

Venezuelan experience in the application of an antimonopoly policy: horizontal agreements.

The application of provisions against agreements between competitors is the area where there is the greatest experience in Venezuelan competition policy. In the period between 1992 and 1997, the Superintendence issued twenty decisions involving the application of articles 9 and 10 of the Act. Some of those cases are discussed in this section. In particular, all the cases of agreements between competitors relating to the application of articles 9 and 10 which were the subject of judicial proceedings are discussed. In these cases, and especially the initial decisions, Procompetencia had to develop criteria on the basis of which an agreement between competitors should be evaluated. One of those criteria was to make a conceptual distinction between “concerted practices” and “agreements” between competitors, and to establish the items of evidence essential to demonstrate each practice, so as to be able to make decisions and apply the required sanctions.

It is important to point out that although Procompetencia found the existence of several cartels, some of its decisions did not stand, following review by the First Court of Administrative Litigation concerning the legality of the administrative activity. However, the decisions of the First Court of Administrative Litigation were always based on the existence of procedural defects and not defects of substance.

1. – The premixed concrete case: the beginnings.

In this case¹, the first investigated by Procompetencia, proceedings were instigated against three producers of premixed concrete in the metropolitan area of Caracas in 1992 which had drawn up identical price lists and tables.

A first element which had to be addressed was the conceptual difference between “concerted practices” and “agreements” between competitors. On this occasion, the Superintendence maintained that although both practices require an exchange of consent between the firms to implement the practice, concerted practices also required the material execution of the agreement. According to this criterion, there are fundamental differences when it comes to proving an agreement and a concerted practice. In the former case, it is sufficient to obtain a written instrument from which the intent to collude can be identified, whether or not it has been executed. In the second case, there is no express agreement between the parties (or rather, the existence of such an agreement cannot be proved), but it can be inferred from the actions of the firms that such an agreement exists.

In the particular case of the producers of premixed concrete in the metropolitan area of Caracas, although the Superintendence could not show the existence of an express agreement between them, there was evidence that they were engaging in a concerted practice.

¹ Decision No.SPPLC/0002-93 of 17 May 1993. “Administrative doctrine of PROCOMPETENCIA 1992-1993”.

Thus the necessary items of evidence were established to demonstrate the concerted practice. For that purpose, Procompetencia leading decisions of the Commission of the European Communities on the subject used as a reference, namely: the S.A. Française des matières colorantes (Francolor) v. Commission of the European Communities (dyes) case,² and the Suiker Unie v. Commission of the European Communities (sugar industry) case³. The Procompetencia decision uses the principles enshrined in those decisions to state that it is contrary to the rules of competition “for a producer to cooperate with his competitors in any way to determine a coordinated course of action relating to price increases and to ensure their success by eliminating in advance any uncertainty concerning the conduct of the others in connection with key aspects such as the amount, date and place of the increases”⁴.

The firms investigated, for their part, claimed that the equality of the prices was not evidence of shared intentions. They also argued that the price lists were for reference purposes, and that the prices actually charged were different from those in the price lists. Lastly, they indicated that the price lists were applied to a small percentage of total transactions in the market. However, the Superintendence held in its decision that the premixed concrete firms were guilty of concerted practices in fixing prices and imposed fines on them. The price lists had similarities not only for the prices of normal and special premixed concrete, but also in the surcharges on sale of the product and the period of validity of the lists. Furthermore, it was indicated that the existence of reference price lists used between competitors has a direct impact on the setting of the prices actually charged.

In addition, Procompetencia considered that there were additional factors in the market investigated which allowed the implementation of the concerted practice, among which it highlighted:

“...the small number of premixed concrete firms in the relevant market for premixed concrete sold in the Caracas area, the fact that premixed concrete is a uniform and homogenous product since its essential characteristics do not vary from one firm to another, and the communication facilities that existed between the firms because they belonged to the same trade association are all concurrent economic factors which suggest the effective existence of a cartel between the firms investigated”⁵.

The judgement of the First Court of Administrative Litigation: the first round.

² Compendium of EU competition decisions 1964-1972, page 130, Decision 69/43.

³ Compendium of EU competition decisions 1973-1980, page 3, Decision 73/109.

⁴ S.A. Française des matières colorantes (Francolor) v. Commission of the European Communities.

⁵ Decision No.SPPLC/0002-93 of 17 May 1993. “Administrative doctrine of PROCOMPETENCIA 1992-1993”, p.70.

The Venezuelan Competition Act envisages the possibility of firms sanctioned by Procompetencia appealing to the administrative litigation jurisdiction⁶ to review the legality of the sanction. Accordingly, the premixed concrete firms appealed to the First Court of Administrative Litigation seeking to have the sentence of the Superintendence overturned, asserting the following arguments, among others,:

1.- The official who conducted the administrative proceedings was not competent to do so. Under the Act on the Promotion and Protection of the Exercise of Free Competition, the administrative proceedings must be conducted by the Assistant Superintendent.

2.- There was a false supposition in law and in fact in the decision. The false supposition in law was the incorrect view that it was not necessary to show the anti-competitive effects of the supposed practice restrictive of competition. The false supposition in fact was the absence of evidence to show an agreed intention by the competitors to fix identical prices, given the reference character of the price lists.

3.- The abuse of power, evident from the transformation by the administration, contrary to the purpose of the law, of *natural* presumptions into presumptions of *law alone*, when the sanctioned firms cannot rebut the presumptions derived from the objective confirmation of the prohibited conduct.

4.- The calculation of the fine does not comply with the parameters laid down in article 50 of the Act on the Promotion and Protection of the Exercise of Free Competition⁷.

In the first judicial review of a Procompetencia decision, the First Court did not rule on arguments of substance. The arguments used to decide that the decision was null and void were that the official who conducted the case was not the Assistant Superintendent, who had that function under the law and who must be appointed by the President of the Republic. In fact, the Superintendence was unaware that as an administrative organ it was subject to a system of administrative law whose purpose was to defend individuals against excesses of the public administration. The designation by the Superintendent of the Director of Investigation and Promotion to act as a presiding official was illegal on the grounds of *ultra vires*, since only the President of the Republic had that power, and only the assistant Superintendent could notify the opening of proceedings and conduct them.

Medical liquid oxygen case.

In this case, two producers of medical liquid oxygen who jointly held a 75% share of the market had been issuing identical price lists for liquid oxygen in bottles since 1990. In

⁶ Article 53 of the Act on the Promotion and Protection of the Exercise of Free Competition.

⁷ The amount of the fine shall be fixed in relation to the seriousness of the offence, taking into account: (1) the manner and scope of the restriction of competition; (2) the size of the market affected; (3) the market share of the defendant; (4) the effect of the restriction on free competition, on other actual and potential competitors, on other parts of the economic process and on consumers and users; (5) the duration of the restriction of competition; and (6) recurrence of the prohibited conduct.

1993, the Superintendencia decided to open proceedings against these firms, based on a complaint about concerted practices⁸.

In this case, Procompetencia maintained the principles on concerted practices established in the premixed concrete case. It was thus indicated that the elements that constituted a concerted practice were the existence of collusion between the parties to the agreement (objective evidence of the practice) and the will of the parties to act in concert (intellectual element).

As in the previous case, the influence of doctrine and comparative jurisprudence was used extensively by the Superintendencia. Thus, it was indicated in the decision that parallel conduct in firms is evidence of the existence of an agreement not to compete, as pointed out in United States case law in the decisions in *Morton Salt Co. v. U.S.*; *Pittsburgh Plate Glass v. U.S.*; and *Safeway Stores v. F.T.C.* It also makes reference to the criteria set out in the “Dyes”, “European Sugar Industry”, “Pittsburgh Corning Europe”⁹ “Vegetable Parchment”¹⁰, “Hi Fi Pioneer”¹¹, “Benelux Glass”¹² and “Zinc Producers Group” cases¹³. In these cases, it is considered that the fixing or simultaneous increasing of prices by identical percentages for the same products, the application of those increases on the same or similar dates, the lack of competition in the market, the homogeneity of the products, the contacts or exchange of information between the firms and the discriminatory measures against competitors who are not party to the agreement are indications of the existence of a concerted practice.

The investigated firms claimed that during the administrative proceedings their right to defence had been violated in that they were not allowed to see the other’s price lists, thus they argued that they did not have access to the items that constituted the prohibited conduct. The investigated firms also argued that the price lists were for reference and that did not “*per se*” alone constitute a violation of competition law. For the oxygen producers, parallel prices do not constitute a concerted practice, but can be evidence that must be added to other evidence to prove the practice. In any case, the firms justified the parallel prices as an expression of the fierce competition in highly concentrated markets where economic agents have similar costs structures.

In this case, the Superintendencia held that there was sound, precise and convergent evidence that left no room for doubt that there had been a concerted practice, such as the parallel issue of reference price lists for exactly the same dates by the firms involved and the contacts between the firms. In addition, the possibility that there had been a concerted practice relied on the following characteristics of the liquid oxygen market: concentration of the market, advertising of prices lists as a form of control by the cartel, the homogeneity of the product as a factor in executing the practice and the inelasticity of

⁸ Decision No.SPPLC/0002-93 of 15 November 1993. “Administrative doctrine of PROCOMPETENCIA 1992-1993”.

⁹ Compendium of EU competition decisions 1964-1972, p. 337, Decision 72/403

¹⁰ Compendium of EU competition decisions 1973-1980, p. 493, Decision 78/252

¹¹ Compendium of EU competition decisions 1973-1980, p. 709, Decision 80/256

¹² Compendium of EU competition decisions 1981-1985, p. 475, Decision 84/388

¹³ Compendium of EU competition decisions 1981-1985, p. 485, Decision 84/405

demand. For all these reasons, the Superintendence decided that the investigated firms were guilty of concerted price-fixing practices.

The judgement of the Court: is the Superintendence properly evaluating the evidence?

The firms sanctioned by the Superintendence appealed to the First Court of Administrative Litigation seeking to have the sentence of the Superintendence overturned, claiming, among other arguments, that:

1.- Their right to a defence had been violated because they had been denied access to the evidence that was being used to prosecute them for the matter for which they were sanctioned, depriving them of the defence provided in article 31 of the Act on the Promotion and Protection of the Exercise of Free Competition¹⁴.

2.- Procompetencia had incorrectly interpreted the scope of the Act on the Promotion and Protection of the Exercise of Free Competition as regards the items of evidence of what constitutes a concerted practice. In this regard, they state that it is not in accordance with the Act that concerted practices can be proved by indications and presumptions, because there is no legal basis for that.

3.- Procompetencia based its decision of false facts when it claimed to infer conduct to fix prices from a single indication (the price lists), without their being other evidence of such a concerted practice.

4.- The lack of any mention in Procompetencia's decisions of the restrictive effect on free competition, since for the investigated firms, the purpose of the Act is to sanction conduct which has a restrictive effect and not conduct which has not produced an anti-competitive effect.

Concerning the complaint that the firms were denied a defence, the First Court of Administrative Litigation held that review of the administrative proceedings and the evidence that demonstrated the practice is an expression of the right to defence enjoyed by persons in a state governed by the rule of law, and thus will allow the accused to defend themselves fully, asserting and proving what is necessary to defend their legal position to the full. Thus, in the face of any conduct by the Administration aimed at restricting or obstructing the subjects of the proceedings from reviewing and examining the administrative proceedings deprives those persons of a defence. For that reason, as the action by Procompetencia restricted the right to defence by denying the firms access to the evidence which was being used to convict them (identical price lists), the First Court of Administrative Litigation annulled the sanction.

Notwithstanding the foregoing, the First Court of Administrative Litigation took care to explain the value of the evidence and presumptions as proof with special emphasis on

¹⁴ Article 31 provides that data and information provided by firms shall be confidential, except where the Act requires their registration or publication. Under that article, Procompetencia decided not to allow access to the price lists of the firms investigated in the proceedings.

concerted practices. In that respect it points out with reference to the decision of the Superintendence that there are two fundamental and crucial pieces of evidence which served to show the concerted practice in the present case, namely:

- 1.- The parallel conduct, evidenced by the reference price lists and the same dates of validity.
- 2.- Contact between the parties, particularly due to the contacts between the sanctioned firms as members of the National Association of Gas Manufacturers of Venezuela.

With respect to the first, the First Court of Administrative Litigation indicated that the violation of the firms' right to defence by denying access to the price lists prevents that evidence being used as evidence of the concerted practice. As regards the evidence of contacts between the firms, it was pointed out that

“...the National Association of Gas Manufacturers of Venezuela allows direct communication between its members, which facilitates exchange of information, and that meetings of the executive board, made up of firms members of the Association, on marketing issues are indicative of contacts between firms which could refer to pricing.

Beyond that, it cannot be inferred, as the Superintendence did, that there was complete evidence of acting in concert.

In the light of the foregoing, the Court holds that it is not in accordance with the spirit of the constitutional text to take as a fundamental proof for the sanction imposed on the appellant firms the existence of an Association which groups manufacturers of gases at national level.”¹⁵

As regards the items of economic evidence used by the Superintendence to determine the feasibility of implementing the concerted practice, the First Court of Administrative Litigation held that for such factors to be taken as evidence, it is essential that the same inference can be drawn from each concerning the matter under investigation. In making such an analysis, the First Court of Administrative Litigation considered that factors such as the lack of competition in the market, the homogeneity of the products and the nature and characteristics of the firms, far from evidencing a concerted practice, reflected the characteristics and specific conditions of the product and its market.

Airlines case: competition in public services.

In 1994, the Superintendence initiated proceedings into the conclusion of agreements to fix prices, limit production and share markets against two airlines which had signed and executed a commercial cooperation agreement for the joint operation of routes to Havana and Santo Domingo, in which they fixed prices and rationalised routes from Caracas.

¹⁵ Judgement of the First Court of Administrative Litigation of 5 June 1997.

On that occasion, the Superintendence said that agreements between competitors which consist of fixing prices, directly or indirectly, by their nature constitute a restriction of competition and that such conduct or practices are one of the most serious contemplated in countries with a tradition of free competition. Thus, the Superintendence states that the seriousness of that conduct is due to the fact “that the proper functioning of a price system, where prices are determined by the free play of supply and demand, is necessary in order for competition in the market to yield the maximum benefit to producers and consumers. For this reason, supervision of conditions which ensure that these conditions pertain in the market are one of the paramount aims of the Act on the Promotion and Protection of the Exercise of Free Competition”¹⁶.

As regards agreements to limit production, the Superintendence stated that they tend to cause a rise in the price of a product or service or contain a fall in prices, thus a restriction of competition can be observed. In this connection, it indicates that “given the normal behaviour of demand, restricting production can have the effect of increasing prices, even though the increase cannot be calculated directly. Consequently, if competitors in concert fix controls to restrict the quantity of goods to be supplied or services provided, the takers will be forced to pay a higher price. This control of supply allows parties to the agreement to manipulate demand and achieve the price they desire. In consequence, such conduct frequently forms part of broader agreements in cartels to fix prices or share markets”¹⁷.

For this reason, it was considered that as the service provided by the airlines is the carriage of passengers on regular flights, an agreement to rationalise routes reduces the number of flights and limits the service. Procompetencia rejected the firms’ argument that the rationalisation agreement allowed them to operate more efficiently, since it would allow them to increase the number of passengers on each flight and reduce costs. Indeed, it was held that in a competitive market, each airline can decide the number of flights that it will provide based on costs and demand. If a flight ceases to be profitable to the provider, the provider can cease to operate it, without the need to agree that with its competitors. Finally, the decision of Procompetencia determined that the agreement did not imply a sharing of the market or geographical areas, and fines were imposed for agreement to fix prices and limit production.

The Superintendence adopted the criteria set out in European and United States doctrine and case law stemming from competition authorities concerning agreements between airlines, in which the prejudicial effects and injury caused by agreements between two or more airlines to fix fares (*Ahmed Saeed Flugreisen v. Zentralfunktionärvereinigung der Bundesrepublik Deutschland* case in the European Court of Justice).

The Superintendence also adopted the criteria set out in the report by the Department of Justice concerning the injury caused by the implementation of agreements on fares within

¹⁶ Decision No. SPPLC/00030-94 of 8 July 1994. “Administrative doctrine of PROCOMPETENCIA 1994”.

¹⁷ Decision No. SPPLC/00030-94 of 8 July 1994. “Administrative doctrine of PROCOMPETENCIA 1994”, p.340.

the International Air Transport Association (IATA) to determine the restrictive character of the Pool agreement or rationalisation of routes from Caracas to Havana and Santo Domingo.

The judgement of the Court: can competition policy be applied to public services?

This case was again decided in favour of the investigated firms. The First Court of Administrative Litigation decided to annul the decision because it was not within the jurisdiction of the Superintendence. Thus, the Court found that firms which engage in an economic activity which consists of exclusive public services¹⁸, where private parties participate by means of a concession, cannot be investigated or sanctioned by a competition authority. The First Court of Administrative Litigation points out that in such cases, the activity is subject to the limitations of the regulatory authority created for the purpose by the State to supervise its activity. For the Court, there is no free competition to protect in such cases, since it is not the market but an external government organ which regulates the activity¹⁹.

We need to make some critical comments concerning this judgement. Firstly, by implication, the judgement claims to ignore the right to economic freedom of firms which carry out an economic activity which constitutes a public service, and which represents the constituent element of a system of free competition and markets. To state that there is no free competition to protect in cases where private persons participate by concession in providing exclusive public services, such that free competition exists only in those economic activities which can be carried on freely without any limitation is wrong. As indicated above, the different variables of competition available to firms in a market are inter-dependent. The fact that one of them is fixed by particular legislation does not mean that the firms cannot compete in other variables. Although it is true that entry and exit from such activities by private persons, and thus free competition, is limited by the State, it is no less true that when that limitation is removed, the private persons to some extent maintain their freedom in managing the business. Economic or enterprise freedom is a true subjective right which cannot be waived or denied, and it must be maintained and respected, at least to the extent of an inalienable core essential for the exercise of that right.

Thus it can be asserted that the basic decisions which affect the operation of the firm and management policies which may be adopted in providing various services are a palpable example of this essential core in the free operation of the firm in activities where there is maximum State intervention. The State's powers of control and management are limited to factors related to the provision of the service and thus cannot extend to the management autonomy of the private concessionaire. The rule seems clear, the private person manages the public service and the State supervises its operation.

In addition, the exercise of economic freedom is clear when the State places private persons who have obtained a concession in conditions of competition. These conditions

¹⁸ Passenger air transport is declared a public service in the Civil Aviation Act.

¹⁹ Judgement of the First Court of Administrative Litigation of 24 September 1997.

are clear from the participation of several firms in providing the same public service, from the fixing of margins for setting prices on a competitive basis which allow the provision of good quality, competitive, safe and sustainable services, and from the prohibition of monopoly practices in the provision of the service (price agreements, sharing of geographical markets, practices which hinder the sustainability of the service, etc.).

The opinion expressed by the First Court of Administrative Litigation was recently modified by the Supreme Court of Justice in the case of *Aerovías Venezolanas S.A. v. Ministry of Transport and Communications*²⁰. In that judgement, the Supreme Court set aside the opinion of the First Court that economic freedom is affected absolutely and generally because it is a public service. On the contrary, such limitations specific to the provision of a public service may co-exist with economic freedom and free competition. Thus, the Supreme Court held that:

“This circumstance of coexistence or validity of economic freedom even in the context of reserved activities is not alien to our legal system, in which, for example, concessions are granted for “cellular telephony” and “operation of the phosphorus industry” in which more than one firm is present and able to compete with each other, based on market rules, to the extent that they do not conflict with the system of reserved activities”²¹.

The judgement of the Supreme Court of Justice thus reflects the interpretation by the Superintendence in the airlines case.

The pharmaceutical laboratories case: (or is it possible to compete when prices are regulated?)

At the end of 1994, the Superintendence initiated proceedings against 37 pharmaceutical laboratories for concerted practices in fixing conditions of sale²². The laboratories had changed their conditions of sale between June and August 1994, as follows: (1) sales on credit up to twenty (20) days maximum, from the date of delivery of the goods, with a discount of up to 2%. From the 21st day, interest on arrears would be applied at market rates. (2) Cash sales, if payment made within five (5) days following delivery, a discount of 5 % would be given for prompt payment.

The case in question is important since at the time when the laboratories decided jointly to modify their conditions of sale and set new conditions, there was regulation of maximum prices for sales of medicines to the public. This was asserted by all the laboratories in the course of the proceedings as an argument against the Procompetencia investigation.

²⁰ Judgement of the Administrative Policy Division of 8 June 1998.

²¹ *Idem*

²² Decision No. SPPLC/0025-95 of 26 May 1995. “Administrative doctrine of PROCOMPETENCIA 1995”.

For its part, the Superintendence maintained, as in previous decisions, that concerted practices suppose a series of acts by the economic agents who engage in the practice which can only be determined by examining the market. Thus, it indicates that one of the instruments necessary to examine the practice is the concept called in antimonopoly theory as “parallelism” of the competition variables in the markets.

Thus the Superintendence indicates that parallelism in the concerted practices has a time dimension and a quantitative dimension. The time dimension refers to the simultaneous modification of a variable in time, while the quantitative dimension refers to the determination of a level of the supposedly concerted competition variable, within which an alignment of the competitors participating in the practice will be observed.

Thus the Superintendence indicates that to “prove the existence of concerted practices in the determination of a competition variable, such as, for example, conditions of sale, resort has to be made to observation of the behaviour of that variable over time, paying special attention to any pattern or behaviour which might apply generally to firms operating in the market in which the practice is occurring, for example, a simultaneous variation in the same direction and of the same magnitude.”.

The Superintendence considered that the laboratories, by their concerted action, were seeking to use their bargaining power to impose the same conditions of sale on all firms with which they did business. Thus it declared that there was a restriction of competition in the fixing of the discounts offered by competing firms intended to prevent the use of variables with which they could effectively compete. The pharmaceutical laboratories were sanctioned and fined.

As regards the arguments wielded by the laboratories concerning the regulation of prices of medicines and the possibility of fixing conditions of sale such as the discount for prompt payment and conditions of sale on credit, given the State regulation of that market, the Superintendence indicated that:

“While it is true that competition is in fact limited by the Executive Power through the regulation of prices to the consumer, the fact remains that at other levels in the chain, variables such as terms of trade, credit, etc. are the result of an interplay, and so long as this is respected, greater benefits are guaranteed to economic agents operating in the rest of the chain.

In the particular case of the pharmaceutical laboratories, despite the fact that their economic activity takes place within the regulatory framework, there are other variables with which they can effectively compete and the way in which they manage them will be to the benefit or detriment of consumers.

The existence of controls in other variables may be a mitigating factor but at no time an exemption from the prohibition of agreements and concerted practices as laid down in

*article 10 of the Act on the Promotion and Protection of the Exercise of Free Competition.*²³

All the laboratories appealed to the First Court of Administrative Litigation seeking nullity of the decision of the Superintendence. Judgement in the proceedings is currently pending.

Case of rates for cinema advertisements in newspapers.

In March 1996, the Superintendence opened an investigation into six newspaper publishers in the capital region on receiving from the Ministry of Development²⁴ a letter addressed to the Association of Venezuelan Cinema Operators signed by six publishers in which they indicated an increase in rates for the publication of cinema advertisements in their newspapers.

During the investigation, the Superintendence found that the agreement between the publishers to fix rates for cinema advertisements had been going on since May 1994. In its decision, the Superintendence held that the agreement investigated constituted a horizontal agreement to fix prices, indicating in that regard that “price is possibly the most important factor in a commercial transaction and the most visible signal that economic agents send to the market. An agreement between competitors to fix prices distorts the market, and thus prevents the market from sending the principal message used by consumers to decide their preference between one product and another²⁵.”

In the case in question, it was indicated that as the price of cinema advertisements was not the result of the independent observation and consideration by the publishers, taking into account their costs, raw materials, technology and other variables which determine the individual supply but had become the result of an express agreement, there was clear evidence of the will to abandon any intention to compete on the basis of price, one of the main variables which affect business activities.

Finally, the publishers were fined and ordered to cease the practice immediately. Of the six publishers sanctioned, four appealed to the First Court of Administrative Litigation seeking nullification of the decision. However, only two of the appeals were held to be admissible, and a judgement in the proceedings is currently pending.

Case of Carabobo State Pharmaceutical College: agreements to exclude a competitor.

In February 1995, the Superintendence initiated proceedings for alleged violation of articles 9 and 7 of the Act against a regional pharmaceutical association (the College)

²³ Decision No. SPPLC/0025-95 of 26 May 1995. “Administrative doctrine of PROCOMPETENCIA 1995, p. 207”.

²⁴ Now the Ministry of Industry and Trade, following the reform of the Organic Law of the Central Administration.

²⁵ Decision No. SPPLC/0017-96 of 18 July 1996. “Administrative doctrine of PROCOMPETENCIA 1996”, pp.251-252.

which had agreed at its assembly to boycott any drugs firm which sold products to a new competitor (municipal pharmacy), i.e. the existence of an agreement to exclude a competitor by incitement not to sell to it the products which it requested (medicines).

In that case, the Superintendence interpreted the content of the provision as prohibiting a boycott, which it took to mean the following²⁶: (a) agreements not to compete in negotiations with their suppliers; (b) agreements to exclude a new competitor; and (c) agreements to exclude a competitor from an association (e.g. a joint purchasing group).

In that regard, the Superintendence found that the boycotts to which article 7 refers relate to a practice executed “by a third party, who has been incited to do so by a group of agents or one agent acting alone²⁷. In other words, it requires the presence of three agents. Firstly, the excluded party, secondly, the agent carrying out the action and thirdly, the agent inciting the second to engage in the practice.”

In the case in question, the Superintendence obtained a certified copy of the minutes of the Executive Board of the association concerned in which it expressly stated its intention to boycott a competitor of its member pharmacies. The Superintendence also found that, due to the statutes of the association and its internal structure, it had sufficient influence to force all its member firms to comply with the terms of the declaration, i.e. it was a firm agreement.

These elements led the Superintendence to the following conclusion concerning this case:

“this is a case of a boycott in that certain economic agents agreed to incite third parties to engage in conduct which seeks to prevent the entry of a new competitor or to cause the exit of a competitor, in this case the Municipal Pharmacy. On this occasion the three parties as defined in the provisions of article 7 can be identified, namely, the CARABOBO STATE PHARMACEUTICAL COLLEGE constitutes the first agent with sufficient economic power to incite third parties, i.e. the DRUG FIRMS to engage in anti-competitive conduct against the MUNICIPAL PHARMACY, consisting of refusal to supply medicines to the latter”.

Beers case: increasing the competitor’s costs.

In this case, a group of exclusive distributors of the brewer REGIONAL, entered a complaint about another brewer, POLAR, for allegedly inciting its own distributors to destroy bottles returnable to the former. It would have the effect of increasing its costs and thus encourage its exit from the market.

Although in this case, the complaint was inadmissible due to lack of evidence to infer the possibility that such a practice was occurring, the Superintendence, although in vague

²⁶ See also SPPLC 0030-94 (AEROPOSTAL)

²⁷ SPPLC/0010-95. Administrative doctrine (1995), p.41.

terms, established the parameters by which the prohibition contained in article 8 should be understood.

“From the text of the article it can be taken that for there to be a violation of this provision, two conditions are required, namely: firstly, there must be manipulation of factors of production, distribution, technological development or investment (referred to below as factors). Secondly, that this manipulation causes harm to free competition. Thus this article prohibits any effect on free competition provided that it is caused by the manipulation of factors.

In theory, the withdrawal, retention and destruction of a competitor’s bottles would be a manipulation of factors of production of an excluding character. However, as indicated above, to order the opening of proceedings to determine the prohibited practices, the Superintendence must presume that the practice is occurring. This is a value judgement which begins with a presumption from the arguments and evidence presented by the complainants that the practice is genuinely occurring. It is therefore necessary to determine whether there is evidence that allows the presumption that POLAR and its distributors engaged in the alleged conduct”²⁸.

Although there is practically no doctrine on article 8, in this decision the interpretation of the Superintendence was that for a practice to be considered illegal under that prohibition, an essential item of evidence was proof of the anti-competitive effects.

Final considerations: What does the future hold for the application of legislation against agreements between competitors?

The antimonopoly laws stem from the application of economic science to law. The result surpasses the mixing of two disciplines to become a discipline with its own characteristics and its own systems of analysis. This can also be observed in Venezuelan legislation. With regard to prohibitions of agreements between competitors, the Act on the Promotion and Protection of the Exercise of Free Competition is broad, it includes different categories of agreement which are closely linked to the economic analysis underlying these practices. The content of the provisions to prevent horizontal agreements not only take into account the various economic effects but also distinguishes between the different legal forms that the agreement may take. In addition, there is a marked international influence in Venezuelan doctrine, especially American case law and the doctrine of the European Union.

Nevertheless, the result of the experience of the application of the Act has not been encouraging. No decision of the Superintendence appealed in the Courts has been upheld. However, no decision, whether those involving agreements between competitors or those concerning other dispositions, has been annulled on grounds of economic

²⁸ SPPLC/0023-98 (POLAR and REGIONAL)

analysis or defects in the substance. On the contrary, the judges have focused firmly, no doubt with reason, on the procedural defects of the administrative decision.

The reason why the decisions of the Superintendence have been so ineffective in the courts is most probably the complexity of the analysis involved. In the legal academic world, at least until now, the development of tools based on economic analysis has not been usual and it is not clear that it would be reasonable to do so. The accumulation of economic knowledge involves a cost, and the proportion of antimonopoly cases in the First Court of Administrative Litigation is certainly insignificant. However, the constantly reiterated fact that all the decisions of the Superintendence have been annulled raises a dilemma.

The emphasis by the courts on the procedural aspects of administrative decisions can be seen as a signal against the Venezuelan antimonopoly organisation. The agents can regard Venezuelan antimonopoly policy as a cost and not as a barrier to anti-competitive practices. If the benefits of collusion are greater than the costs of the judicial proceedings, firms have an incentive to engage in it. In small, low-income economies like Venezuela, industries tend to be more concentrated, and the risks of collusion rise, thus to send a signal against the antimonopoly organisation may encourage collusion in a large number of industries, and this clearly imposes costs on consumers.

The foregoing is a challenge for competition policy in Venezuela. In the short term, the agency should concentrate on improving its legal expertise and substantiating its decisions in sanctions proceedings. Secondly, the agency should focus its action on promoting competition, so that it not only takes action against firms which engage in anti-competitive practices, but also works to create institutional conditions to increase competition. In the long term, alternatives such as the establishment of links with the academic world, public opinion, and development of specialised courts are possible.

Fortunately, history is on the side of antimonopoly organisations. In France, the organisation responsible for competition policy had to wait forty years to win its first case in the courts. In Canada, it was a century before the courts saw a judge with training in an antimonopoly agency.