allow those undertakings the possibility to eliminate competition in respect of a substantial part of the products in question.¹⁷² There is no longer any need for a decision to be given for an exemption to

¹⁶⁸ ECMR Articles 2 (2) and 2 (3).

¹⁶⁹ *Höffner v. Macroton*, [1991] ECR I-1979.

¹⁷⁰ See Jones and Sufrin, *EC Competition Law* (2nd Ed., 2004, OUP) at 110.

¹⁷¹ Article 81 (3) EC.

¹⁷² *Ibid.*

take effect: if the activity violating Article 81 (1) EC falls within the scope of Article 81 (3) it is automatically exempt.¹⁷³

Section 2: Competition Law in Mexico

Introduction

The importance of Mexico for international trade should not be understated: a federal republic in the heart of Central America and a member of the North American Free Trade Agreement (NAFTA)¹⁷⁴ since the beginning of 1994, this country presents a free-market (open) economy committed to the liberalization of commerce and the removal of both public and private barriers to trade. Further, the country itself does not represent a negligible target market: Mexico currently claims a population of just under 105 million people.¹⁷⁵

Mexico's modern competition policy, begun in the mid 1980s, reflects the country's desire to end central government control and protection of domestic enterprise in favour of market led reform of the economy.¹⁷⁶ A key element in this reform was the adoption of a general competition law, a law that aims to ensure that private barriers to trade would not replace the public barriers which were removed by agreements such as NAFTA. In fact Article 1501(1) of the NAFTA¹⁷⁷ committed the government of Mexico to the adoption of measures proscribing anti-competitive behaviour, a commitment the authorities in Mexico fulfilled with the adoption of the Federal Law on Economic Competition (LFCE) and the creation of the Federal Competition Commission (CFC) in 1993.¹⁷⁸

¹⁷³ Article 1 (2) of Regulation 1/2003.

¹⁷⁴ For a copy of the text of the NAFTA see <http://www-tech.mit.edu/Bulletins/nafta.html>.

¹⁷⁵ See http://www.greatestcities.com/North_America/Mexico.html.

¹⁷⁶ See the article 'Competition Law and Policy in Mexico: an OECD Peer Group Review' www.oecd.org/dataoecd/57/9/31430869.pdf at page 11, known hereafter, as the "OECD Report".

¹⁷⁷ Article 1501: Competition Law (1). Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct, and shall take appropriate action with respect thereto, recognizing that such measures will enhance the fulfilment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.

¹⁷⁸ Although this law was promulgated in at the very end of 1992—more than a year before the NAFTA would enter into force in Mexico—it was passed after the formal negotiations for the NAFTA had been completed.

The following provide the sources of the competition law regime in Mexico:

1. 1917 Constitution. Article 28 ;
2. Federal Law on Economic Competition (LFCE) ;¹⁷⁹
3. Regulations of the Federal Law on Economic Competition (LFCE);¹⁸⁰ and
4. Internal Regulations of the Federal Commission on Competition (CFC).¹⁸¹

Purpose of the Competition Law

According to Article 2 of the LFCE the competition policy objective of the competition law is “to protect the competition process and free market access by preventing monopolies, monopolistic practices and other restraints of the efficient functioning of markets for goods and services”. It should be obvious from the above article that *efficiency* is the cornerstone of the government’s policy on competition. Although economic growth is not expressly mentioned in the law, the OECD believes that the promotion of economic growth is an implicit policy objective of the LFCE: economic growth should follow from greater efficiency and effective competition.¹⁸²

The Institutions Regulating Competition

Article 23 of the LFCE states that the Federal Commission on Competition “shall act as a technically and operationally independent agency charged with the prevention, investigation and combating of monopolies, anticompetitive practices and concentration”. It is the sole agency in Mexico that is responsible for applying the LFCE, enjoying as it does so independence in its decision making.¹⁸³

The Internal Regulations of the CFC define its internal structure. There are five different elements to the Commission:

- (1) The Plenum¹⁸⁴;

¹⁷⁹ *Diario Oficial de la Federación* (Federal Register), December 24 1992.

¹⁸⁰ *Official Gazette of the Federation*, March 24 1998.

¹⁸¹ *Official Gazette of the Federation*, August 28 1998.

¹⁸² OECD Report, *loc. cit.* n. 5 at 12.

¹⁸³ Article 23 LFCE.

¹⁸⁴ Which consists of the five Competition Commissioners, including the Chairman (also known as the President). It is the decision making authority of the CFC. It takes its decisions by majority vote.

- (2) The President or Chair¹⁸⁵;
- (3) The Executive Secretary¹⁸⁶;
- (4) The Operational General Directorates¹⁸⁷; and
- (5) The General Directorates for Coordination and Administrative Support.¹⁸⁸

The five Competition Commissioners are appointed to staggered ten-year terms of office which can be renewed and they may only be removed for duly justified, grievous cause.¹⁸⁹ The Chairman of the Commission presides over plenary sessions and, in the event of a tie, casts the deciding vote.¹⁹⁰

The Commission has the power to carry out the following functions:

- (a) to *investigate* the existence of monopolies, cartels, anticompetitive practices and concentrations prohibited by the LFCE, in pursuit of which it shall be empowered to request relevant information or documents from private parties and other economic agents;
- (b) to establish the necessary *coordination* to combat and prevent monopolies, cartels, concentrations and unlawful business practices;
- (c) to *issue rulings* on cases within its jurisdiction, assess penalties for violations of the LFCE, and report unlawful conduct affecting competition to the Public Prosecutor's Office;
- (d) to *offer opinions* on the *restructuring of programs and policies* of the federal government that are detrimental to competition;

¹⁸⁵ According to Article 28 LFCE the Chairman has the following functions : to coordinate the work of the Commission; to implement, execute and monitor the internal policies established for the Commission; to publish an annual report on the work of the Commission, including the results of their activities in defence of open competition and free access to markets; to request from Mexican and foreign authorities information required to investigate possible violations of this Act; to act as the legal representative of the Commission; to appoint and remove personnel; to create the necessary technical and administrative units in accordance with the Commission's budget, and to delegate duties to these units; and to carry out such other duties as are conferred under the laws and regulations of Mexico

¹⁸⁶ This body is responsible for the administrative and operational coordination of the CFC: Article 29 LFCE.

¹⁸⁷ There are six of these covering the following areas: legal affairs; economic studies; mergers; investigations; privatisation and bidding processes; and regional coordination.

¹⁸⁸ There are five of these covering the following areas: international affairs; economic norms; control and follow-up; administration and information media.

¹⁸⁹ Article 27 LFCE.

¹⁹⁰ Article 14 of the Internal Rules of the CFC, *op. cit.*

- (e) to *offer opinions*, when requested to do so by the Federal Executive, on the suitability of *draft legislation* and regulations in matters concerning competition;
- (f) where it deems appropriate, to *offer opinions* on the *effect* of laws, regulations, agreements, directives and administrative acts on competition (such opinions are not legally binding, however, nor is the Commission required to issue an opinion);
- (g) to prepare, and ensure compliance with, *manuals* for the internal organization and procedures of the Commission;
- (h) to participate along with other competent agencies in the signing of *international treaties, agreements and conventions* regulating policies on competition, to which Mexico has acceded or intends to accede;
- (i) to carry out such *other duties* as are assigned to it under the laws and regulations of Mexico.¹⁹¹

Prohibitions

Article 8 of the LFCE prohibits “monopolies and measures to exclude competitors” and “any practices that, under the terms of [the LFCE], tend to diminish, harm or impede competition and the freedom to produce, process, distribute or market goods and services”.

Prohibited conduct under the LFCE is divided into “absolute monopolistic practices”¹⁹² and “relative monopolistic practices”.¹⁹³

Absolute monopolistic practices are considered to be practices that are so detrimental to efficiency of the market that they are prohibited *per se* i.e. in and of themselves, without any analysis of the actual effects of such conduct. The presumption of inefficiency cannot be overcome with the so-called “efficiency defence”.

¹⁹¹ Article 24 LFCE.

¹⁹² Defined in Article 9 LFCE.

¹⁹³ Defined in Article 10 LFCE.

Relative monopolistic practices are those practices—other than absolute monopolistic practices that “improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of other persons”.¹⁹⁴ They are not considered illegal however unless it is shown that:

- (1) the entity in question has “substantial market power”¹⁹⁵; and
- (2) the practices in question involve goods or services pertaining to that market.

The “efficiency defence” is available, but the burden of proof is on the person who wishes to rely on this defence.¹⁹⁶

Article 9 details the absolute monopolistic practices that are prohibited. Essentially they are horizontal agreements that have the object or effect of:

- (a) price fixing;
- (b) output restriction;
- (c) market division; or
- (d) bid rigging.¹⁹⁷

All types of vertical agreement are included within Article 10, the article in relation to relative monopolistic practices. Five specific vertical agreements are expressly mentioned in Article 10.¹⁹⁸ Only one type of horizontal agreement is expressly referred to.¹⁹⁹ Article 10 Section 7 provides a catch all prohibition for those practices not expressly mentioned in the rest of the article.²⁰⁰

¹⁹⁴ Article 9 LFCE.

¹⁹⁵ Article 12 LFCE deals with market definition; Article 13 LFCE deals with market power. Article 6 of the LFCE Regulations, *op. cit.*, clarify both these articles.

¹⁹⁶ See Article 6 LFCE Regulations, *op. cit.*

¹⁹⁷ The Federal Commission on Competition considers the following to be indicators of an absolute monopolistic practice under the terms of Article 9: (1) the sale price offered in the national territory by two or more competitors of goods and services that are internationally interchangeable is considerably higher or lower than the international reference price, unless the difference is due to tax provisions, transportation or distribution costs; and (2) two or more competitors establish the same maximum or minimum prices for a good or service or apply the sales or purchase prices dictated by a business chamber association or other competitor for a good or service: Article 6 of the LFCE Regulations, *op. cit.*

¹⁹⁸ These deal with vertical market division; resale price maintenance, tied sales; exclusive dealing agreements and refusals to deal: Article 10 Sections 1 to 5.

¹⁹⁹ A collusive boycott agreement: Article 10 Section 6.

²⁰⁰ Article 10 Section 7 states that relative monopolistic practises may include—once the substantive test is fulfilled—any act which unduly diminishes, harms or impedes competition in the production, processing, distribution or marketing of goods and services. It must be noted however that this ‘catch all’ phrase has effectively been declared unconstitutional—due to its vagueness—by the Mexican

The LFCE admits no exceptions to prohibited practices.

Remedies/Sanctions

According to Article 35 FLCE, the Commission may assess the following penalties:

- (a) order the *suspension, modification or cessation* of the practice or combination at issue;
- (b) order *partial or total divestiture* of a concentration improperly formed, in addition to any fines that may apply;
- (c) levy *fines* of up to 7,500 times the minimum wage applicable in the Federal District for giving *fraudulent testimony* or false information to the Commission, in addition to any criminal liability for such action;
- (d) levy *fines* of up to 375,000 times the minimum wage applicable in the Federal District for engaging in *an inherently restrictive practice*;
- (e) levy *fines* of up to 225,000 times the minimum salary applicable in the Federal District for engaging in a *"relative" anticompetitive practice*, but only up to 100,000 times the minimum wage applicable in the Federal District for violation of Article 10 (VII) of this Act;
- (f) levy *fines* of up to 225,000 times the minimum wage applicable in the Federal District for forming a *concentration* prohibited by this Act, and up to 100,000 times the minimum wage applicable in the Federal District for *failing to notify* the Commission before entering into a transaction for which advance notification is required; and
- (g) levy *fines* of up to 7,500 times the minimum wage applicable in the Federal District *on individuals* who, on behalf of corporate entities, engage directly in restrictive practices or concentrations prohibited under this Act.²⁰¹

In the case of a subsequent offence, the Commission may impose an additional fine of up to double the limit for the original violation.²⁰² The Commission, in deciding

Supreme Court in the *Canal/GWLM* case: see Adriaan ten Kate, 'Unilateral Conduct Under Mexican Competition Law: Form-Based Versus Effects-Based Approaches', (unpublished paper presented at the 5th Trans-Atlantic Antitrust Dialogue on International and Comparative Competition Law, 10th May, BIICL, London) at p. 11.

²⁰¹ See Article 39 LFCE.

whether to impose fines or not, takes into account, *inter alia*, the following information:

- the seriousness and amount of damage arising from the violation;
- whether the conduct was intentional;
- the size of the affected market and the violator's market share;
- the duration of the practice; and
- the general record of the violator.²⁰³

The CFC has no power to impose judicial sanctions.

Procedures

Article 30 LFCE states that:

- (1) the proceedings before the CFC are administrative in nature; and
- (2) the proceedings can be initiated as a result of a complaint by an affected party or *ex officio* at the CFC's own request.

An "affected party" in relation to absolute monopolistic conduct is defined as the public at large; for relative monopolistic behaviour he or she is defined as one who has actually suffered injury (i.e. was actually affected by) the alleged violation.²⁰⁴

Following receipt of a complaint the CFC has ten days to do publish an agreement that will do one of the following:

- (a) order the initiation of the investigation;
- (b) fully or partially dismiss the report/complaint; or
- (c) notify the filer of the report/complaint—only if the written report/complaint omits items required in the Law or its Regulations—in order to clarify or complete the said report/complaint.²⁰⁵

In the case of (c) above, the clarification must be received within fifteen days and the corresponding agreement must be handed down within five days of receiving the notification.²⁰⁶

²⁰² *Ibid.*

²⁰³ For a more comprehensive list see Article 36 LFCE.

²⁰⁴ See Article 32 LFCE.

²⁰⁵ See Article 25 of the LFCE Regulations.

²⁰⁶ *Ibid.*

The investigation period begins with the publication of the agreement—ordering the initiation as *per* (a) above—and may be no less than 30 and no more than 90 days long.²⁰⁷ After completion of the investigation, if there is sufficient evidence to confirm the existence of monopolistic practices or prohibited concentrations, the Chair and Executive Secretary shall issue a writ of presumed liability *summoning* the party presumed to be liable.²⁰⁸

According to Article 33 LFCE, proceedings before the Commission shall be conducted as follows:

- (1) The alleged violator shall be given *notice* of the investigation along with a copy of the complaint, where applicable;
- (2) The alleged violator shall have 30 calendar days thereafter to submit a *response*, along with relevant documents or other evidence;
- (3) Within 30 days of submission of this evidence, *oral or written arguments* shall be out and presented to the Commission;
- (4) When these proceedings have been *completed*, the Commission shall issue its ruling within *60 calendar days*.

If one is dissatisfied with a decision of the CFC one can petition the Commission for reconsideration.²⁰⁹ There is a time limit of thirty days on the petitioning party.²¹⁰ The CFC then has sixty days within which to resolve the issue.²¹¹ Failure to rule within this time frame ensures that the original decision stays in effect.²¹²

If one is dissatisfied with the actions of the CFC, one has two options for judicial relief:

- (1) seek judicial review in a federal district court, also known as an “amparo” action;²¹³ or

²⁰⁷ See Article 27 of the LFCE Regulations. In exceptionally complex cases, the Commission’s Plenary may extend the deadline for periods not exceeding 90 days: *ibid*. There are of course separate deadlines for merger review: see Article 21 LFCE.

²⁰⁸ Article 30 LFCE Regulations.

²⁰⁹ See Article 39 LFCE.

²¹⁰ *Ibid*.

²¹¹ *Ibid*.

²¹² *Ibid*

²¹³ See Articles 103 and 107, Constitution of the Federal Republic of Mexico (1917), *op. cit*.

(2) seek appellate action in the Court of Fiscal and Administrative Justice.²¹⁴

Mergers

Article 16 LFCE prohibits economic concentrations whose object or effect is to “diminish, harm or impede” competition. A concentration is defined as “a merger with or acquisition of control over another firm, or any other act joining together companies, associations, stockholders, business partnerships, trust companies or assets in general, which is carried out between competitors, suppliers, customers, or any other economic agents”.

Exemptions

Reflecting Article 28 of the 1917 Constitution, the LFCE applies to “all economic agents”²¹⁵—including government agencies—who are engaged in activity in any sector of the economy.²¹⁶ Like Article 28, the LFCE admits exceptions in the cases of coinage of money, the mails, telegraphs, and radiotelegraphy, the issuance of paper money by a single bank to be controlled by the Federal Government, and in the case of copyright and patent holders.²¹⁷ Likewise labour associations and export trade associations are also exempt if they are legally constituted.²¹⁸

ANNEX III: CHRONOLOGY OF THE EU-MEXICO FREE TRADE AGREEMENT NEGOTIATIONS

²¹⁴ The prime function of this court is to consider tax cases, but it asserts jurisdiction to review any agency action that involves the imposition of a monetary payment obligation on a private party. See OECD Report, *op. cit.*, at 46.

²¹⁵ See Article 3 LFCE.

²¹⁶ See Article 1 LFCE.

²¹⁷ See Article 4 LFCE.

²¹⁸ See Article 5 LFCE (labour associations) and Article 6 LFCE (export trade associations). In relation to export trade associations Article 6 imposes further conditions than just legality—e.g. voluntary membership and ability to leave group without hindrance— that must be fulfilled before an exemption will be created.

Chronology of the European Union - Mexico Free Trade Agreement	
8 December 1997	Mexico and the EU sign the three instruments serving as legal basis for the new bilateral relation: a Global Agreement, an Interim Agreement and a Final Act.
23 April 1998	The Mexican Senate unanimously approves the Interim Agreement.
13 May 1998	The European Parliament approves the Interim Agreement.
1 July 1998	The Interim Agreement enters into force.
14 July 1998	Creation of the Joint Committee of the Interim Agreement. Start of free trade agreement negotiations.
From November 1998 to November 1999 nine technical rounds of negotiation were alternatively held in Mexico City and in Brussels.	
6 May 1999	The European Parliament approves the Global Agreement.
24 November 1999	After nine technical rounds, the negotiation of the free trade agreement concludes. Press release
16 March 2000	The European Parliament gives a favorable opinion on the results of the free trade negotiation.
20 March 2000	The Senate approves the Global Agreement and the results of the free trade negotiation. The European Committee approves the results of the goods negotiation.
23 March 2000	Sitting of the Joint Committee of the Interim Agreement and adoption of the goods negotiation results. Signature of the Lisbon declaration on the new association between Mexico and the European Union.
1 July 2000	Entry into force of the agreement (goods). Text of the Mexico - EU FTA
27 February 2001	Sitting of the Joint Committee of the Global agreement and adoption of the trade in services, movements of capital and related payments, and intellectual property subjects. Joint press release
1 March 2001	Trade in services, movements of capital and payments, intellectual property, and government procurement enter into force.

	<p>The political and cooperation aspects of the Global Agreement enter also into force.</p> <p>From this day on, all the legal instruments of the agreement are in force.</p>
2 October 2001	First meeting of the Mexico - EU Joint Committee. Joint press release
13 May 2002	Second meeting of the Mexico - EU Joint Council. Joint press release
18 May 2002	First Mexico - EU Summit. Press release
3 October 2002	Second meeting of the Mexico - EU Joint Committee. Joint press release
26 November 2002	First EU-Mexico Civil Society Forum. Joint press release
27 March 2003	Third meeting of the Mexico - EU Joint Council. Joint press release

ANNEX IV: EU-MEXICO QUESTIONNAIRE

Part 1: Questions Specific to the Competition Provisions of the EU-Mexico Free Trade Agreement (FTA)

Impact on Competition Enforcement Cooperation

1. What impact have the competition law provisions of the EU-Mexico FTA had upon competition law enforcement cooperation between the EU and Mexico?

- a. Has cooperation between the EU and Mexico in competition matters improved as a direct result of the FTA? Please cite examples that explain why you think this is the case.

- b. Has cooperation between the EU and Mexico in competition matters been unaffected by the FTA? Please cite examples that explain why you think this is the case.
2. Do you believe that the competition provisions of the FTA between the EU and Mexico have contributed in any direct manner to the development of the core principles of either jurisdiction's competition law or policy? If so, how? If not, why not?
3. Do the competition law provisions of the EU-Mexico FTA have any practical effect? Please cite examples.

Objectives

4. To what extent have the objectives of the competition provisions of the EU-Mexico FTA been achieved?
5. What are the factors that triggered the negotiation and signing of the EU-Mexico FTA?
6. Are there any specific reasons why the competition law provisions had to be included in this FTA? Which party and within which department or ministry was the demandeur?

Benefits of the Competition Provisions

7. Are the benefits that the competition provisions in the EU-Mexico FTA offer positive, net of their expense in negotiation and upkeep? If so how do you measure this?
8. Are the net benefits of the competition provisions of an FTA positive where agency-to-agency agreements already exist? If so, why? If not, why not?

9. Please name any examples of cases/parties that have benefited directly from the competition provisions of the EU-Mexico FTA?

10. Have the trade summits and the meetings of senior trade officials under the EU-Mexico FTA produced any direct benefits for competition law enforcement in the EU and Mexico?

Limitations

11. What, if any, are the limitations of an FTA as an instrument of competition enforcement cooperation?

12. What is possible in terms of cooperation in competition enforcement as a result of the EU-Mexico FTA? Can you account for any discrepancy between the potential and actual results of the EU-Mexico FTA?

Confidentiality

13. How worried should businesses be about the possible consequences for confidential business information under the EU- Mexico FTA? Why?

Trust

14. What impact do the competition law provisions of the EU-Mexico FTA have upon the development of trust between the European and Mexican competition authorities?

15. Are FTAs and the regular trade summits or meetings between senior trade officials that they set up conducive to the development of trust required to improve enforcement cooperation between competition officials? How? What examples illustrate your point?

16. Would the use of dispute settlement procedures under the EU-Mexico FTA be detrimental to the cooperative relationship that has been created between the relevant competition authorities? If so, how? If not, why not?

Exchange of Information

17. Does the EU-Mexico FTA require the exchange of information that would otherwise not be accessible to the requesting partner? If not does it allow, i.e. create additional authority for, information exchanges that would otherwise be impossible? If not does it provides new channels or procedures for exchanges which would already be allowed but are given a more formal framework in the agreement?

Trade and Competition

18. What relationship exists between competition obligations and trade obligations on both the EU and Mexico? In particular, do the competition provisions of the FTA only cover competition matters *that affect trade* or do they cover competition matters in general?

Failure to Act

19. What if any are the sanctions, both formal and informal, for “failure to act” on the part of one competition authority under the EU-Mexico FTA? Have these sanctions ever been used? Explain with examples.

Hard Law/Soft Law

20. Would you describe the EU-Mexico FTA as “hard law” or “soft law”? Explain.

21. Are the EU-Mexico FTA’s formal rules broad in scope and consistent with the emergence of strong informal contacts?

Mutual Recognition

22. Does the EU-Mexico FTA require both parties to mutually recognise the competition provisions of the other signatory party?

Improvements

23. How, in your opinion, would you improve upon the competition provisions in the EU-Mexico FTA?

Approval?

24. Despite your possible criticisms, would you recommend the competition provisions of the EU-Mexico FTA as an instrument of competition enforcement cooperation to other trading partners? Why?

Part 2: Questions Specific to the Issue of an Agency-to-Agency Competition Enforcement Cooperation Agreement between the EU and Mexico

Need

25. Do the EU and Mexico need an agency-to-agency competition enforcement cooperation agreement? Why?

Benefits

26. What would be the benefits to the EU and Mexico of an agency-to-agency agreement?

27. How would the development of trust between the competition authorities of the EU and Mexico be affected by the conclusion of a competition enforcement cooperation agreement between their competition authorities?

28. Would the conclusion of an agency-to-agency agreement between the EU and Mexico contribute in any direct manner to the development of the core principles of either jurisdiction's competition law or policy? If so, how? If not, why not?

29. Would you agree with the assertion that, *in contrast to the FTAs*, enforcement cooperation agreements at an *agency-to-agency level* contribute a very great deal to enforcement cooperation directly in terms of:

- a. providing the formal mechanism through which cooperation can occur;
- b. providing the requisite information and trust through the operation of the mechanism; and
- c. providing opportunities for further exchanges of information, both formal and informal?

Limitations

30. What, if any, are the limitations of an MOU or agency-to-agency agreement as an instrument of competition enforcement cooperation?

Confidentiality

31. Is the fact that confidential information cannot usually be exchanged under agency-to-agency agreements a help or hindrance for the competition authorities?

Approval?

32. Despite your possible criticisms, would you recommend an agency-to-agency agreement as an instrument of competition enforcement cooperation to other trading partners? Why?

**Part Three: General Issues Relating to Competition Enforcement Cooperation
Between the EU and Mexico**

The National Competition Laws of the EU and Mexico

33. Can you think of any aspect of European competition law that is particularly worrying for the Mexican competition authorities, from a trade, competition or competition law enforcement perspective?

34. Can you think of any aspect of the Mexican competition law that is particularly worrying for the European competition authorities from a trade, competition or competition law enforcement perspective?

35. Do the competition authorities in the developing country partner i.e. Mexico have policy objectives other than protecting the competitive process, consumer welfare, or economic efficiency, such as the promotion of small to medium-sized enterprises or other social objectives e.g. employment. Does the agreement contain any provisions which could directly or indirectly affect the ability of Mexico to give effect to these aims?

36. Are there different standards of legal protection between EU-Mexico in competition matters (e.g. criminalisation of cartels), and if so how has this situation been addressed?

Cooperation between the Competition Authorities of the EU and Mexico

37. What factors, both formal and informal, impede enforcement cooperation between national competition authorities?

38. What factors, both formal and informal, can improve enforcement cooperation between national competition authorities?

39. In practice, is informal cooperation more effective in resolving potential disputes or complicated cases than formal cooperation? Why?

40. Are formal arrangements necessary to facilitate informal cooperation, despite their various limitations? To that end are they sufficient?

41. Can you identify and explain the factors that determined the choice of cooperative instrument in the relationship between the EU and Mexico?

42. Other than notifications can you detail any concrete examples of enforcement cooperation in practice between the competition agencies of the EU and Mexico?

43. Please detail the *flow of cooperation* between the competition agencies of the EU and Mexico:

a. How many notifications have the European competition authorities received from Mexico since the signing of the EU-Mexico FTA?

b. How many notifications have the Mexican competition authorities received from the EU since the signing of the EU-Mexico FTA?

c. How many requests for cooperation have the European competition authorities received from Mexico since the signing of the EU-Mexico FTA?

d. How many requests for cooperation have the Mexican competition authorities received from the EU since the signing of the EU-Mexico FTA?

e. How many requests for the use of positive comity have the European competition authorities received from Mexico since the signing of the EU-Mexico FTA?

f. How many requests for the use of positive comity have the Mexican competition authorities received from the EU since the signing of the EU-Mexico FTA?

44. What remains to be done in relation to the development of cooperation between the EU and Mexico in competition enforcement matters?

Notification

45. How are mutual notification provisions necessary or helpful in bilateral agreements?

46. Please detail any examples of notification in practice between the agencies of the EU and Mexico?

47. How did notification benefit either party in the above examples?

Positive Comity

48. Please detail any concrete examples of the use of informal or formal positive comity in practice between the agencies of the EU and Mexico?

49. Do you believe the use of positive comity has benefited either the EU or Mexico? Why?

Trust

50. How important to improved enforcement cooperation is the development of trust between national competition authorities?

51. How do governments usually promote trust between national competition authorities?

52. How do the competition agencies themselves usually foster trust with their counterparts abroad?

53. Does trust precede or follow the signing of competition agreements? In other words, is trust a pre-requisite for or a consequence of such agreements?

Assistance

54. How important is technical assistance (in its many forms) for the operation of a so-called North-South agreement on competition enforcement cooperation?

The Relationship between FTAs and Agency-to Agency Agreements

55. Would an agency-to-agency agreement be ineffective in the absence of a corresponding FTA, with its dispute resolution provisions? If so, how? If not, why not?

56. Are the competition law provisions of the EU-Mexico FTA weakened by the absence of an agency-to-agency agreement? If so, how? If not, why not?

Potential Conflict?

57. Are agreements of the kind concluded between the EU and Mexico a way of exporting the competition regime of the Northern partner to the Southern partner? If this can be documented, then is there a potential for future conflicting provisions should a developing country, in this case Mexico, sign agreements with more than one Northern nation?

Improvements/Recommendations

58. How, in your opinion, could competition enforcement cooperation be improved between the European and Mexican authorities?

59. What is the next step in the process of improving competition enforcement cooperation between the competition authorities of the EU and Mexico?

60. Do you have any further comments on the contribution of bilateral trade or competition agreements to competition law enforcement cooperation between the EU and Mexico?