



POLICY ROUNDTABLES

Exit Strategies

2010

Introduction

The OECD Competition Committee held a roundtable discussion on Exit Strategies in June 2010. This document includes an executive summary and the documents from the meeting: a call for contributions from the OECD Secretariat, written submissions from Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Denmark, the European Union, Japan, the Netherlands, the Russian Federation, Spain, Switzerland, the United Kingdom and BIAC, as well as an aide-memoire of the discussion.

Overview

During the financial crisis many governments aided both the financial and non-financial sectors in their countries on an unprecedented scale. These emergency measures have in some cases taken precedence over competition rules. In particular the fact that governments helped some banks but not others has weakened competition in some markets, with “too big to fail” institutions commanding a higher market share than previously. This has exacerbated moral hazard problems.

With the stabilisation of the economic situation, these emergency measures will have to be phased out, and incentives for exit designed. Competition principles and agencies must play a major role in the design and implementation of these exit strategies, as anticompetitive measures tend to retard or even prevent recovery in the aftermath of a crisis.

Related Topics

Competition and Credit Rating Agencies (forthcoming 2010)
Competition, Concentration and Stability in the Banking Sector (2010)
Competition and Financial Markets (2009)

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Exit Strategies held by the Competition Committee in June 2010.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les stratégies de sortie de crise, qui s'est tenue en juin 2010 dans le cadre de la réunion du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable and the delegates' written submissions, and taking into account the hearing on Competition and Credit Rating Agencies¹, several key points emerge:

- (1) *The financial crisis was a result of inadequate regulation and credit rating, not inadequate competition.*

The crisis was provoked by deficient regulation, especially of innovative forms of financial securities with difficult-to-measure credit risk. The main ratings agencies had also become laxer in their assessments, helping to conceal the rising proportion of low quality securities. When the crisis broke, the low quality of many financial assets became easy to see but remained hard to measure. Interbank transactions fell sharply since all banks worried about the solvency of their counterparties. Interbank lending rates on unsecured loans averaged a few basis points above those on secured loans before the crisis, but the spread rose to over 200 basis points by end-2008 and even at mid-2010, the spread was over 40 basis points on loans of more than 6 months. Many large banks were perceived to be "too big to fail". This designation implies a certain measure of market dominance, but inadequate competition was not responsible for the crisis.

- (2) *Emergency actions taken during the financial crisis helped restore stability but caused some harm to competition as well.*

During the crisis, many governments aided the financial sector in their countries on an unprecedented scale – and some non-financial sectors on a lesser scale. The emergency measures had to be taken hurriedly, sometimes at a few days' notice, to prevent the world's financial system from seizing up completely. Because of the importance of financial stability for the smooth working of the economy, financial market regulators have more powers than regulators in most other sectors.

Government help included direct participation in the capital of some banks, including outright nationalisation, injections of liquidity to encourage banks to continue lending to industry, state guarantees of banks' deposits and lending, and brokering by governments of mergers between financial institutions. Some financial authorities imposed bans on certain kinds of short selling transactions. Central banks also injected large amounts of liquidity into the system to replace the normal mutual lending and borrowing between banks, which had dried up.

The fact that governments helped some banks but not others weakened competition. State aid in itself is anti-competitive, and was often accompanied by competitive restrictions on the aided firms in the form of caps on directors' remuneration, bans on price leadership, and forced divestiture of branches or subsidiaries. On the other hand, because banks are enmeshed in a network of mutual borrowing and lending, preventing large players in the market from failure

¹ See www.oecd.org/competition.

helped their competitors by reducing contagion and panic. None of this implies that competition issues were ignored. In most OECD countries, even where the competition policy agencies had no specific powers to design the emergency measures, their advocacy and experience were drawn upon, or offered by them, to help plan and implement those measures in ways that would be less harmful to competition.

(3) *Emergency measures must eventually be withdrawn.*

Because the emergency measures distorted competition, are expensive for public finances, and involve governments to an undesirable extent in running banks, they need to be wound down as markets stabilise. Furthermore, economic evidence and past experience show that rather than speeding up sustainable recovery from crises, anticompetitive measures tend to retard or even prevent recovery after the immediate crisis passes. But there are questions of timing, to what extent competition principles and agencies should or can guide the design of exit measures, and whether it is desirable to return to “business as usual.” Just as the emergency measures themselves distorted competition, winding them down also affects competitive conditions in the financial sector.

The authorities in many cases set time limits at the outset on the emergency measures. For example, guarantee schemes were often applied with a limit on their duration -- either a specific date or until such a time as the markets stabilised. Participation in the capital of banks that risked failure and were judged “too big to fail” was accompanied by government pledges that they would sell their stakes when banks returned to stability and profitability.

(4) *Competition principles and agencies should play a major role in the design and implementation of exit strategies.*

A lesson from the crisis is that the “too big to fail” perception encouraged the relevant institutions to pursue high risk / high yield strategies in the expectation that if the risks materialised (the size of which most analysts discounted right up to the beginning of the crisis), they would be bailed out, and their beliefs were validated. As noted above, though, the bailouts interfered with competition. Receiving a bailout package usually entailed bearing part of the costs. Financial aid for private sector banks came with strings attached in the form of restrictions on their activities, while guarantee schemes were not free of charge. Therefore, banks that felt they were strong enough not to need them did not apply. Furthermore, forced mergers of failing banks with stronger ones usually resulted in the new whole being less than the sum of its constituent parts. Banks which were judged to be weak even before the crisis, and not of systemic importance, were wound down. Thus competition between banks was weakened by the crisis and by the emergency measures, and the survivors emerged even more profitable than before.

Because financial markets are international, but competition agencies and bank regulators are national, the latter need to take into account the international ramifications of their actions. A big weak bank in a small country may be perceived as meriting continued support, but it might not be of systemic importance in a wider geographical context. Governments and their financial authorities that have organised mergers between weak banks that remain fragile may be reluctant to withdraw support, even if the merged entity has no stand-alone long-term future. At the other extreme, governments that have injected public money into banks that do have a long-term future have an incentive to maximise their return by encouraging the market dominance of those banks.

The timing of exit is critical. Withdrawing too early may provoke failure of the aided banks and leave competition even weaker. Delayed withdrawal, however, could result in some institutions becoming dependent on public support.

The inherent tensions between competition principles and financial market regulatory principles are likely to become more acute. The crisis showed clearly that existing regulatory structures were inadequate to prevent the crisis occurring, and regulators throughout the OECD countries are drawing up plans to tighten regulations further. Insofar as they concern the Basel III proposals to require banks to provide more and higher quality capital better to withstand shocks, the implications for competition between existing banks are neutral, provided that they are applied uniformly within and across countries. But such moves will make it even more difficult for new banks to enter the market.

Now that financial markets are recovering from the crisis, the “too big to fail” institutions command a higher market share than previously, exacerbating moral hazard problems. Proposals to break them up, or separate their investment bank and commercial operations, do not command universal support among analysts and are strongly resisted by the big banks themselves. It is not clear what comparative advantage competition policy agencies could have in designing new regulatory structures that would discourage banks from following high risk strategies. Forbidding banks to participate in activities such as “naked” short selling, or putting permanent caps on bonus payments could reduce risk but also competition between banks. But the competition agencies should advocate regulatory structures that make it easier for new entrants, and they should continue to raise concerns regarding mergers that result in “stronger banks” that can charge higher fees. Reforms that make it easier for households to change banks – such as making account numbers portable – would also be welcome.

(5) *Credit rating agencies serve a vital purpose, but the market is a natural oligopoly.*

There are great advantages for both issuers and investors in having objective assessments, comparable across issuers, instruments, countries, and over time, of the credit risk attached to the issuer of a security. Assessments by individual issuers would be clearly suspect, while assessments by the investors would be costly for them to make, if there were many instruments to be compared, and would also require full disclosure by the issuers of all relevant information. Therefore, credit rating agencies (CRAs) appeared early in the 20th century, and for many years three agencies -- Moody's, Standard and Poors (S&P), and Fitch -- have dominated the field. The CRA market is a natural oligopoly because issuers gravitate to the CRA they trust most and that has a large client base, while investors do not wish to have to interpret different types of ratings for the same instrument from a plethora of CRAs.

(6) *Dangerously risky behaviour by banks was exacerbated by the actions of the main rating agencies.*

As financial markets expanded in scale and scope, demand for ratings rose and banks and fund managers were increasingly required by regulators to invest in securities above a certain grade. This created some moral hazard problems. Whereas the CRAs previously employed independent firms to check the information provided by issuers, this practice gradually died out and they relied on issuers' honesty and due diligence. It also became very difficult to analyse the underlying degree of risk in securitised assets built up from large numbers of heterogeneous and individually illiquid assets. The CRAs, especially Fitch, also competed fiercely for market share and analysis shows that in the years before the crisis, the CRAs tended to inflate ratings above what their own models would have estimated. Consequently, even as the underlying riskiness of

many financial assets was increasing and the average quality of the entire spectrum of financial assets was falling, average ratings tended to rise. Rating inflation was recognised as a problem even before the crisis, as it contributed to the Asian financial crisis late last century and the internet bubble early this century.

- (7) *Steps must be taken to ensure that this does not happen again, though more competition may not be the solution. CRAs should increase the level of their due diligence and, ideally, switch to “investor pays” business models.*

Given that CRA performance worsened when competition for market share increased, the solution may not be to encourage more CRAs to enter the market. Proposals for improvement include a government-owned and managed CRA with no ties to issuers or investors; obliging investors rather than issuers to pay for ratings; if issuers pay, obliging them to seek a second opinion from an investor-owned CRA; obliging issuers to choose a CRA picked at random; relying on other data such as share prices, as well as ratings; and a “platform pays” model, in which a clearing house provides information based on all CRA assessments. There are objections to all of those proposals. A publicly owned CRA may come under pressure to inflate the ratings for domestic firms. History shows that investors are unwilling to pay for ratings and would not do so unless it became a legal obligation. A “second opinion” from an investor-owned CRA would be difficult given that there are very few such CRAs. Picking a CRA at random would not change the industry much, given the very small number of CRAs. It is true that share prices incorporate a great deal of publicly available information about firms – but that information is also available to the CRAs. Furthermore, share prices are volatile and the history of the stock market shows that share price analysts are just as prone to excessive optimism as the CRAs.

The conclusions were that the CRAs performed their function badly in the run-up to the crisis (but not all countries which used CRA ratings, such as Australia and Canada, experienced a crisis), that a move towards the investor pays principle is desirable, though difficult to achieve, that better monitoring of CRA performance is necessary, and that CRAs must thoroughly check the information they are given by issuers.

SYNTHÈSE

par le Secrétariat

Des débats de la table ronde, des contributions écrites des délégués et de l'audition sur la Concurrence et les Agences de Notation Financière¹, il ressort les principaux points suivants:

- (1) *La crise financière a résulté d'une inadéquation des réglementations et notations, et non d'une concurrence inadéquate.*

Une réglementation déficiente, surtout pour les formes innovantes de titres financiers dont le risque de crédit est mesuré de manière imparfaite, n'est pas parvenue à prévenir la crise financière. Les principales agences de notation ont été de plus en plus laxistes dans leurs évaluations, ce qui a contribué à dissimuler une proportion croissante de titres de mauvaise qualité. Lorsque la crise a éclaté, la faible qualité d'un grand nombre d'actifs financiers est clairement apparue, sans qu'on puisse néanmoins la mesurer. Les transactions interbancaires ont chuté brutalement, les banques s'interrogeant sur la solvabilité de leurs contreparties. Avant la crise, les taux des prêts interbancaires non garantis dépassaient de quelques points seulement ceux des prêts garantis, mais cet écart est passé à plus de 200 points de base à la fin de 2008 et, au milieu de 2010, il était encore de plus de 40 points de base pour les prêts à plus de 6 mois. Un grand nombre de banques ont été considérées comme « trop grandes pour faire faillite ». Ce raisonnement suppose un certain degré de puissance sur certains marchés (ainsi qu'une perception d'un haut degré d'interconnectivité systémique), mais la crise n'a pas été provoquée par une concurrence insuffisante.

- (2) *Les mesures d'urgence qui ont été prises durant la crise financière ont aidé à rétablir la stabilité, mais ont également été nocives pour la concurrence.*

Durant la crise, un grand nombre de gouvernements ont aidé à une échelle sans précédent le secteur financier de leur pays et, à un moindre degré, certains secteurs non financiers. Les mesures d'urgence ont dû être prises à la hâte, parfois en quelques jours, pour empêcher que le système financier mondial de s'effondre totalement. Du fait de l'importance de la stabilité financière pour le bon fonctionnement de l'économie, les autorités de régulation en charge du secteur financier ont davantage de pouvoirs que leurs homologues de la plupart des autres secteurs.

Les aides publiques ont pris la forme de prises de participation directe au capital de certaines banques (y compris sous la forme d'une nationalisation pure et simple), d'injections de liquidités pour inciter les banques à continuer de prêter aux entreprises, de garanties des dépôts et prêts bancaires par l'État et de fusions entre institutions financières sous l'égide des pouvoirs publics. Plusieurs autorités financières ont interdit certains types d'opérations à découvert. Les banques centrales ont également injecté dans le système bancaire des liquidités considérables pour remplacer les transactions interbancaires normales, qui s'étaient tariées.

¹ Voir www.oecd.org/competition.

Le fait que certaines banques aient été aidées par le gouvernement mais pas d'autres a affaibli la concurrence et ce, selon le niveau existant de concentration des marchés concernés. Les aides d'État sont en elles-mêmes anticoncurrentielles et, souvent, les entreprises aidées ont été frappées de restrictions à la concurrence de plusieurs façons : un plafonnement des rémunérations des dirigeants, une interdiction de fixation des prix par une entreprise dominante et la cession forcée de succursales ou de filiales. D'un autre côté, parce que les banques ont tissé tout un réseau d'emprunts et de prêts bilatéraux, empêcher les grands acteurs du marché de faire faillite a aidé leurs concurrents en limitant les mouvements de contagion et de panique. Cela ne veut pas dire pour autant qu'on ait ignoré les problèmes de concurrence. Dans la plupart des pays de l'OCDE, même lorsque les autorités de la concurrence n'avaient pas de prérogatives particulières pour la conception des mesures d'urgence, on a fait appel à leur expertise et à leur expérience – ou bien elles ont offert elles-mêmes leur concours – pour planifier et appliquer ces mesures en essayant de nuire le moins possible à la concurrence.

(3) *Il faudra en définitive éliminer les mesures d'urgence.*

Parce qu'elles ont faussé la concurrence, sont onéreuses pour les finances publiques et font intervenir à l'excès les pouvoirs publics dans la gestion des banques, les mesures d'urgence devront être supprimées à mesure que les marchés se stabiliseront. De plus, les données économiques et l'expérience montrent qu'au lieu d'accélérer une reprise durable après une crise, les mesures anticoncurrentielles ont tendance à la retarder, voire à l'empêcher dès que la crise sera terminée. Mais plusieurs questions se posent à cet égard : quel doit être le calendrier ? Jusqu'à quel point les principes de concurrence et les autorités de la concurrence doivent-elles ou peuvent-elles piloter la conception des mesures de sortie ? Est-il souhaitable d'en revenir au statu quo ante ? Tout comme les mesures d'urgence faussent elles-mêmes la concurrence, leur suppression influe également sur la concurrence dans le secteur financier.

On peut fixer dès le départ des délais pour l'application des mesures d'urgence. Par exemple, les dispositifs de garantie ont souvent été mis en place pour une certaine durée, leur application étant limitée à une date précise ou au moment où les marchés se stabiliseraient. L'État a pris des participations au capital des banques en grave difficulté qui étaient jugées trop grandes pour faire faillite en s'engageant à céder ces participations dès que les banques en seraient revenues à une situation de stabilité et de rentabilité.

(4) *Les principes de concurrence et les autorités de la concurrence devraient jouer un rôle majeur dans la conception et la mise en œuvre des stratégies de sortie.*

Une des leçons à tirer de la crise est que la notion de banque « trop grande pour faire faillite » a incité les banques concernées, ou quelques unes de ses unités spécialisées, à adopter des stratégies très risquées et très lucratives en tablant sur le fait que, si les risques se matérialisaient (la plupart des analystes ont sous-évalué ces risques jusqu'au début de la crise), elles seraient renflouées, ce qui s'est vérifié. Cependant, comme décrit auparavant, le renflouage a affecté la concurrence. Le renflouage a généralement un coût pour les banques. Les aides aux banques du secteur privé ont été assorties de certaines contraintes, sous la forme de restrictions à leurs activités, et les dispositifs de garantie n'ont pas été gratuits ; Ainsi, les banques qui se sentaient suffisamment fortes pour ne pas avoir besoin d'aides ne les ont pas demandées. De plus, les fusions forcées de banques en difficulté avec des établissements plus solides ont eu en général pour résultat que le nouvel ensemble était inférieur à la somme de ses composantes. Les banques qui étaient jugées faibles avant même la crise et qui ne revêtaient pas une importance systémique ont été liquidées. Dès lors, la concurrence entre banques sur certains marchés a été affaiblie par la crise et par les mesures d'urgence, et les banques qui ont survécu ont pu dégager une rentabilité plus forte qu'auparavant.

Parce que les marchés de capitaux sont internationaux, mais qu'elles agissent au niveau national, les autorités de la concurrence et les autorités de régulation du secteur bancaire doivent prendre en compte les ramifications internationales des mesures qu'elles prennent. Une grande banque en difficulté d'un petit pays peut être considérée comme devant encore bénéficier d'une aide, mais elle ne sera peut-être pas d'une importance systémique dans un contexte géographique plus large. Les gouvernements et les autorités financières qui ont organisé des fusions entre des banques faibles qui restent fragiles pourront se montrer réticents à mettre fin à leurs aides, même si l'ensemble issu de la fusion n'a aucune chance de préserver son autonomie à long terme. À l'autre extrême, l'État, lorsqu'il a injecté des fonds publics dans des banques qui n'ont pas d'avenir à long terme, est incité à maximiser son investissement en favorisant une domination du marché par ces banques.

Le calendrier de sortie des mesures d'urgence est crucial. Si l'on supprime trop tôt ces mesures, on risque de provoquer une faillite des banques aidées, avec pour conséquence une concurrence encore plus faible. Néanmoins, si l'on supprime trop tard les mesures d'urgence, certains établissements risquent de devenir tributaires des aides publiques.

Les tensions intrinsèques entre les principes de concurrence et les principes de régulation des marchés de capitaux devraient s'accroître. La crise a bien montré que les structures actuelles de régulation étaient insuffisantes pour empêcher qu'elle éclate, et les autorités de régulation des pays de l'OCDE préparent actuellement un durcissement des réglementations. Dans le cas des propositions Bâle III consistant à imposer aux banques d'accroître leurs fonds propres quantitativement et qualitativement pour mieux résister à un choc, les conséquences pour la concurrence entre les banques sont neutres, dès lors que les nouvelles mesures s'appliquent uniformément au niveau national et international. Mais l'entrée de nouvelles banques sur le marché en sera d'autant plus difficile.

Maintenant que les marchés de capitaux se redressent après la crise, les banques « trop grandes pour faire faillite » détiennent une part de marché plus forte qu'auparavant, ce qui aggrave les problèmes d'aléa moral. Les projets visant à les scinder ou à dissocier leurs activités de banque d'affaires et de banque commerciale ne sont pas approuvés par tous les analystes, et les grandes banques y résistent elles-mêmes vigoureusement. On ne voit pas très bien quel avantage comparatif les autorités de la concurrence tireraient de la mise en place de nouvelles structures de régulation qui décourageraient les banques d'adopter des stratégies très risquées. Interdire aux banques de se livrer à des activités comme la vente à découvert « à nu », ou imposer un plafonnement permanent des bonus pourrait réduire les risques, mais aussi affaiblir la concurrence entre banques. Les autorités de la concurrence devraient soutenir des structures de régulation facilitant les nouvelles entrées, et elles devraient aussi continuer de faire part de leurs préoccupations à l'égard des fusions qui créent des banques plus puissantes pouvant pratiquer des tarifs plus élevés. Les réformes qui ont pour but de faciliter le changement de banque pour les particuliers -- telles que la portabilité du numéro de compte -- paraissent également judicieuses.

(5) *Les agences de notation financière ont un rôle fondamental, mais le marché est un oligopole naturel.*

Aussi bien pour les émetteurs de titres que pour les investisseurs, il est essentiel d'avoir une évaluation objective – comparable entre émetteurs, entre instruments, entre pays et dans le temps – du risque de crédit lié à l'émetteur d'un titre. Une évaluation par l'émetteur sera manifestement suspecte, et une évaluation par l'investisseur sera coûteuse pour lui s'il doit comparer un grand nombre d'instruments, et il faudra pour cela que l'émetteur diffuse l'intégralité des informations pertinentes. C'est pourquoi les agences de notation ont vu le jour au début du 20^e siècle et, pendant de nombreuses années, trois agences – Moody's, Standard and Poors (S&P) et Fitch – ont dominé ce secteur.

Le marché de la notation est un oligopole naturel, parce que les émetteurs de titres s'adressent à l'agence de notation en laquelle elles ont le plus confiance et qui dispose d'une large clientèle, alors que les investisseurs ne souhaitent pas avoir à interpréter différents types de notations d'un même instrument émanant d'un grand nombre d'agences de notation.

- (6) *Le comportement extrêmement risqué de certaines banques a été aggravé par l'action des principales agences de notation.*

À mesure que les marchés de capitaux se sont développés et étoffés, la demande de notation a augmenté, et les autorités ont de plus en plus obligé les banques et les gestionnaires de fonds à investir dans des titres d'une certaine qualité. Cela a créé des problèmes d'aléa moral. Alors que les agences de notation recouraient précédemment aux services d'établissements indépendants pour vérifier les informations fournies par les émetteurs, elles y ont renoncé progressivement pour s'appuyer sur l'honnêteté et la diligence raisonnable de l'émetteur. Par ailleurs, il est devenu très difficile d'analyser le degré de risque sous-jacent d'actifs titrisés constitués d'un grand nombre d'actifs hétérogènes et individuellement illiquides. Les agences de notation, en particulier Fitch, se sont en outre livrées à une très vive concurrence pour les parts de marché, et on peut constater que, durant les années qui ont précédé la crise, elles ont eu tendance à attribuer des notations supérieures aux estimations résultant de leurs propres modèles. Par conséquent, alors même que le risque sous-jacent d'un grand nombre d'actifs financiers s'aggravait et que la qualité moyenne de l'ensemble de la gamme des actifs financiers se dégradait, la notation moyenne s'est inscrite en hausse. Cette « inflation » des notations, jugée problématique avant même la crise, a contribué à la crise financière asiatique de la fin du siècle dernier et à la bulle internet du début de ce siècle.

- (7) *Des mesures doivent être prises pour que cela ne se reproduise plus même si plus de concurrence n'est peut-être pas la solution. Les ANFs devraient améliorer le niveau de leur diligence et, idéalement, se tourner vers le modèle de l'investisseur payeur.*

Puisque la performance des agences de notation a été moins bonne alors que la concurrence pour les parts de marché s'est intensifiée, la solution n'est sans doute pas d'inciter un plus grand nombre d'agences à entrer sur le marché. Les solutions incluaient la création d'une agence de notation à capitaux et à gestion publics, sans liens avec les émetteurs de titres ou les investisseurs ; le paiement de la notation par l'investisseur et non par l'émetteur de titres ; l'obligation pour l'émetteur, si c'est lui qui paie, de demander un deuxième avis à une agence de notation détenue par des investisseurs ; l'imposition à l'émetteur de choisir au hasard son agence de notation ; le recours à d'autres données, notamment les cours des actions et les évaluations qui ont pu être faites ; la mise en place d'un modèle de « plateforme payante », avec lequel un organisme fournit des informations reposant sur toutes les évaluations réalisées par les agences de notation. Ces propositions se heurtent à une série d'objections. Une agence de notation à capitaux publics pourrait être incitée à attribuer aux entreprises nationales une notation trop élevée. L'histoire montre que les investisseurs ne sont pas disposés à payer les notations et ne paieraient que si la loi les y obligeait. Un « deuxième avis » de la part d'une agence de notation détenue par des investisseurs entraînerait une plus forte expansion de ce sous-secteur qui comporte plusieurs entreprises, mais qui toutes ensemble pèsent nettement moins que les plus grandes tant au niveau individuel qu'en termes agrégés. Choisir une agence de notation au hasard ne modifierait guère la situation, puisque les agences de notation sont très peu nombreuses. Il est vrai que les cours des actions contiennent beaucoup d'informations sur les entreprises, qui sont publiquement disponibles, mais les agences de notation disposent également de ces informations. De plus, les cours des actions sont très instables et l'histoire des marchés boursiers montre que les analystes financiers sont tout aussi enclins que les agences de notation à un optimisme excessif.

On peut en conclure que les agences de notation ont mal exercé leurs fonctions avant la crise (cependant tous les pays utilisant les notations d'agences n'ont pas connu une crise ; c'est le cas notamment de l'Australie et du Canada) ; qu'il est souhaitable d'adopter le principe du paiement par l'investisseur, même s'il est difficile à mettre en œuvre ; qu'une surveillance plus étroite des performances des agences de notation est nécessaire et que les agences de notation doivent minutieusement vérifier les informations que leur fournissent les émetteurs de titres.

CALL FOR CONTRIBUTIONS



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
Competition Committee

The Chairman

To competition delegates

COMP/2010.67

30 March 2010

TO ALL COMPETITION DELEGATES AND OBSERVERS

**Re: Roundtable on Exit Strategies (16 June 2010)
Call for Country Contributions**

Dear Delegate/Observer,

The Competition Committee agreed to hold a follow up discussion to the February 2009 roundtable series on Competition and Financial markets, focusing on the standalone issue of exit strategies. This letter is an invitation for written submissions to that roundtable, to be held on the afternoon of Wednesday, 16 June 2010 (3 pm-6 pm).

During the crisis, emergency measures have in some cases taken precedence over competition rules. These Government actions have concerned both financial and non financial firms. With stabilisation of the economic situation, these emergency measures have to be phased out and plans or incentives for exit designed. There is a twofold goal of ensuring (i) that any competitive distortion created by measures adopted during the crisis is eliminated and (ii) measures are taken to ensure the market is ‘crisis-proof’ for the future. The question is how can competition policy assist in these goals and how can competitive normality be ensured in carrying them out?

The roundtable will be primarily based on written contributions from members and observers; so I look forward to your submissions. In addition, outside experts may join us at the roundtable.

I suggest that you address in your submission the following questions, while encouraging you to raise or discuss other issues based on your own experience:

1. What are the different types of strategies that have been formulated in your country to exit from government actions that were taken to fight the crisis?
2. To what extent have you, as a Competition Authority, been involved in the design of those exit strategies? Have you identified some related competition issues? How will they be addressed? In particular, to what extent is your Authority involved in the improvement of financial regulations (*i.e.* regulations covering credit rating agencies and specialized financial products like hedge funds) to ensure that competition concerns are taken into consideration and coordinated with financial security objectives?
3. Regardless of whether your government has actually implemented any exit strategies yet, in your view, what exit strategies *should* be adopted to get the best outcome for competition, bearing in mind the constraints of other policy initiatives? The list attached -- which is extracted from the February 2009 Secretariat background paper, DAF/COMP(2009)11 -- presents a non exhaustive set of pro competitive exit strategies. Do you see other pro competitive exit strategies?
4. Could you explain what measures *should* be carried out to ensure that the market is crisis proof for the future? In particular,
 - How should financial regulations be improved (*i.e.* specialized financial products related regulations) so that competition concerns are considered while still meeting the objective of financial security? What should be done for reducing regulatory barriers to entry in credit rating agencies including those paid by investors, thus increasing the availability of credit rating information available? What should be done to reduce switching costs (*i.e.* by implementing “switching packs”)?
 - Is there a competition solution to avoid contagion risk across affiliates of financial conglomerates, particularly when investment banks are situated within a bank? (Allowing investment banks operating within a bank to benefit from a bank’s low overall interest rates distorts competition with independent investment banks and creates a potentially dubious incentive for risky activities to be hidden, non-transparently, within larger, less risky entities). Would it be appropriate to explore the feasibility of promoting a structural separation option with a non-operating holding company structure including banking and investment banking activities as subsidiaries, which would borrow in their own name with no recourse to the parent or other members of the group?
 - What can competition authorities do to help governments improve their responses to crises and potential crises in the future so as to reduce the negative impact on competition? For example, what should be done to reduce or eliminate the moral hazard inherent in bailouts, which encourages banks to engage in risky strategies without having to bear much of the risk themselves? Should international co-ordination be improved so as to avoid the competition problems that could arise when some countries bail out their businesses but others do not? How?
 - Should competition policy, especially in the financial sector, focus on consumer welfare or also on other objectives, like general economic and systemic stability?

Please advise the Secretariat **by 16 April 2010** at the latest if you will be making a written contribution. Written submissions are due **by Monday 31 May 2010**. Failure to meet that deadline could result in a contribution not being distributed to delegates over OLIS in a timely fashion in advance of the meeting.

All communications regarding documentation for this roundtable should be sent to Ms. Erica Agostinho Tel. - +33 (0)1 45 24 89 73; Fax - +33 (0)1 45 24 96 95; E-mail Erica.AGOSTINHO@oecd.org. Patricia Hériard-Dubreuil would be pleased to answer any substantive questions you may have about the roundtable. Her phone number and e-mail address are: +33 (0)1 45 24 91 41, Patricia.HERIARD-DUBREUIL@oecd.org.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Frédéric Jenny', with a stylized flourish at the end.

Frédéric Jenny
Chairman
Competition Committee

Exit Strategies for Competition

[Extract from DAF/COMP(2009)11]

1. Exit from Government Actions

- a) Sell public stakes in nationalised institutions:
 - within a time frame that is reasonable, transparent and foreseeable to limit the time in which there are potential distortions to competition;
 - ensuring that competition laws apply to ensure government divestments do not reduce market competition;
 - ensuring that any structural competition problems present (e.g. from excessive market power) are eliminated prior to or during privatisation.
- b) Provide capital or other special aids as deemed appropriate while:
 - providing incentives, particularly financial incentives, that will encourage benefitting institutions to prefer private investment;
 - regularly reviewing the need for state funds and guarantees, as well as whether state funding and guarantees are handicapping a speedy return to normal market conditions;
 - conditioning aid to non-financial firms on restructuring to ensure a viable future business plan;
 - limiting the extent to which state subsidies can be used for purposes that were unintended by the government;¹
 - limiting the role of the government in day-to-day operational details of supported firms; and
 - ensuring financial incentives are present for the firms receiving support to redeem state investments or state sponsored loans.
- c) Reduce provision of capital or other special support when:
 - systemic concerns are less present;
 - institutions are solvent and more liquid; and
 - lending to the real economy starts returned to normal.
- d) Stop provision of capital or other special support when:
 - systemic concerns are not present;
 - institutions are clearly solvent and liquidity problems are resolved;
 - counter-party confidence is returned;
 - a firm's business is fundamentally not viable for the future; and
 - lending to the real economy is operating normally.

¹ This could occur when institutions find a way to borrow at below normal market rates in one jurisdiction and move funds for activities in another jurisdiction.

e) Review financial market regulations and regulatory structures for unintended or unnecessary restrictions on competition.²

2. Exit from anticompetitive private actions

a) Avoid anticompetitive business structures by preferring international bank takeovers of domestic banks where domestic takeovers risk increasing market power.

b) To the extent that anti-competitive megamergers have already occurred, promote new entry that can reduce competitive concerns of such mergers by:

- Reducing regulatory barriers to entry to banking, both in formal regulation and process;
- Increasing the availability of fine-grained credit-rating information available about SMEs and consumers; and
- Ensuring that switching costs are limited, for example by implementing a regime that reduces the non-pecuniary costs of switching financial institutions (e.g., by implementing “switching packs”)

c) Consider, at an internationally co-ordinated level, whether structural separation is necessary for investment banking activities that are situated within a bank. If no structural separation is in place, investment banks may effectively gain access to low cost central bank lines of credit and to guarantees unavailable to independent investment banks. Allowing investment banks operating within a bank to benefit from a bank’s low overall interest rates distorts competition with independent investment banks and creates a potentially dubious incentive for risky activities to be hidden, non-transparently, within larger, less risky entities. One possible solution that avoids creating an international Glass-Steagall Act would be to promote a non-operating holding company structure where the components of financial institutions, including banking and investment banking arms, are subsidiaries of a non-operating parent and borrow in their own name with no recourse to the parent or other members of the group.

² In order to promote rigor in this review process, governments can use pro-competitive regulatory guidance, such as that contained in the OECD’s *Competition Assessment Toolkit* (www.oecd.org/competition/toolkit).

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AUSTRALIA

1. Introduction

This submission discusses the major financial sector policy interventions undertaken by the Australian Government in response to the global financial crisis, the competition considerations which have emerged, and steps which may be taken to reduce the likelihood that comparable interventions will be required in the future.

The submission will consider the following financial sector policy interventions:

- the Guarantee Scheme for Large Deposits and Wholesale Funding (the Guarantee Scheme);
- the Financial Claims Scheme (FCS)
- extensions of Reserve Bank of Australia (RBA) market operations.
- restrictions on short selling;
- the special purpose vehicle for car financing (OzCar); and
- the \$16 billion investment in residential mortgage-backed securities (RMBS).

2. The global financial crisis and the policy response – Australia's experience

Australia entered the global financial crisis in a strong position, with an effective framework for prudential regulation and supervision and significant capacity for fiscal and monetary stimulus relative to other developed economies. This economic and policy context helped ensure the effectiveness of Australia's policy response to the crisis and allowed Australian policy makers to consider competition issues at a time when most OECD counterparts were focused exclusively on stability.

Well-timed policy stimulus in Australia has supported confidence, economic activity and jobs during the global downturn. Stimulus measures offset underlying weakness in household consumption and private investment, and, in conjunction with an easing of monetary policy, helped ensure a relatively shallow domestic downturn. Treasury estimates that the economy would have contracted by 0.7 per cent in 2009 if it were not for stimulus, compared to actual growth of 1.3 per cent. The estimated peak stimulus impact occurred in the June quarter of 2009, and stimulus is now being steadily withdrawn – with Treasury estimating that stimulus will detract around 1 percentage point from economic growth over 2010.

In response to the upheaval that emerged in global financial markets from September 2008 the Australian Government undertook a range of policy measures to help Australia to emerge from the crisis having avoided the failure of a single authorised deposit-taking institution. In addition to the fiscal stimulus which provided support to the broader Australian economy, the Government undertook policy interventions designed to address specific risks and market failures which emerged in the Australian financial system as a result of international financial market turmoil. The Australian Government has not been required to make interventions on the scale of many advanced economies; significantly no financial institution has received direct Government support. The Government's crisis response policies were implemented with the intention that they would be withdrawn as market conditions normalised.

The competition impacts of the financial crisis and the policy response were given careful consideration by the Australian Government and its agencies. Although Australia's financial system has performed strongly relative to others during the crisis, it has not been immune from the impact. Competitive intensity has eased, partly due to the withdrawal or scaling back of some smaller lenders, reflecting their reduced capacity to raise funds and also, in the case of many foreign lenders, their reduced capacity to divert scarce capital from their home economies. As a result, the market shares of the four major banks have increased.

Two significant merger transactions also occurred during the period: Westpac-St George (which occurred prior to the height of the global financial crisis), and CBA-BankWest. Both transactions were carefully scrutinised by the Australian Competition and Consumer Commission (ACCC) under Australian merger laws, with neither being found to substantially lessen competition¹.

Throughout the global financial crisis, Australia continued to enforce competition laws, including section 50 of the Trade Practices Act, which prohibits mergers and acquisitions of assets that result in, or are likely to result in a substantial lessening of competition. Australia remains committed to the enforcement of its merger law.

While market shares of the four major Australian banks have increased during the global financial crisis, the non-major Australian banks have generally maintained their market positions. Moreover, a range of bank and non-bank lenders are now becoming more competitive again. In particular a number of smaller non-bank lenders are offering competitive rates on residential home loans, offering rates sometimes 1 per cent less than the major banks.

The implementation and withdrawal of the Government's policy response to the financial crisis, and associated competition considerations are discussed in the context of specific measures below.

2.1 *The guarantee scheme*

The Guarantee Scheme provided authorised deposit-taking institutions with access to an Australian Government guarantee on wholesale debt and large deposit obligations, for a fee. The Guarantee Scheme was introduced in October 2008 to ensure Australian ADIs access to wholesale funding during the crisis. Its introduction in Australia followed the announcement of similar schemes around the world, and ensured that Australian ADIs were not placed at a disadvantage relative to their international competitors.

The Guarantee Scheme was successful in securing the flow of credit to Australian businesses and households, and played a critical role in supporting the Australian economy through the crisis. ADIs raised over \$160 billion in wholesale debt through the Guarantee Scheme.

The Guarantee Scheme supported competition by ensuring that all ADIs had uninterrupted access to wholesale funding. Non-major banks and other smaller lenders used the Guarantee Scheme to raise in the order of \$65 billion in funding.

It was suggested by some that the Guarantee Scheme fee schedule – which charged ADIs at differential rates² according to their credit ratings – disadvantaged mostly smaller ADIs rated BBB+ and

¹ In the case of the CBA-BankWest merger which took place near the height of the financial crisis, the ACCC found that BankWest's competitive model was not sustainable and that BankWest would cease to be a competitive force in the medium term in the event that the merger was opposed.

² 70 basis points for ADIs rated AA- or higher, 100 basis points for ADIs rated between AA- and BBB+, and 150 basis points for ADIs rated BBB+ or lower.

below. However the fee schedule was designed to reflect market pricing, and in so doing reflect the risk borne by the Commonwealth and provide incentive for ADIs to discontinue use of the guarantee as market conditions normalised. Moreover this suggestion is not borne out by the fact that many of the non-major ADIs, who have traditionally been less reliant on wholesale funding markets than the major banks, increased their use of this funding source through the Guarantee Scheme. Retrospective flattening of the fee structure for the existing stock of guaranteed debt, which has been advocated by some, would be unfair for lower rated institutions that determined not to use the Guarantee Scheme on the basis of the pricing schedule that existed during the Scheme's operation.

On 7 February 2010, the Government announced the closure of the Guarantee Scheme on the unanimous advice of the Council of Financial Regulators, which comprises the Governor of the RBA, the Secretary to the Treasury, and the Chairmen of the Australian Prudential Regulation Authority (APRA) and ASIC. The Council advised that bank funding conditions had improved such that the Guarantee Scheme was no longer needed, and that no Australian institution would need the Guarantee Scheme to fund themselves.

The Guarantee Scheme closed to new issuance of wholesale securities and additional deposit funds on 31 March 2010. Outstanding guaranteed liabilities continue to be covered by the Guarantee Scheme to maturity for wholesale funding and term deposits or to October 2015 for at call deposits.

The Government's intention to close the Guarantee Scheme when market conditions normalised was flagged when the policy was first announced. The Government's clear strategy for exit provided ADIs with the incentive to strengthen their financial position while Government support was still in place, in preparation for more normal policy settings. There is strong evidence that this approach was employed by Australian ADIs.

In addition, by announcing the closure of the Guarantee Scheme almost two months prior to its effective end date, the Government provided a significant period of notice to ADIs and to the broader market. Where necessary, ADIs used this window to meet future funding requirements, though in aggregate, issuance during this period was comparatively low.

As a result of the Government's clear exit strategy there were no adverse impacts on the Australian financial sector following the withdrawal of the Guarantee Scheme. This is reflected in the stability of key financial market indicators such as equity prices, credit default swap rates and bond yields.

2.2 *The financial claims scheme*

The FCS provides automatic free coverage for all deposits up to \$1 million. The FCS had been under development for several years prior to 2008. However, it was implemented in October 2008 with a temporary \$1 million cap in response to the financial crisis.

Though it was designed to enhance financial system stability and depositor protection, the FCS is also a competition enhancing policy, as relative to the four major banks which dominate the Australian banking sector, smaller ADIs rely more heavily on deposit funding and benefit more from the protection the FCS provides to deposits up to \$1 million. The introduction of the FCS stemmed the flow of deposits from some smaller institutions to the major banks which was beginning to occur late in 2008.

The FCS is intended to be a permanent feature of Australia's financial system and as such there is no exit strategy for this policy. The Government has committed to a review of the FCS in October 2011, which will focus on whether a cap of \$1 million is appropriate as an ongoing deposit insurance limit.

2.3 *Extensions of RBA market operations*

In addition to rapid easing of monetary policy, the RBA significantly expanded its market operations to ease liquidity pressures in the Australian financial system during the financial crisis. This expansion eased liquidity pressures in the Australian financial system by: increasing the supply of funds to exchange settlement accounts; introducing a term deposit facility; lengthening the term and expanding the eligibility criteria of repurchase arrangements; and initiating a swap facility with the US Federal Reserve.

The extension of the RBA's market operations was based entirely on stability objectives. However to the extent that the extension reduced the likelihood of financial institutions becoming insolvent, it could be seen to have supported the existing level of competition by preventing industry consolidation.

The extension of the RBA's market operations was a direct response to increased demand for liquid assets; as market conditions have improved and this demand has eased the RBA has been able to gradually scale back activities. The scaling back of these operations has not had an impact on competition as it has only occurred as demand for the expanded facilities has subsided.

Exchange settlement balances are now approximately double the levels prevailing prior to the crisis, having been more than fourteen times these levels at the peak of the crisis. The RBA's offering of long-term repurchase agreements and repurchase agreements for an expanded set of private securities have been scaled back significantly, but are still available to market participants on the right terms. Finally the temporary swap lines established with the US Federal Reserve expired on 1 February 2010. The facility had not been used since April 2009, however at the peak of the crisis the amount outstanding under this facility had been as high as US\$28 billion.

2.4 *The ban on short selling*

On 21 September 2008, the Australian Securities and Investments Commission (ASIC) banned covered and naked short selling in order to address volatility in the market. Subsequently, the Government passed the Corporations (Amendment) Short Selling Act 2008 which clarified ASIC's powers to regulate short selling activity, permanently banned naked short selling and provided the framework for a comprehensive short selling disclosure regime.

In November 2009, the Government enacted details of its permanent short selling disclosure regime. The regime requires the reporting and public disclosure of covered short selling transactions and, with effect from 1 June 2010, reporting of short positions and their subsequent public disclosure.

ASIC's temporary ban on covered short selling was designed to ensure the ongoing stability of Australia's financial system during the global financial crisis. Short selling activity, particularly of financial securities, had the potential to erode confidence in Australia's financial sector by contributing to volatility in share prices. This could have made it difficult for financial institutions to raise capital, especially during a period of reduced liquidity and tight credit markets, and could have reduced competition.

In framing the permanent short selling disclosure regime, it was important to strike an appropriate balance between transparency and protecting the confidentiality of a short seller's proprietary trading strategy. It was also important to allow legitimate hedging activity.

An overly onerous regulatory regime would have decreased the competitiveness of Australia's financial system and encouraged firms to engage in regulatory arbitrage. Immediate disclosure of short selling positions could damage short sellers' competitiveness.

On 21 October 2008, ASIC lifted the ban on covered short selling of non financial securities. On 25 May 2009, it lifted the ban on covered short selling of financial securities. In lifting the ban, ASIC reviewed market conditions and judged the balance between market efficiency and potential systemic concern had moved in favour of lifting the ban. However, legislation has been passed banning naked short selling, as this practice was seen as being a potentially destabilising practise.

2.5 OzCar

On 5 December 2008, the Australian Government announced that a car dealership financing special purpose vehicle (SPV) would be established to provide temporary liquidity support for eligible new car or mixed (new and used) car dealerships. The establishment of the SPV followed the announcements in October 2008 by GE Money Motor Solutions (GE) and General Motors Acceptance Corporation (GMAC) that they intended to exit the Australian wholesale floor plan financing market. The departure of these two financiers could have potentially left a large number of commercially viable dealerships without financing, as the remaining financiers indicated at the time that they did not have sufficient capacity to finance the GE and GMAC dealerships.

The establishment of the SPV supported competition in the car sales market by providing market stability and industry confidence in the car dealership wholesale floor plan financing market. This facilitated other financiers stepping in to finance dealerships that would have otherwise have been left stranded by the departure of GE and GMAC. Existing financiers have progressively expanded their capacity to provide finance to car dealerships and fill the gap left in the market by the departure of GE and GMAC.

Expected demand for financing through the OzCar SPV has fallen as market conditions have improved, and removal of the scheme is not expected to cause any significant disruption to the market. The financing provided by the SPV is scheduled to cease by 30 June 2010.

2.6 Investment in RMBS

The Australian Government has committed \$16 billion to be invested in AAA-rated RMBS. This measure is designed to support smaller lenders to promote competition in the residential mortgage lending market, following the dislocation of securitisation markets.

The Government's debt management agency – Australian Office of Financial Management (AOFM) – evaluates potential investments based on the contribution issuers will make to competition in the residential mortgage market. To qualify for the programme, securities must also meet certain minimum eligibility criteria which have been designed to ensure that the underlying collateral loans are of high credit quality.

The AOFM determines the yields at which it purchases RMBS in consultation with issuers. The yield balances the objective of maintaining a competitive flow of funds for new lending with the objective of attracting private investment along side AOFM investment.

As of 31 May 2010, this initiative has enabled 14 smaller mortgage lenders to raise around \$16.9 billion in total, or an average of around \$1.2 billion each, to fund new mortgage loans. The AOFM has committed \$12.2 billion of the allocated maximum of \$16 billion.

The objective of this initiative is to support competition in the mortgage sector while the private securitisation market remains affected by the US sub-prime lending crisis and the global financial crisis. In particular, the initiative is enabling participating lenders to maintain competitive interest rates, higher

lending volumes and higher market shares than would otherwise be the case. This is helping to maintain competitive pressures in the mortgage market.

Securitisation historically has been an important driver of competition in Australia's mortgage market. It allows unrated or lower-rated lenders to issue AAA-rated debt instruments, providing them with a large and inexpensive source of funding that enables them to compete effectively with Australia's four largest commercial banks. The growth in securitisation markets was a key factor driving the reduction in banks' interest margins from as high as around 4 per cent in the early 1990s to around 2 per cent in 2007.

The Government's investment in RMBS has helped restore confidence in Australian RMBS, especially since November 2008. The private sector's contribution to RMBS transactions supported by the Government has increased from 20 per cent towards the end of 2008 to around 80 per cent in the first quarter 2010.

3. Minimising the likelihood and impact of future crises

3.1 *Australia's approach*

Australia's experience of the global financial crisis has demonstrated the importance of strong economic growth, sound public finances, and an effective framework of prudential regulation in reducing the likelihood and severity of future financial crises, and enhancing the capacity of policy makers to manage crises when they do emerge.

With above-trend growth forecast, the Government has taken action to return the budget to surplus by:

- allowing the level of tax receipts to recover naturally as the economy improves, while maintaining the Government's commitment to keep taxation as a share of GDP below the 2007-08 level on average; and
- maintaining the 2 per cent cap on real spending growth, on average, until the surplus reaches 1 per cent of GDP.

The Australian Government and its regulatory agencies are also taking an active role in the process of international financial sector reform (see below). The Australian Government is committed to maintaining the momentum for financial sector reform whilst taking appropriate account of Australia's domestic circumstances.

3.2 *International financial sector reform*

Financial sector reform responses to the financial crisis are being led through the Group of 20 (G20). The G20's proposed reform agenda is being advanced by organisations such as the Basel Committee on Banking Supervision (BCBS), the Financial Stability Board (FSB), the International Organisation of Securities Commissions (IOSCO) and the IMF. These organisations are currently advancing a range of financial sector regulatory reforms aimed at reducing the need for future funding and deposit guarantees and central bank liquidity extensions, as well as market failures linked to financial instability – such as those seen in the Australian RMBS, equity derivative and vehicle financing markets during the most recent financial crisis.

Key areas of activity for Australia are:

- working on enhanced capital, enhancing institutional risk management, reporting requirements for re-securitisations and off-balance sheet vehicles, liquidity and leverage issues as a result of work by the BCBS.
- enhanced liquidity requirements, which should be appropriately calibrated to reflect individual country circumstances;
- institutional compensation policies. APRA released its final standards on executive remuneration standards on 30 Nov 2009, having taken effect as of 1 Jan 2010;
- macro-prudential monitoring;
- market misconduct, reviewing regulatory adequacy in relation various activities;
- working with the IMF, IOSCO, the International Association of Insurance Supervisors (IAIS), the BIS and the FSB to reduce differential regulation across markets;
- enhanced supervision of identified institutions such as hedge fund counterparties and credit ratings agencies;
- fair valuation and enhanced disclosure of securities and complex instruments; and
- enhanced international supervisory co-operation. APRA has 17 MOUs with foreign counterparts, ASIC has 40.

BELGIUM

Introduction

1. *Types of action taken by the Belgian government*

1.1 *In the financial sector*

The actions of the Belgian government can be summarised as follows (in EUR)¹:

- capital injections by underwriting equity or other financial instruments:
 - Dexia: 6.4 billion,
 - Ethias: 1.5 billion,
 - Fortis: 4.7 billion in return for 49.93% of the Fortis Bank (Belgium) shares – followed by the purchase of the remaining shares from the holding for 4.7 billion,
 - KBC: 7 billion (no voting rights),
- offering of state guarantees:
 - Dexia: 150 billion (together with the French and Luxembourg governments),
 - Fortis: 150 billion,
- specific impaired asset scheme guarantees:
 - Dexia: 16.6 billion,
 - Fortis: 1.5 billion,
 - KBC: 20 billion,
- increase of the amounts benefiting of deposit guarantees and extending the guarantee to branch 21 insurance products,
- emergency lending assistance made available by the central bank (NBB/BNB) tot systemic banks.

¹ See further for a survey the expert report to the Parliament, Session 2009-2009, doc. 1643/002 (Kamer/Chambre) and 4-1100/1 (Senaat/Sénat), par. 1024 et seq. p. 390 et seq. See also the following Commission decisions: Commission decisions, cases N574/2008 and N255/2009, Belgium (Fortis), 19 November 2008 and 12 May 2009; and Commission decision, case C18/2009, Belgium (KBC), 18 November 2009. At the time of writing there were not yet public versions of the Commission decisions in respect of Belgian state aid measures concerning Dexia and Ethias. See for Dexia the Commission press release of 13 March 2009 (IP/09/399).

On July 17th 2009, Belgium had approved measures committing 26.7% of its GDP, more or less equal to the commitment of the Netherlands (25.4%) and the UK (26.8%), significantly below Ireland (229.4%), but well in excess of the EU average (12.6%)².

1.2 *In general*

The federal and the regional governments also took a number of general measures to counteract the impact of the financial and general economic crisis such as:

- a commitment to inject 3 billion EUR (0.9% of GNP) in the economy,
- an increase of the resources of the federal *Fonds de participations* and of the regional funds, and the raising of the amounts that can benefit of guarantees in order to facilitate the access to financing for small and medium sized undertakings³.

These measures were mostly punctual or limited in time, and therefore require no exit strategy.

In case it were decided that the economy still requires similar actions at the time that the abovementioned measures cease to have effect, we would need a “renewal” rather than an “exit” strategy.

2. *Cost of the actions taken by the Belgian government in respect of financial institutions*

The Minister of Finance and the Secretary of State for the Budget declared in respect of exit strategies what follows⁴:

“Le coût de l'intervention de l'État dans le secteur bancaire est actuellement inférieur aux recettes qu'elle génère, a indiqué Didier Reynders, dans le cadre de la présentation mardi des chiffres définitifs du budget 2009.

L'État touche, en effet, des intérêts sur les prêts, des dividendes et des primes pour la garantie qu'elle a offerte à plusieurs banques, ce qui représente plus que la charge de la part de la dette due à l'intervention dans le secteur bancaire en raison des taux d'intérêt très bas.

La couverture des produits structurés ne pose pas de problème non plus et la plus-value sur l'action BNP Paribas Fortis devrait permettre à l'État d'intervenir, comme il l'a prévu, en faveur des actionnaires de Fortis Holding,

De plus, l'État a déjà reçu des offres de remboursement de ses interventions, notamment de la KBC, et nous examinerons la réponse que nous donnerons à cette demande,»

They concluded: « A ce stade, il n'y a donc aucune raison pour que l'État fasse une quelconque opération pour récupérer ses interventions ».

² See annex 2 of http://ec.europa.eu/competition/state_aid/legislation/review_of_schemes_en.pdf.

³ See further for a survey the expert report to the Parliament, Session 2009-2009, doc. 1643/002 (Kamer/Chambre) and 4-1100/1 (Senaat/Sénat), par. 1033 et seq. p. 394 et seq.

⁴ See <http://www.didier-reynders.be/agenda/articles/annee-10/janvier/agenda-12-01-10.php>.

This declaration was made before the Greek debt crisis. But while that crisis may increase the risk that a guarantee might be called, one may also argue that the fact that guarantees are still in place reduces the risk of contamination.

It should also be added that the share process of BNP Paribas and Dexia shares do not allow the state to exit at brake even.

3. *Questionnaire*

3.1 *What are the different types of strategies that have been formulated in your country to exit from government actions that were taken to fight the crisis?*

The government pursued at the very beginning of the crisis a partial exit strategy in order to limit its degree of exposure:

- When the initial recapitalisation of Fortis proved insufficient the market, the government sold the Dutch subsidiaries of Fortis and ABN Amro to the Dutch government for 16.8 billion EUR⁵.
- In order to limit its exposure the government sold 74,94% of its shareholding to BNP Paribas in return for BNP Paribas shares valued at 8.2 billion EUR; these shares have generated in 2009 a dividend of 192 million EUR.
- The KBC instruments provide for an exit of the government. KBC has indicated that it is interested in an earlier exit, but the government is not⁶.

The implementation, including exit, of the crisis related government actions is moreover governed by the European Commission decisions in respect of the state aid aspects of these measures⁷.

Dexia and Ethias are historically seen as public institutions and the government intervened in these undertakings is partly to be seen in the context of an existing public sector relationship (the existing relationship is primarily with local government).

3.2 *To what extent have you, as a Competition Authority, been involved in the design of those exit strategies? Have you identified some related competition issues? How will they be addressed? In particular, to what extent is your Authority involved in the improvement of financial regulations (i.e. regulations covering credit rating agencies and specialised financial products like hedge funds) to ensure that competition concerns are taken into consideration and co-ordinated with financial security objectives?*

We have as a competition authority not been involved in the design of exit strategies because we have no powers in respect of state aid. We are regularly invited to ECN related co-ordination meetings on state aid, but given the fact that we have no powers in this area, we do normally not attend.

We have not identified related competition issues. This is not surprising given the scope of the in-depth analysis by the European Commission⁸.

⁵ The Commission decision N574/2009 mentions an amount of 12.8 billion EUR.

⁶ The warranty fee consists of a fixed amount of 1.1 billion EUR plus an annual commitment fee of 120 million EUR.

⁷ See for a most recent summary of the Commission's approach:
http://ec.europa.eu/competition/state_aid/studies_reports/phase_out_bank_guarantees.pdf

In case we had any specific competition law related concerns in respect of financial regulations we can always express these concerns to the federal Minister for the economy and discuss such concerns with the central bank (NBB/BNB) and the financial regulator (CBFA).

3.3 *Regardless of whether your government has actually implemented any exit strategies yet, in your view, what exit strategies should be adopted to get the best outcome for competition, bearing in mind the constraints of other policy initiatives? The list attached -- which is extracted from the February 2009 Secretariat background paper, DAF/COMP(2009)11 -- presents a non exhaustive set of pro competitive exit strategies. Do you see other pro competitive exit strategies?*

The answer to this question depends very much on:

- the type of measures and the extent to which their implementation was subject to conditions aiming at maintaining a level playing field, and
- the extent to which banking and financial market regulations offer an adequate protection, and are perceived by stakeholders as offering an adequate protection, against irresponsible market behaviour.

If measures do not noticeably distort competition, and confidence in banking management and regulators is still shaken, it may be best for competition to maintain measures that give government a direct say in the banking community. It is also important in order to restore confidence in market mechanisms that taxpayers can be convinced that they receive adequate compensation for their efforts.

It is very important for the medium to long term functioning of markets that the impact on public finance of the costs of an aging society does not jeopardise monetary stability and the ability of governments to invest e.g. in education and public infrastructures. We should therefore allow governments to recoup on their interventions in the financial sectors without giving them an incentive to pursue themselves excessively risky market behaviour.

3.4 *Could you explain what measures should be carried out to ensure that the market is crisis proof for the future?*

We regret to believe that markets will never be crisis proof but we hope that a competition policy that aims at promoting sustainable development by focussing on consumer welfare will help to reduce the risks.

How should financial regulations be improved (i.e. specialised financial products related regulations) so that competition concerns are considered while still meeting the objective of financial security? What should be done for reducing regulatory barriers to entry in credit rating agencies including those paid by investors, thus increasing the availability of credit rating information available? What should be done to reduce switching costs (i.e. by implementing "switching packs")?

- **Financial regulation**

Financial markets are by their very nature open and global. We do not believe that any agreement or organisation will ever be able to ensure an all encompassing regulation and supervision of financial market operators and products.

⁸ See decisions referred to in footnote 1.

There is, however, a significant demand for genuinely safe products offered by financial institutions that transparently have no conflicting interests with their customers. We therefore suggest considering the following approach:

- A certification or quality label for a limited number of basic financial products for which adequate guarantees are offered (e.g. specific capitalisation ratio); this certification should be done or cautioned by a public institution (the central bank or the financial market regulator);
- Stricter and more transparently enforced rules on transparency for all other products in order to enable customers to assess risks, available guarantees and potential conflicts of interest;
- A progressive adjustment of capitalisation requirements in order to limit the risk that financial institutions' assets do not match their liabilities, taking into account the potential systemic impact of such risks;
- The certification of financial institutions that accept a regulatory framework that effectively avoids conflicts of interest between the supplier of financial services and its customers. If no financial institution is willing to accept such restrictions, the governments should envisage re-entering that market;
- A clear message that financial institutions will be considered at least as fraudulent under criminal law.

- **Rating agencies**

The confidence in the existing rating agencies of government, the public at large and many operators may be damaged beyond repair. But the risks inherent in rating are so important that it does not seem prudent to propose a public agency. Public agencies should not go beyond verifying the description of products and the regulation of rating agencies. They should avoid creating the impression that they endorse or take responsibility for the ratings of regulation compliant agencies.

We need, however, to seek an international regulatory framework for rating agencies. Such framework may provide for an accreditation procedure for regulation compliant agencies. The regulation should provide for guarantees that agencies that may claim to be regulation compliant have no conflict of interests and thus no financial interest in giving a more positive or more negative rating (e.g. by stipulating that a public body will designate the rating agency, as is discussed in the US).

We do not think that there is much point in a strict regulation for the access to the market for rating agencies as we will never be able to avoid that an offshore entity presents itself as a rating agency. We should focus on the ability of all operators to distinguish the regulation compliant from other agencies.

As indicated above we consider furthermore that public authorities should focus on improving the regulation, certification and supervision of financial institutions and products by public bodies.

Is there a competition solution to avoid contagion risk across affiliates of financial conglomerates, particularly when investment banks are situated within a bank? (Allowing investment banks operating within a bank to benefit from a bank's low overall interest rates distorts competition with independent investment banks and creates a potentially dubious incentive for risky activities to be hidden, non-transparently, within larger, less risky entities). Would it be appropriate to explore the feasibility of promoting a structural separation option with a non-operating holding company structure including banking and investment banking activities as subsidiaries, which would borrow in their own name with no recourse to the parent or other members of the group?

A return to the rules requiring a strict structural separation of retail and investment banking can certainly be envisaged. There should at least be a strict and transparent separation

of accounts and allocation of capital guarantees in order to ensure that each activity bears its own risk.

We tend to see the protection of the customers of retail banks and the availability of financing at arm's length for undertakings as a more pressing concern than the risk of a distortion of competition between investment banks. More specifically, we see the need for safeguards against the fact a retail bank or its owners might be tempted, e.g. based on the implicit government guarantee, to offer financing that might otherwise not be available in order to benefit from the fees received by the investment bank.

We also consider that these regulatory challenges should be approached with due regard for the context in which retail banks became increasingly involved in relatively risky transactions. The significant reduction of the possibility to generate income by arbitration on currency transactions and divergent interest rates due to market and monetary integration, made banks more dependent on fee income in an environment in which its retail customers were not used to pay on a service-by-service basis. We should therefore perhaps help to convince the public that retail banks that offer the guarantees they seek may not be sustainable unless we accept a realistic pricing of banking services – while at the same time avoiding the risk that this debate is abused by banks to charge excessive charges for the services for which the clients are apparently willing to pay.

What can competition authorities do to help governments improve their responses to crises and potential crises in the future so as to reduce the negative impact on competition? For example, what should be done to reduce or eliminate the moral hazard inherent in bailouts, which encourages banks to engage in risky strategies without having to bear much of the risk themselves? Should international co-ordination be improved so as to avoid the competition problems that could arise when some countries bail out their businesses but others do not? How?

This Committee has seen no evidence that competition authorities contributed to the causes of the crisis. We believe that we adequately took into account the special circumstances caused by the crisis while strengthening rather than weakening the enforcement of the rules of competition.

We also believe that the European Commission's state aid policy reduced significantly, and perhaps eliminated, the moral hazard inherent in bailouts and that it avoided the distortions such bailouts might otherwise have caused in the Union.

The Lehman Brothers case has shown that there is a case for improved international co-ordination, but this is in the first place an issue for financial market regulators. It may, because it is concerned with state aid on an international level in the second place be an issue to be dealt with in the framework of the WTO.

Should competition policy, especially in the financial sector, focus on consumer welfare or also on other objectives, like general economic and systemic stability?

Competition policy in general, and in particular in the financial sector, should be consistent with policies aiming at economic and systemic stability. Competition authorities should not focus on objectives that are outside the scope of their powers, but they should give due regard to the impact of their interventions on society when pursuing their own goals. We assume that a competition policy that focuses on consumer welfare with the aim of contributing to sustainable development will rarely advocate measures that risk harming general economic and systemic stability.

However, in the unlikely event of a conflict of policy objectives, the government should give priority to its primary tasks of ensuring security and systemic stability. Competition authorities should accept the primacy of democratic government over markets and thus the primacy of the State on which the legitimacy of competition law enforcement depends.

CANADA

1. Introduction

The purpose of this note is to provide Canadian insights and perspectives on the questions posed in the OECD “Call for Country Contributions” document that identifies questions, challenges and suggested sources relevant to pro-competitive exit strategies for national and global financial sectors and systems.

Canada fully agrees with the many OECD documents distributed for this Roundtable that emergency measures to assist financial and non-financial companies and industries, and the fiscal stimulus packages of some national governments over the past three years may have distorted competition in national and global financial and non-financial markets and may have distorted as well international trade and investment flows. These documents note in particular that in some jurisdictions, during the crisis, emergency measures took precedence over competition rules, and that government guarantees and other bail-out operations for banks that are firm specific can have long-term adverse effects on the competitive environment.¹ It is essential that the exit strategies of all countries should be designed to remove and not add distortions to national and global competition and international trade associated with these emergency measures.

This note will pay greater attention to non-financial firms, sectors, and markets, and focus on the more general principles that are relevant to pro-competitive exit strategies for both financial and non-financial sectors.

2. Canada’s response to the global recession

Canada’s emergency measures for firm restructuring and fiscal stimulus programme were smaller in both absolute terms and relative to GDP than those of most other OECD countries. As one indicator, the Canadian government’s fiscal deficit as a proportion of GDP is estimated to be 4.6% in 2010, compared with 12.8% in the UK, 11% in the U.S., about 8% in France and Japan, and an average of 7.1% in the Euro area.²

Direct financial assistance to business was limited to Canada’s partnership with the United States to assist the North American motor vehicle sector.³ The Canadian financial sector continued to operate in the usual manner and to be profitable throughout most of the recession period. Moreover, Canada did not adopt “Buy Canadian” or other domestic preference policies, and in fact had to absorb a major appreciation of the Canadian dollar relative to the American dollar, which greatly increased import competition in our domestic market and provided important export market opportunities for producers in the United States and other countries.

The Government’s actions in support of Canada’s automotive sector were based on sound principles. These principles include: looking beyond immediate challenges to factors for long-term success; protecting taxpayers; ensuring support is based on strong business cases; making support available to the range of

¹ See in particular OECD (2009b) and OECD (2009c).

² The Economist (2010b).

³ Waddell (2010).

automotive firms; recognising that Canada is part of a highly integrated and increasingly global market; and ensuring that all stakeholders are involved.

It has been demonstrated that the effects of a failure of one or more large automotive companies in Canada would not be localised to one province or area of Canada solely. Rather, the supply chain that produces automotive parts, as well as the suppliers of steel, textiles and plastics essential to automobile manufacturing are widespread across Canada. Moreover, the extent of integration in the auto sector is pervasive, and any failure in one firm would have direct effects not only on their suppliers but on competitors as well since the major suppliers sell to all of the assemblers. An immediate shock to the automotive supplier base would pose a risk to the manufacturing operations of the rest of the North American assemblers.⁴ As a result, the Government has taken significant steps to support the automotive sector to help it adjust to a rapidly changing global environment.⁵

Canada's fiscal stimulus programme largely focused on infrastructure and the provision of other public works and public goods which helped to lay the foundation for greater competition, innovation and national competitiveness in the years ahead. The application of Canada's competition policies, competition laws and other laws and regulations were not softened and made more permissive over this period. Instead, the recession period was business as usual for Canadian governments in their continuing efforts to foster greater competition and competitiveness in Canadian industries and markets.

In this regard, during this period in March 2009, the Government of Canada introduced and the Canadian Parliament passed substantive amendments to the core conspiracy, abuse of dominance and merger provisions of the *Competition Act* in order to make competition law enforcement in Canada more effective, and more consistent with the competition regimes of our major trading partners. Over the same period, the Government of Canada made significant amendments to the *Investment Canada Act* that lowered obstacles to foreign investment to ensure that reviews of transactions of net benefit to Canada are focused on larger transactions.

In Budget 2010, the Government subsequently announced changes to satellite and uranium foreign ownership rules; and as well announced public consultations on telecommunications for ownership rules which are forthcoming. These changes were designed to increase competition, consumer choice and domestic and foreign entry into these sectors. In short, despite the global economic crisis, the Government of Canada has continued to implement competition policy and related reforms in order to make our markets even more competitive and open to foreign direct investment and global competition. This is one reason why outside experts believe the economic recession was shorter and less severe in Canada than in many other OECD and other major economies.⁶

Recent progress has been made under the Agreement on Internal Trade (AIT) by the federal, provincial and territorial Committee on Internal Trade (CIT). In October 2009, the CIT approved

⁴ The "too big, important and/or inter-connected to be allowed to fail" externality argument emerged in the financial sector but it also applied to non-financial markets and industries starting of course with the North American and European motor vehicle industries. See Waddell (2010), Beck (2008 and 2010).

⁵ In 2008–09, the Government of Canada and the province of Ontario provided significant support to Chrysler and General Motors (GM) to help them restructure, through short term loans, debtor-in-possession financing and exit financing. The federal government and the Ontario government made \$3.8 billion available to Chrysler. In return, the governments received a 2.5-per-cent equity stake in the restructured firm. Moreover, all of the US\$9.5 billion committed to GM has been disbursed. Canada and Ontario received a combined 11.7-per-cent ownership stake in a restructured GM, as well as US\$403 million in preferred shares.

⁶ See The Economist (2010a).

amendments to the AIT which revised the Agriculture and Food Goods Chapter, extending coverage of the Chapter to all technical measures related to agricultural products. This will further facilitate inter-provincial trade for the benefit of all Canadians, including producers and processors. The Chapter will come into force once all Parties sign the Chapter.

In addition, on October 7, 2009, the new Dispute Resolution Chapter came into force. The Chapter will significantly strengthen the enforcement measures for government to government disputes, including monetary penalties for non-compliance with panel recommendations. As well, in August 2009, the revised labour mobility chapter came into force so as to achieve full labour mobility. These revisions will enable any worker certified for an occupation by a regulatory authority of one Party to be recognised as qualified for that occupation by all other Parties.

Finally, in order to address concerns expressed by Canadian business with respect to obstacles they face, a work plan on business regulations and standards was approved in July 2009 by the Committee. The primary objective of the work plan is to identify those business impediments (i.e. regulatory discrepancies, overlapping and duplicative regulations) that raise business compliance costs. The work plan targets three areas, namely; reconciling corporate registration and reporting requirements, identifying priority business sectors where licensing requirements impose a burden on business and where greater reconciliation would be beneficial, and strengthening obligations under the AIT as they relate to regulations and standards.

Finally, the Government of Canada's March 2010 budget, as well as the budgets of other Canadian governments at the provincial and municipal levels, have laid out programmes to reduce government spending, deficits and debt in the coming years – and thereby promote market competitiveness, economic efficiency and private investment, and business expansion in the future.

3. Exit strategy themes that are important to Canada

Canadian financial assistance and other interventions during the global financial crisis and economic recession were designed and implemented in a manner that ensured minimum adverse impacts on competition in Canada, and on the access of our trading partners to Canadian markets. Furthermore, while the exit strategies now being implemented by the Government of Canada and other Canadian governments will be challenging for Canadian citizens, businesses, and industries, these strategies will have positive implications for competition in Canadian and global markets, through further reductions in the burdens and distortions that government deficits and debt place on businesses, consumers, and the operation of markets.

The remainder of this note presents a Canadian perspective on how this can be achieved. Particular attention is given to competition policy and law, and the key interactions between competition and other policies and regulatory regimes that are important to achieving this objective. Canada believes that the following principles are of paramount importance.

3.1 *Build exit strategies into emergency measures from the outset*

Exit strategies and measures to minimise harm to competition, consumers and economic efficiency and to achieve other long-term economic objectives should be built into and made an integral part of the design and implementation of emergency measures and fiscal stimulus programmes from the very beginning.⁷

This is done in Canada by designing our financial assistance agreements with industry to minimise negative impacts on competition, competitors, consumers and economic efficiency, meet other public

⁷ See OECD (2008).

policy objectives as needed, and provide strong incentives to business recipients to repay their loans and to use the government aid to solve their financial and competitiveness problems.⁸

Canada has implemented a number of policy approaches to foster adjustment and productivity in the economy, generally including policies affecting the intensity of competition and market access. The implementation of such instruments was guided by the following three principles:

- **Do no harm** through ensuring that: government intervention does not impede competition or the proper functioning of the market or does so to the minimum extent possible; the measures taken do not have any unintended adverse effects on the firm and its suppliers, customers and competitors; and government action would neither precipitate a failure nor impede necessary adjustments; and through considering whether a lack of intervention might lead to a disorderly restructuring that would result in a loss of efficiency in the economy.
- **Determine the systemic effect of business failure** through: identifying the scope of failure and to what extent it is restricted to the firm or alternatively will have a system-wide effect along or across value chains; determining the extent to which the firm is integrated vertically and horizontally into value chains and whether a failure would threaten other parts of the value chain, competitors and/or sectors which rely on the same, interwoven supply chains.
- **Ensure a viable business emerges following a government intervention** by ensuring that: all stakeholders (e.g., shareholders, employees, suppliers) participate in and contribute to the restructuring; and the intervention would potentially result in a net positive return to the firm, the government and the overall economy.

In short, any intervention made by the Government of Canada to facilitate company restructuring has to be principled based, conducted on a case-by-case basis, and requires significant review, oversight, due diligence and adherence to strict covenants. In addition, similar to the proposals by the OECD, the Canadian government tightens the terms of financial assistance agreements and imposes other pressures and penalties on beneficiary companies that are: slow to respond to market opportunities; improve their financial and competitive performance; and repay their government loans, repayable contributions and other financial obligations to the government.⁹

As noted, the Government of Canada's stimulus programme for FY 2009 and 2010, called Canada's Economic Action Plan, emphasised public infrastructure and other public goods as well as related public policy objectives such as: tax reductions; actions to stimulate housing construction and renovation and skills development; and support to businesses and communities in difficulty (e.g. the auto sector). These measures included increased investments in Export Development Canada and the Business Development Bank of Canada to improve liquidity in the marketplace and to help these two financial institutions to provide further assistance to exporters and small and medium-sized businesses that were in difficulty during the global financial crisis.

3.2 *Ensure effective competition policy and competition law enforcement*

To the extent that some OECD members softened their competition policies and competition law rules during the crisis, a clear statement should be made that from this point on, national competition laws are now being applied in a vigorous and highly co-ordinated manner among all OECD member states and

⁸ See Waddell (2010).

⁹ OECD (2009b).

throughout the global economy through, e.g. the work of the OECD Competition Committee and International Competition Network.

The emergency measures and fiscal stimulus programmes over the past two years were intended to provide companies in financial distress with *temporary* assistance during a difficult period in order to improve their financial and competitive performance. It was recognised by OECD member governments that some financial and non-financial companies would use this grace period to get back on their feet, while for other companies, the emergency measures may have simply delayed their inevitable exit from the market.

As emphasised earlier, a clear signal should be sent to national and international businesses and their stakeholders by Governments and competition authorities in OECD member countries that competition policy and law will not be used and misused in the future to allow anticompetitive mergers, cartels, abuses of dominance and other anticompetitive arrangements and conduct that: (i) would give companies in distress more time to get their affairs in order; but (ii) would cause serious harm to competition and consumers; and (iii) would slow down the processes of stabilisation and reform in national and global financial markets, and of reform and structural adjustment in national and global economies, that are essential to sustainable economic growth and prevention of similar crises in the future.¹⁰

Mergers and acquisitions can play an important role in restructuring and enhancing the strength and stability of the financial sector. In some jurisdictions, these proposals continue to be assessed for the most part from a financial stability perspective. As the economic recovery builds momentum, each proposed merger and acquisition will also need to be assessed by the appropriate competition law jurisdiction or jurisdictions in terms of the competition law standards of the merger's effects on markets. These merger reviews would need to take full account of the important differences between jurisdictions with respect to the extent of competition in their current financial industries and markets, the quality of their financial regulatory regimes, and other considerations that are addressed in a typical merger analysis.

3.3 *Apply the competition lens to policies and regulatory regimes*

Exit strategies that remove distortions caused by emergency measures and promote national and global competition, market access and international trade in the future need to go beyond appropriate competition policies and competition law enforcement. The work of the OECD over the past two decades on the interactions between competition law and policy and other policies and regulatory regimes – such as trade, industrial, innovation, and science and technology policies, intellectual property rights, sectoral regulations and regulatory reform, corporate governance and bankruptcy laws, and consumer policy and protection laws – point out that all of these policy and regulatory regimes need to work together to generate the competitive, innovative and dynamic national and global economies that are required to support sustainable economic growth and a better quality of life in the future.

This requires that the competition toolkit as well as the consumer impact and other tests and toolkits developed by the OECD and its member states over the past number of years could and should be applied in a consistent pro-competitive manner in removing the global crisis emergency measures and implementing the national and global exit strategies in the coming years.¹¹ Related policy issues where the competition lens can be applied during the exit strategy period can be especially important in this regard. They include:

- Any “temporary” trade protection measures that impede market access and protect inefficient domestic businesses should be phased out as part of any exit strategies. Their elimination is needed in order to support national and global competition, help to reduce government spending

¹⁰ Beck (2010).

¹¹ See in particular OECD (2007) and OECD (2010).

and deficits, and bring government rules into line with WTO and other international trade obligations.

- As noted above, some of the companies that were protected by special measures during the crisis will not have the ability to survive when protections and emergency measures are removed. Governments have a responsibility to ensure that the required bankruptcy, corporate reorganisation and restructuring laws and social safety net programmes are in place so that these failing firms can exit the market in an orderly manner with minimum harm to competition and to the welfare of workers, communities and other stakeholders. Exit strategies to promote competition and sustainable economic growth in the future require competition, bankruptcy, securities, corporate governance and other policies, laws and regulatory regimes that allow the orderly exit of inefficient companies, and the easy entry and expansion of more efficient and dynamic competitors in both financial and non-financial markets.¹²
- National and global policy and regulatory regimes should promote not only static competition in the near term but as well dynamic competition, innovation, technological change and entrepreneurial start-ups in the long run. Despite the economic crisis, the Government of Canada did not intervene in several high profile insolvencies and restructurings, but rather allowed the insolvency processes of Canada and the United States to facilitate the orderly exit or restructuring of Canadian firms. It is likely that some of the companies that received significant financial assistance from governments during the crisis will exit the market as the economic recovery continues. Additional government assistance to these failing firms could simply further distort business incentives and competition and slow down the improvements in private and government “balance sheets” that are so important to sustainable economic growth.

4. Concluding comments

To summarise, the major themes from a Canadian perspective are as follows:

- Financial sector exit strategies and regulatory reform are clearly very important and the emphasis given by the OECD and others to the implications of pro-competitive exit strategies for national and global financial sectors and systems is fully understandable.
- We should go beyond financial sector reform to address how national and global exit strategies and their implications for competition affect the interactions between the financial and non-financial sectors, as well as competition, economic efficiency, welfare and related socio-economic outcomes and objectives in non-financial industries and markets.
- National and global exit strategies of government must send a clear signal to business which changes their strategies and incentives from seeking financial support and protection from governments to taking measures to address their own financial, corporate governance and competitiveness situation.

One implication is that more research should be conducted on exit strategies, competition, the interactions between financial and non-financial sectors, and the implications for competition, efficiency, innovation, competitiveness and stability in non-financial markets and industries. For example, the research by Beck¹³ and his colleagues on the interactions and tradeoffs between competition and stability

¹² OECD (2009b).

¹³ Beck (2008, 2009 and 2010) and Beck et al. (2010).

could be extended to some non-financial industries, markets and supply chains that have similar characteristics in such areas as network, domino and contagion effects that can make them fragile and subject to collective financial distress that affects all major players in a market, industry and/or supply chain.¹⁴

Without a doubt, financial companies, industries and markets are very different from non-financial companies, industries and markets and therefore the interactions between competition, financial stability and other public policy issues are also very different and complex.¹⁵ However, the lessons we are now learning in assessing the interrelationships between competition, exit strategies and regulatory reform for financial industries could also be helpful in increasing our understanding of similar issues in many non-financial industries with similar characteristics. For example, future research on competition and stability could focus on the implications of different competition/stability relationships in the financial sector on the non-financial sectors, and on the ability of global and national financial sectors to meet the needs of financial consumers and business customers, large and small.¹⁶

Further theoretical, empirical and policy analysis is needed to provide guidance to decision makers in the future on the weight to be given to the “too big to fail” argument and the conditions that either strengthen or weaken this argument that would be relevant to a specific financial or non-financial industry, company or set of companies that are in distress.

The analysis as well should address situations when financial assistance to industries and companies is unavoidable, by providing guidance to decision-makers on how the assistance should be designed to minimise the cost to taxpayers; the distortions to competition, the quality of service to customers, consumer welfare and aggregate efficiency; as well as the moral hazard, opportunism and related strategic behaviour problems which delay exit strategy implementation and increase the risks of future business requests for bailout assistance because of high growth/high risk products and strategies, which presume that governments and taxpayers will pay for the downside risks through future bailouts.¹⁷

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¹⁴ See e.g. Cseres K. J. (2008).

¹⁵ OECD (2009).

¹⁶ See Stiglitz (2010).

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DENMARK

1. What are the different types of strategies that have been formulated in your country to exit from government actions that were taken to fight the crisis?

Denmark has adopted a number of exit incentives in the support schemes to the financial sector in accordance with the EU state aid regulation. Furthermore, Denmark is gradually withdrawing part of the support for the financial sector and is thus already beginning to exit from the government actions taken in response to the crisis.

Several different measures have been adopted with regard to ensuring timely exit from government support schemes. The Danish government has adopted an unlimited state guarantee for simple creditors of financial institutions which expires 30. September 2010. The measure was later amended to include the possibility of individual guarantees for financial institutions and a measure concerning state recapitalisation of financial institutions was also adopted.

The Danish recapitalisation scheme was contemplated as a temporary transitional measure and was thus adopted in order to ensure that banks had access to the necessary capital to sustain their activities once the guarantee scheme expires. The measure illustrates the Danish state's attempt to take account of the financial sector's situation after the expiry of the general state guarantee and an attempt to provide a smooth foundation upon which banks can return to the market on their own terms and at their own pace.

The Danish parliament has also passed a bill concerning the handling of distressed banks which will enter into effect after the expiry of the guarantee. This measure is introduced as a transition from crisis support to normal market conditions. The Danish government will however still be involved in the financial sector with regard to handling of distressed banks and individual guarantees for banks, which can be given for loans of up to three years.

With regard to exit-strategies applied to these measures it should first of all be mentioned that government support of the financial sector is temporary and, therefore, limited in time. It has thus been the aim of the Danish government only to give necessary and temporary support to correct the market failures following the systemic financial crisis.

Furthermore, the Danish recapitalisation measure has been targeted towards the support of only fundamentally sound banks in accordance with the EU state aid regulation under the temporary framework. The requirement that only fundamentally sound banks would receive government support was to ensure that aid was not given to banks that were poorly managed and to ensure that the state aid had the wanted effect.

If support is given to distressed firms during a crisis, competition suffers by supporting firms that have shown incapable of surviving under normal market conditions. Exit of ineffective firms from the market and the threat of new entrants to the market are important drivers in order to achieve efficient markets that promote welfare and innovation.

By ensuring that aid is only given to healthy undertakings, the measure supports only the survival of those firms that under normal market conditions would have been able to run an ongoing business without government support.

Thirdly, the government has ensured that firms in the financial sector opting for government support pay a sufficiently high price for the support measures. This is done in order to provide firms with the proper incentive to turn to the private financial markets once these are functioning normally again or to refrain from applying for support in the first place. Setting high prices for financial state aid measures also ensures that only firms with a real need actually receive it.

The guarantee scheme adopted in Denmark, for example, was designed in such a way that the state guarantee would not be drawn upon before losses surpassed 4,6 billion euros. These first 4,6 billion euros of losses would instead be covered collectively by the participating banks ensuring a strong financial contribution from the participating banks. The private financial contribution was designed in order to minimise the state aid to that which was estimated necessary to reach its goal. In addition, the contributions from private banks give incentives to withdraw collectively from the unlimited guaranty once market conditions have normalised.

The government capital injections came at a price set sufficiently high to give firms incentives to either not apply for capital injection or – for firms who did apply for capital injections – to return to the financial markets once these function normally. The pricing mechanism in this aid scheme was designed in accordance with principles used by the European Central Bank and the state aid rules of the Treaty of the Functioning of the European Union.

The second largest bank in Denmark, Nordea Bank AB, chose to obtain loan capital from the private equity market instead of obtaining capital injections from the government scheme. This could be an indication that the strategy of high prices for state capital injections was well designed.

As the latest development, the Danish government has proposed a bill concerning the handling of distressed banks. The bill is meant to enter into effect when the existing guarantee scheme expires and seeks to handle the distressed banks through a controlled winding-up process in order to optimise the outcome for depositors and investors compared to normal termination through the bankruptcy procedure. At the time of banks' inability to adhere to Danish financial regulation regarding insolvency¹, the banks are given a choice between liquidation in accordance with normal rules concerning bankruptcy and allowing the takeover of assets by a subsidiary of the state owned company set up with the purpose of facilitating the winding-up of insolvent banks.

The subsidiary will hereafter instigate a controlled and swift winding-up of the distressed bank. The distressed bank will continue to function until it is liquidated, but may not participate in aggressive marketing of its activities or compete on the market. The subsidiary will see to it that the simple creditors, and to some degree also the stockholders, of the distressed banks minimise their losses in connection with the liquidation of the distressed bank.

With the introduction of the measure for the handling of distressed banks, and expiry of the general guarantee scheme, neither the banking sector nor the private depositors benefit from a state guarantee. With the new measure, the Danish state is initiating a withdrawal from the financial crisis regime of government support to a situation whereby the private banking sector almost entirely stands on its own. What remain of government support of the sector are the individual guarantees that can be attached to loans of up to three years and the fact that the handling of distressed banks is under government control to

¹ Assuming that all attempts of selling the bank have proven unsuccessful.

a certain degree. However, the participation in the measure for the handling of distressed banks is entirely voluntary and government takeover of a distressed bank will not be carried out before all possibilities of a private sale have been explored.

Denmark has not given direct state aid to specific companies in the real economy during the crisis, although some relief were given in terms of postponement of payment of specific taxes and value added tax.

2. To what extent have you, as a Competition Authority, been involved in the design of those exit strategies? Have you identified some related competition issues? How will they be addressed? In particular, to what extent is your Authority involved in the improvement of financial regulations to ensure that competition concerns are taken into consideration and co-ordinated with financial security objectives?

The first government general action taken in response to the crisis was the general guarantee scheme adopted in October 2008. The Competition Authority was represented in the task force created to design the guarantee scheme as well as the credit scheme. Some ideas during the design phase were abandoned as a consequence of competition concerns expressed by the Competition Authority's representative. The Danish Bankers' Association as well as other interested parties were also consulted in the design of the guarantee scheme.

The Competition Authority has likewise been involved in giving advice on the design of the subsequent initiatives with respect to conformity with EU state aid rules.

Legislation regulating the financial sector is prepared by the Ministry of Economic and Business Affairs and the Financial Supervisory Authority. However, all new regulation is submitted to the Competition Authority in an official hearing for the Authority to give its statement on issues relating to possible anti-competitive effect.

3. Regardless of whether your government has actually implemented any exit strategies yet, in your view, what exit strategies should be adopted to get the best outcome for competition, bearing in mind the constraints of other policy initiatives?

Government ownership of commercial enterprises can in and of itself constitute a distortion of competition. The perception of the market, in some cases, is that a firm which is owned by the state will have easier access to capital and a better credit rating than ordinary private firms in a similar legal and factual situation. It is also widely understood, that the state would be reluctant to allow a government owned company to go bankrupt. The threat of failure is therefore minimal for the publicly owned firm in question. Ownership alone may in some situations thus provide a competitive advantage for the companies in question and as a result, distorts competition at the expense of tax payers and society as a whole.

Public ownership can constitute interference in the market and should only be applied in matters of sincere general economic interest such as that of natural monopolies and to ensure stability of the financial system. Therefore, any government involvement in the financial sector should subsequently be scrutinised with the purpose of securing timely exit from a situation whereby the sector is dependent on state aid.

In addition to this, once the financial markets are normalised, the state should begin its withdrawal from the market. This entails putting a stop to all provision of capital, as well as other means of support, to financial institutions. This may not be possible to implement from one day to the next and it should be considered whether state guarantees should still be given in order to support confidence in the market while slowly phasing out the level of state aid given to companies while they once again adapt to market conditions. It may also prove necessary, as in the case of Denmark, to provide support to the simple

creditors and stock owners of distressed banks in order to provide a more smooth transition back to normal market conditions and to safeguard the asset value of the distressed banks.

As contemplated by the Danish government, it is also important to provide incentives for firms to return to normal market conditions at the opportune moment for the individual company. This can be done by setting sufficiently high prices for guarantees and other support measures. This ensures that companies do not linger in a permanent state of government resuscitation, whereby inefficient companies may be sustained at the expense of new, efficient and innovative entrants. It also ensures that companies return to the market when the market is functioning again and is able to supply its products or services at a price below that of the state aid schemes.

Setting relatively high prices also ensures that only companies who truly need the aid choose to accept it and that the aid schemes do not provide unnecessary and disproportionate advantages to companies or entire industries. But perhaps more importantly, high prices ensure that individual companies have incentives to improve their risk profiles in order to keep costs down. In regard to this, it is important to set prices individually in accordance with the receiving firm's risk profile and credit rating. Setting a fixed price for the entire sector or industry, promotes risk taking and generally benefits inefficient firms at the expense of more efficient firms.

JAPAN

Introduction

In this contribution paper, with regards to Japan's exit strategies, we would like to introduce (i) the capital injection of public funds into banks as a counter measure to the financial crisis, and (ii) government actions on corporate rehabilitation and industrial revitalisation.

1. Capital injection of public funds into banks as a counter measure to the financial crisis

1.1 *Progress of capital injection of public funds into banks¹*

1.1.1 *First injection of public funds based on the Financial Function Stabilisation Law*

At the end of the 1990s, Japan was confronted with a major financial crisis, the precursors to which were the collapses of Yamaichi Securities and Hokkaido Takushoku Bank in November 1997. In the wake of the crisis, the Law concerning Emergency Measures for Stabilising Financial Functions (Financial Function Stabilisation Law) was put into effect, and a system for preventive injections of public funds was introduced for the first time.

The capital injection of public funds was then capped at 13 trillion yen. In fact, public funds totalling 1,815.6 billion yen were injected into 21 major banks, including the Long-Term Credit Bank of Japan and the Nippon Credit Bank, which were facing management crises in March 1998.

It is worth mentioning that the "capital injection of public funds" was instituted by the Deposit Insurance Corporation, a government-authorised corporation, established under the Deposit Insurance Law to stabilise the financial system. The Deposit Insurance Corporation [almost wholly (about 95%) government-funded] injected the public funds by purchasing stocks, etc., in the banks in question through the Resolution and Collection Bank (reorganised into the Resolution and Collection Corporation in 1998), which had 100% voting rights. (The injection of public funds discussed in section B below was made possible through the same mechanism.)

1.1.2 *Second injection of public funds based on the Early Strengthening Law*

Despite the capital injection made in accordance with the Financial Function Stabilisation Law, the Long-Term Credit Bank of Japan and the Nippon Credit Bank failed to resolve their management crises. Consequently, the government enacted in October 1998 the Law concerning Emergency Measures for the Revitalisation of the Functions of the Financial System (Financial Revitalisation Law) and the Law concerning Emergency Measures for the Early Strengthening of the Functions of the Financial System (Early Strengthening Law).

¹ See National Diet Library Issue Brief 477 (Mar. 30, 2005).

The Financial Revitalisation Law created a system that would enable the government to buy nonperforming assets from sound financial institutions. The same law also provided the legal foundations for the government to temporarily nationalise the Long-Term Credit Bank of Japan and the Nippon Credit Bank.

The Early Strengthening Law, on the other hand, was designed to strengthen the scheme for preventive injections of public funds as a temporary measure. With the present law as its legal basis, 7.5 trillion yen in public funds were injected into 15 major banks in March 1999.

1.1.3 Creation of a permanent system out of temporary measures and the injection of public funds to Resona Bank

With the revision of the Deposit Insurance Law in May 2000, the temporary measure used for liquidation based on the Financial Revitalisation Law became permanent. As a way to respond to the financial crisis, moreover, the same law set forth provisions for capital injections (Article 102, Section 1), blanket government protection of bank deposits (Article 102, Section 2), and the establishment of the Special Crisis Management Bank (Article 102, Section 3).

In accordance with Article 102 of the Deposit Insurance Law, about 2 trillion yen worth of public money was injected into Resona Bank in 2003, one of Japan's largest banks. This time, it was the Deposit Insurance Corporation that carried out the injection through the acquisition of voting shares in the bank. Ultimately, the Corporation held about 70% of the bank's voting shares.

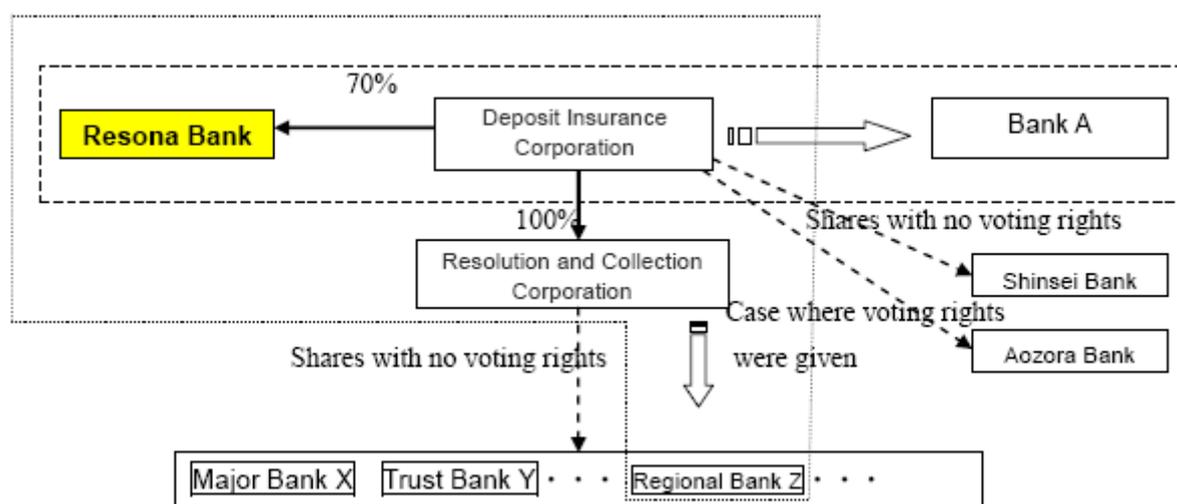
1.1.4 Acquisition of bank stocks by the Deposit Insurance Corporation (or Resolution and Collection Corporation)

As Resona Bank received a capital injection in 2003 based on Article 102 of the Deposit Insurance Law (as was described in section C above), the Deposit Insurance Corporation or the Resolution and Collection Corporation held stocks, etc., in numerous banks.

That is, with two injections of public funds (one in 1998 based on the Financial Function Stabilisation Law, and the other in 1999 based on the Early Strengthening Law; see sections A and B respectively for detail), the Deposit Insurance Corporation, through the Resolution and Collection Corporation, which owned 100% voting rights, had come to hold stocks, etc., in the then four mega banks and more than ten regional banks.

Moreover, based on the provisions for temporary nationalisation set out in the Financial Revitalisation Law (See Section B above), the stocks of both Shinsei Bank (formally, the Long-Term Credit Bank of Japan) and Aozora Bank (formally, the Nippon Credit Bank) were transferred in 1998 from the Resolution and Collection Corporation to the Deposit Insurance Corporation.

The bank stocks that the Deposit Insurance Corporation or the Resolution and Collection Corporation held were preferred stocks (with the exception of Resona shares), thus, in principle, these stocks did not come with voting rights. However, it was possible that voting rights would become attached to stocks of certain regional banks, as those banks would fail to offer dividend payments.



1.2 Subsequent conditions

Since then, the Deposit Insurance Corporation has not acquired voting stocks of banks other than Resona Bank based on the Deposit Insurance Law. Also, voting rights on non-voting stocks of banks, which the Deposit Insurance Corporation owned through the Resolution and Collection Corporation based on the Financial Function Stabilisation Law and/or the Early Strengthening Law, have not materialised.

Additionally, from 2004 to 2006, major banks were successful in paying back public money.

2. Corporate rehabilitation led by Industrial Revitalisation Corp. of Japan

The Industrial Revitalisation Corp. of Japan is a stock company established in April 2003 (and dissolved in March 2007) as a temporary measure under the Industrial Revitalisation Corporation Act. It was wholly funded by the Resolution and Collection Corporation, and its principal aim was to purchase nonperforming loans and help corporate borrowers rebuild their operations.

Details of its rehabilitation scheme are as follows:

- The Industrial Revitalisation Corp. of Japan selects companies with viable business prospects and greater potential for rehabilitation from among the nonperforming loans of main lenders.
- The Industrial Revitalisation Corp. of Japan buys the company's debt claims held by banks other than its main lender at a price deemed commensurate with the company's actual situation. In this way, the company's creditors are limited only to its main bank and the Industrial Revitalisation Corp. of Japan. Consequently, the company will find it easier to reconcile competing interests, compared to situations in which it is dealing with multiple lenders (lending banks).
- Main lenders are expected to give up a portion of their loan claims. Moreover, in co-operation with the Industrial Revitalisation Corp. of Japan, they draw up a blueprint for the rehabilitation of borrower companies. In this way, they can help the companies rebuild their operations.

NETHERLANDS

Introduction

During the crisis, competition rules were occasionally overruled in order to implement emergency measures. As the economic situation stabilises, these emergency measures ought to be phased out and plans and/or incentives for exit should be designed. The roundtable on exit strategies will focus on two issues. Firstly how competition policy can assist in ensuring that any competitive distortion created by measures adopted during the crisis be eliminated (whilst concurrently ensuring that the market is crisis-proof) and secondly how competitive normality may be preserved whilst carrying out such exit strategies. This contribution addresses the exit strategies formulated in the Netherlands; the involvement of the Netherlands Competition Authority (NMa) in the design of these exit strategies; and measures to be carried out to ensure that financial markets are crisis proof for the future.

1. Exit strategies formulated in the Netherlands

During the crisis, several Dutch financial institutions received State aid in varying degrees; they either (i) made use of a general guarantee scheme for senior unsecured debt securities of banks (i.e. ING, SNS Reaal); (ii) received capital support (i.e. ING, SNS Reaal and Aegon) or guarantees on impaired assets (i.e. ING) and/or; (iii) were nationalised (i.e. roughly the retail banking activities of ABN Amro in the Netherlands and the banking and insurance activities of Fortis in the Netherlands). In addition, these Dutch financial institutions were also assisted by the various liquidity support measures provided by central banks. .

All State aid is provided on a temporary basis and (as far as possible) in line with market conditions. The European Commission has assessed (and continues to assess) State aid measures set up to support Dutch financial institutions. When assessing cases, the Commission verifies whether measures are (i) well-targeted; (ii) limited to the minimum necessary; and (iii) designed to minimise distortions to competition.

State aid can distort the competitive level playing field between financial institutions.¹ Market players may perceive institutions that have received State aid to be safer than institutions that have not received State aid. This may result in lower risk premiums for supported institutions.

In addition, distortions between market segments may exist due to the fact that various markets and products may be affected in different ways by the aid measures, for example in relation to the requirements that are placed on assets which are secured by the State (DNB, 2009).

Therefore, according to the Netherlands Competition Authority (NMa), the State aid measures should be ended as soon as markets are able to function independently. As the NMa recognises that terminating the State aid measures could prove to be difficult, a credible exit strategy will need to be case-specific and will largely depend on (i) the type of government support; (ii) the financial institution involved; (iii) market conditions; and (iv) the relevant regulation.

¹ The Dutch bank Van Lanschot Bankiers filed a complaint with the European Commission in the Summer of 2009. According to the complaint, the interest rates of ABN Amro and Fortis (nationalised banks) on deposits in the Netherlands were too high.

The IMF (2009) has outlined a possible schedule for exit strategies. Under this schedule, an initial reduction of central banks' liquidity support measures would occur, followed by a reduction in State guarantee schemes (on debt, equity and deposits). Finally, direct capital support and guarantees on impaired assets would also be reduced. According to such a schedule, market participants would first assume liquidity risks and only thereafter the solvability risks of their counter parties.

The remainder of this contribution will describe three related matters: firstly, issues of State intervention in the Dutch financial sector; secondly, the involvement of the NMa in the design and implementation of these measures and; finally, the NMa's view on some of the proposals that are currently circulating in the debate on regulation in the financial sector.

1.1 Debt guarantee scheme

The Dutch general debt guarantee scheme was extended for a second time, in December 2009, until the end of June 2010. This was due to the fact that market conditions had not yet justified ending the guarantee scheme. Although the extension has been approved by the European Commission, the Commission has requested Member States to start preparing the phasing-out of the guarantee schemes.²

Measures such as the Dutch debt guarantee scheme are probably least distortive to the competitive level playing field, since they are open to all banks. However, such guarantee schemes may lower the funding costs of institutions and this may lower their incentive to restructure. Therefore, as outlined above, debt guarantees should be gradually phased out once markets are starting to function normally.³

Nonetheless, it remains unclear and therefore uncertain when markets will be functioning 'normally'. It seems unlikely (and possibly even undesirable) for credit markets to operate in the same way as before the crisis. Therefore, making exit conditional on the functioning of markets, could lead to delays in exit.

1.2 Capital support measures and the ING case

All three Institutions (ING, SNS Reaal and Aegon) which received capital support have already started the process of reducing their reliance on State aid by paying back the Dutch State.⁴ However, none of the three beneficiaries has yet paid back the capital injection in full.⁵

In this regard it is also noteworthy that ING and the Dutch State have appealed the State aid decision of the European Commission. In particular, the appeal relates to an early repayment by ING of the Dutch State aid. In its decision, the Commission stated that it considers this early repayment option (and subsequent debt reduction) to be an additional form of supplying aid.⁶ ING has indicated that it will not

² See <http://europa.eu/rapid/middayExpressAction.do?date=18/12/2009&direction=0&guiLanguage=en>. However, the recent financial market turbulence related to the sovereign debt of Greece (and other European countries) could make a short-term exit more unlikely.

³ The ability to adjust the conditions of the scheme over time, makes it possible to ensure that the scheme will become increasingly unattractive; as a result of which, the banks will gradually rely less on external support and shocks may be avoided.

⁴ All three have financed the repayments via the stock markets.

⁵ SNS Reaal and ING have recently indicated that full repayment is unlikely this year. Aegon has to delay reimbursing its capital support at least until its viability plan has been approved by the European Commission.

⁶ Commission Decision of 18 November 2009 in case C 10/2009.

reimburse the remainder of the capital injection until the European courts have ruled on the case. A ruling is expected at the end of 2011. It is possible that these disputes will delay an early exit.

Further to the above, ING has issued a restructuring plan to the European Commission under which it will divest a large part of its current businesses. ING plans to divest its insurance activities in the Netherlands and to carve out a fully operating retail bank. The NMa welcomes this measure because of the highly concentrated nature of the Dutch retail banking market (in which the three largest banks (ING, ABN Amro/Fortis and Rabobank) have a combined market share of above 70% in a number of markets). The divestiture will be carried out under the supervision of a monitoring trustee and a hold-separate trustee. Nonetheless, there could be some risk that the divested retail bank will not be a full competitor on the market immediately following divestment. This is due to the fact that ING will provide assistance in creating a Treasury function and will ensure funding for two years post-divestment.

Furthermore, ING must adhere to a price leadership ban under which it is prohibited to offer more favourable prices than its three best priced direct competitors for a period of three years.⁷ According to the NMa, there is a risk that this measure may significantly restrict effective competition, because of the highly concentrated nature of the Dutch banking sector. These risks are enlarged, since similar behavioural rules have been imposed on the newly merged ABN Amro/ Fortis, as a result of which such conditions are now imposed on two of the three major players in the Dutch banking markets.

1.3 Nationalised institutions (ABN Amro and Fortis Netherlands)

In October 2008, the Dutch State acquired control over (i) the retail banking activities of ABN Amro and Fortis in the Netherlands; (ii) the retail insurance activities of Fortis in the Netherlands (ASR Nederland); and (iii) Fortis Corporate Insurance.

The Dutch State does not consider itself to be a long-term investor in these financial institutions. In June 2009 the State sold Fortis Corporate Insurance to the British insurance company Amlin for EUR 350 million as a first step in its exit strategy. The expectation is that ASR Nederland will also be sold in due course.

In October 2008, the Dutch government acquired ABN Amro and Fortis' retail banking activities. Prior to the nationalisation of these banks, a merger had been planned between ABN Amro and Fortis. In the wake of the nationalisation, the Dutch government decided to proceed with these merger plans. However, according to the NMa, the decision to proceed with the merger of ABN Amro and Fortis could delay exit. According to the February 2010 decision of the European Commission "*the Dutch State indicates that the timing of the exit will take place once (i) the new group has been able to show a positive track record (especially in terms of synergies); and (ii) market valuations for large financial groups have further normalised*". In addition, the integration of ABN Amro and Fortis will create a larger and more complex financial institution. At the same time, a divestiture of ABN Amro and Fortis as two separate entities, would not necessarily have guaranteed a prompt exit either.

Referring to the first condition, it should be noted that the integration of ABN Amro and Fortis has begun only recently (April 2010).⁸ Therefore, it is uncertain whether synergies from the merger will be

⁷ Or until it has paid back the EUR 10 billion capital injection from the Dutch state (whichever time limit is shorter). This requirement is part of a legal appeal of ING at the European courts.

⁸ The legal merger of ABN Amro and Fortis could only start after completion of the divestiture of 'New HBU' and 'IFN Finance'. These two activities of ABN Amro were sold, since this was a remedy accepted by the European Commission in the merger case of ABN Amro and Fortis. The NMa strongly supports this decision, because of the concentrated nature of the Dutch (retail) banking market. 'New HBU' and 'IFN Finance' were sold to Deutsche Bank in April 2010.

realised in the near future. The Dutch State has injected EUR 1.2 billion of capital into ABN Amro/Fortis to finance integration costs and to have the banks comply with solvability requirements of the Dutch central bank. Such capital injections supports the hypothesis that synergies are only likely to be realised after a period in which the integration is to take place.

With regard to the second condition, the NMa observes that exit strategies are naturally based on prevailing market conditions. Governments will be faced with the dilemma that a prompt exit will not necessarily be aligned with maximising returns/shareholder's (tax payers') value. It will also be very unclear when valuations of financial groups have 'normalised', since it is unlikely that valuations will return to pre-merger levels any time soon. In February 2010 the Commission noted that it could not confirm that ABN Amro and Fortis would generate a sufficient return to adequately remunerate its shareholders.

According to the NMa, there is no clear exit strategy formulated with regard to the banking activities of ABN Amro and Fortis. The NMa feels that setting criteria under which exit may take place (or at least setting conditions under which exit must be evaluated), would help to avoid the nationalisation of ABN Amro/Fortis from lasting longer than necessary.

2. Involvement of the NMa

From the outset of the financial crisis, the NMa undertook advocacy initiatives regarding exit strategies by holding periodic discussions with the Dutch Ministry of Finance. The NMa has constantly stressed that State aid ought to be in line with market conditions and proportional, with regard to the duration and amount of the aid.

The NMa believes that public administrators of financial institutions should manage their investments in financial institutions at arm's length in order to avoid political interference in the day-to-day operations of these institutions. In addition, potential tension may exist between the role of the State as regulator on the one hand and its role as shareholder on the other. This is because the State may have less incentive to impose strict regulations on institutions it still holds a stake in, since this might lower the institutions' market value. It is fair to add that there are currently no indications that such a situation has emerged in the Dutch market. At the same time, the State imposed measures on Dutch financial institutions to restrict (excessive) management remuneration.

As a consequence of these concerns, the NMa lobbied the government to place the financial participations in a separate agency and to have dedicated teams for each institution. Indeed, the latter has been part of the Ministry of Finance's policy from the outset. However, the debate regarding the organisational structure surrounding the management of financial participations continues.⁹ In any event, even with the management of financial institutions put at arm's length, the conditions of the State's exit as management of such institutions ought to be clearly defined.

The NMa believes the independence of the supervisory board members appointed by the government is necessary in order to encourage healthy competition. The NMa has advised that each supervisory board member ought to be on the board of a single institution. Furthermore, there should be no risk of exchange of information between the State appointed supervisory board members who act on different boards of different institutions. In effect, a Fire wall ought to exist between these administrators.

⁹ Dutch parliament has requested the government to investigate different options for managing the participations at arm's length. Most likely, the new Dutch government will decide on this issue (after the next general elections in June 2010). Therefore, it will probably take a prolonged period before this issue is settled.

With regard to privatisation of the nationalised institutions, the NMa has reservations against selling the merged ABN Amro/Fortis bank to a (large) player which is already active in the Dutch markets. This is because of the concentrated nature of many financial markets in the Netherlands. The privatisation of ABN Amro/Fortis ought not to lead to a substantial impediment to effective competition. The new structure of the Dutch financial sector should promote both competition and stability. For this reason, a buyer which is not yet active in the Dutch markets would be preferable (or ABN Amro/Fortis should be brought to the market as a separate institution). This view has been communicated to the Dutch government on various occasions and it may have implications for exit strategies, as it may restrict the number of potential buyers on the market (in case the Dutch State would prefer to sell the nationalised banks to an existing player). The NMa also finds it important that the process by which a buyer is selected, is transparent. The State should disclose the criteria under which potential buyers are selected.

3. Measures to ensure that financial markets are crisis proof for the future

As the financial crisis has once again shown, the financial sector is a unique and important sector, especially because of its tasks relating to financial intermediation. Sector-specific regulation is necessary to safeguard stability. Nonetheless, such regulation should not restrict competition more than necessary. The focus of financial institutions should be on consumers and prices must be transparent.

As a logical result of the financial crisis, regulations will be altered and amended, most likely resulting in stricter regulation. The NMa's use of advocacy and guidance measures attempts to safeguard future regulation from unnecessarily hampering effective competition by raising entry barriers and/or needlessly restricting innovation.¹⁰ The NMa believes that it is important that smaller financial institutions will not be discriminated against by new regulation, since such discrimination could lead to an increase in barriers to entry or expansion. The NMa tries to promote a level playing field within and between countries.

3.1 Towards a safer and more competitive financial sector

The NMa supports initiatives to reduce moral hazards in the financial sector, since such measures will often also improve the level playing field in the sector. Because markets expect that systemically important financial institutions will be saved by the State in case of financial distress, such institutions may be able to attract more favourable funding. By reducing moral hazard and ensuring that investors in financial institutions suffer in case of distress, such implicit subsidies for systemically important financial institutions could be reduced.

One important way to reduce moral hazard is to order institutions to create recovery and resolution plans (also referred to as "living wills"). Living wills can be especially effective in reducing moral hazard if supervisors are able to intervene sooner (also referred to as prompt corrective action). Early intervention could help to ensure that financial institutions must take significant measures earlier. At the same time, early intervention may actually decrease the likelihood that financial institutions will go bankrupt, which could harm the competitive process since failing firms do not exit the market.

However, it is important to verify that imposing such a measure does not unnecessarily increase barriers to entry or expansion. For example, in case a smaller financial institution would be required to set up a completely new and separate business division if it wants to enter a new retail market, this could increase barriers to enter that market.

¹⁰ It is interesting to note, however, that innovations in the financial sector are often only based on tax or regulatory arbitrage, and may in fact not directly benefit consumer welfare.

Two other policy responses currently under debate are imposing leverage caps and prescribing higher capital requirements (while possibly also making them more anti-cyclical). Such measures would not reduce moral hazard directly. However, these steps are likely to be necessary in order to create a more stable financial sector. It seems important to ensure that these measures are implemented in such a way that the rules do not discriminate between institutions of different size and background.

In addition, there may be advantages to separating investment banks from ‘retail banks’ via non-operating holding companies. Such separation may reduce distortions of competition related to internal subsidies; it could also make institutions easier to govern and to split up in case they face problems. It might therefore be worthwhile to investigate whether splitting the risky, non-transparent, hidden (investment banking) activities from the ‘plain vanilla’ banking products (and separating the high-risk/high reward culture from the ‘safe and secure’ culture). However, such a rule will be difficult to implement since it will not always be clear which activities should be considered as ‘plain vanilla’ (e.g. it ought to be noted that securitised products were also bought by the ‘safe’ retail banks). In addition, since the financial crisis was not only caused by the behaviour of investment banks, such a measure would not be sufficient in itself to guarantee financial stability in the future.

With regard to credit rating agencies, the NMa questions the practice of making the ratings of the larger rating agencies obligatory through regulation. Such policies can raise barriers to entry and/or expansion and can limit competition.

Finally, it is important to ensure that regulation does not discriminate between the various statutory natures of institutions since this would distort the level playing field (hedge funds are one example of this possible phenomenon).

3.2 Cross-border co-ordination

The complexity of financial institutions reaches across national borders. The NMa therefore supports cross-border solutions and harmonisation. This is particularly true with regard to divestments of State-supported institutions. The sale of a divested unit to a foreign entity should not lead to competition and/or stability problems in the foreign country.

It seems important to organise *bail-outs* of large financial institutions at a European level. Such a co-ordination will help to ensure that large financial institutions can have their headquarters within smaller countries, without threatening the viability of the domestic economy in case a bail-out of such an institution is necessary. Such co-ordination will also enhance a level playing field between institutions from different countries.

The NMa supports the creation of financial supervision at a European level and welcomes the creation of a European Systemic Risk Board.

Deposit guarantee schemes may increase moral hazard, since the downward risk on retail funding is (partly) covered by the government. Such guarantees can prevent financial institutions from altering their business models, since they may rely too much on guaranteed retail funding (instead of e.g. interbank funding) (DNB, 2009).

In response to the financial crisis, many governments have expanded their *deposit guarantee schemes*, in order to prevent bank runs. This has also occurred in numerous European countries, after which an initiative was undertaken to partly harmonise existing schemes in the EU. This initiative was, amongst others, undertaken in order to limit distortions of competition due to differences in guarantee schemes. Many differences do however remain between national deposit guarantee schemes in Europe.

In order to support a level playing field, the NMa encourages the institution of a harmonised deposit guarantee scheme at European level. In order to limit moral hazard, such a scheme should, according to the NMa, be (partly) based on risk-adjusted premiums, which the banks would pay on an ex ante basis.

Nevertheless, in the Netherlands, ex ante funding of the deposit guarantee scheme will probably not be sufficient to cover the deposits of one of the three larger Dutch banks. The size of the fund could act as an indicator for markets whose institutions would be deemed too important to fail. Furthermore, important issues related to the timing of contributions may exist. For example, if ex ante contributions are stopped or reduced once the guarantee fund reaches its desired size, this may have an impact on the timing of entry decisions.

In conclusion, Dutch financial institutions received State aid in varying degrees during the financial crisis. In order to minimise distortions of the competitive level playing field between financial institutions State aid measures should be ended as soon as markets are able to function independently. In the meantime, public administrators of financial institutions should manage their investments at arm's length. The NMa advocates (and will continue to do so) that new measures to ensure that financial markets are crisis proof should not lead to increased barriers to entry, expansions or exit and not distort the level playing field between financial institutions.

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SPAIN

Since the outburst of the financial crisis in 2007, the Spanish government has implemented several measures so as to limit its impact. Those measures have focused on economic policy and public aid aimed at easing the crisis, but also on regulatory reforms put in place in order to strengthen the capacity of the Spanish economy to react in the event of future crises.

1. Public intervention in the context of the crisis: State aids

Public financial support has been granted both in the financial and in the real sectors. In the financial sector, the goal was to restore credit. In the real sector, the aid has focused on the construction and the automotive sector.

The European Commission (EC) exercises supervisory powers over State aids -above certain thresholds- granted by member States. Following the deepening of the financial crisis in the autumn of 2008, the EC has provided guidance in the form of Communications on the design and implementation of State aids in the crisis context, in order to minimise competition distortions¹.

1.1. Financial sector

The following support schemes were notified to the EC and have been approved:

- *State aid NN 54/A/2008 Fund for the Acquisition of Financial Assets*². The objective is to provide liquidity to credit institutions and to encourage them to grant more credit to businesses and households. The Fund is financed by the State Treasury with €30 billion³ and was meant to purchase high quality assets from volunteer credit institutions at market prices. The purchases had to take into consideration the principles of objectivity, security, transparency, efficiency, profitability and diversification.

Between November 2008 and January 2009 four auctions were organised, in which 54 credit institutions acquired €19.34 billion (64% of total funds available) for three years. A large share of the funds (74%) went to savings banks. No more auctions have taken place as a result of other aid schemes put in place and of liquidity injected by the European Central Bank. The scheme will however be active until banks have paid back the funds.

¹ See contribution by the EU to the roundtable on State Aid of the GFC of February 2010 (DAF/COMP/GF/WD(2010)3. DGCOMP has recently issued a Staff Working Paper on the application of state aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010. http://ec.europa.eu/competition/state_aid/studies_reports/phase_out_bank_guarantees.pdf.

² Royal Decree-Law 6/2008 of October 10, on the creation of the Financial Assets Acquisition Fund (FAAF).

³ 1 billion=1.000 millions.

- *State Aid NN 54/B/2008 Spanish Guarantee scheme*⁴. The State guarantee covers, against remuneration, the issuance of new notes, bonds and obligations admitted to the official secondary market. The maturity of the financial instruments covered is between three months and three years (up to five years in exceptional circumstances). The scheme's overall budget was set at €100 billion for 2008 and 65 billion for 2009, of which only 51 billion have been used. Only solvent banks have access to the guarantee scheme; 59 of them have made 160 bond issues in two years. The scheme contains elements of State aids but safeguards have been introduced so that it is ensured that the State intervention is proportionate and limited to what is necessary, and that it takes place through the adequate instruments.

On May 18th 2010 the ECOFIN decided to extend the global EU guarantee framework, with some changes. Member States are required to apply for an extension of their own national scheme. Spain has not applied yet, but in any case issuances would only be allowed until the end of the year.

- *Enlargement of the Deposit Coverage Fund*. Following EC's advice, the Spanish Deposit Coverage Fund has been increased from €20.000 to €100.000 for every depositor and account.
- *N 28/2010 Fondo de Reestructuración Ordenada Bancaria (FROB)*⁵. The purpose of the Fund is threefold: to finance restructuring processes of institutions with insolvency problems, to increase the resources of institutions experiencing short term difficulties but with good prospects of long-term viability, and to maintain confidence in the system by increasing the strength and solvency of surviving institutions. This mechanism will be in place at least until June 30th 2010. Up to now, the FROB has issued €3 billion in 5-year bonds. In addition, the FROB's aid to financial institutions in merger processes is estimated at €2.155 billion, although the CNC has only received four merger notifications so far (even in the context of the FROB, mergers need to be notified to the CNC for approval).

1.2. *Real economy*

The following horizontal aid schemes have been approved by the EC:

- *State aid N 307/2009 Temporary aid scheme for granting limited amounts of compatible aid*. Temporary grants are provided to undertakings having to face sudden shortages or unavailability of credit as a result of the global financial and economic crisis. The scheme allows for the provision of limited amounts of aid until the end of 2010. Firms that were in difficulty before July 1st 2008 in the meaning of the EU guidelines, are excluded. The total amount of aid available is estimated at €1.4 billion.
- *State aid N 68/2010 Guarantee regime according to the EU general temporary framework*. Guarantees are provided for credits backing up current and new investment in every sector of the economy. The guarantee cannot exceed 90% of the credit amount. The available budget for this scheme, estimated at €800 million, is limited by the capacity of public administrations, both central and regional, to cover for the beneficiary defaults. This regime will be in force until the end of 2010.

⁴ Royal Decree-Law 7/2008, of October 13th, on Urgent Measures on economic and financial matters in connection with the Concerted Action Plan for the Countries of the Euro Zone.

⁵ Royal Decree-Law 9/2009, of June 26th, on bank restructuring and on strengthening the resources of the credit institutions.

Besides these horizontal measures, public support for the real economy has focused on labour intensive sectors such as the automotive and the construction sectors.

1.2.1 Automotive sector

- *State aid N 140/2009 Competitiveness plan for the automotive sector – Investments on manufacturing of more environment-friendly products.* Interest rate subsidies are granted for investment loans geared to the production of green products, i.e. “green cars”, and car components which significantly improve environmental protection. Aid is only allowed for projects involving early adaptation to, or going beyond, EU product standards aimed at increasing environmental protection. The scheme applied to companies of all sizes during 2009 and amounted to €800 million (€100 million in aid and €700 million in loans).
- *Plan 2000 E⁶* was conceived to foster car demand, to maintain employment in the sector and to encourage the substitution of old cars (more than 5 years old) for new and less polluting ones. The plan consists of subsidies, coming from the central and regional administrations, to consumers for the purchase of new cars (an effort is also required from car manufacturers in the form of discounts). The aid from the Central Administration is to be granted from January 1st 2010, up to either September 30th 2010 or 200.000 new cars purchased.

Regarding the construction sector, with the aim of creating employment and easing the impact of the crisis, €33 billion have been invested through the State Fund for Local Investment, the Special Fund for the Economy and Employment, and the State Budget.

The State Fund for Local Investment has allocated €8 billion among Local Councils during 2009 in proportion to their population, for the financing of new local infrastructure. Then, a new package of measures was adopted in 2010 under the umbrella of the “Sustainable Economy Strategy”, including several new funds:

- The State Fund for Local Employment and Sustainability, with a budget of €5 billion for local administrations to finance investments that foster economic performance, innovation sustainability and education.
- The State Fund for a Sustainable Economy has a budget of €20 billion, granted by ICO (the State credit agency) and commercial banks over 2010 and 2011. The Fund focuses on projects dealing with energy efficiency, R&D in the environmental field, waste treatment, health and biotechnology, among others.

2. Post crisis regulatory initiatives

Regulatory reforms of the Spanish financial sector include EU measures aimed at enhancing transparency, responsibility, supervision and crisis prevention in the sector, including the establishment of a new supervisory framework, the revision of rules on credit rating agencies’ activities and the modification of Directives on capital requirements. Also, the EC is currently working on a proposal to create a set of common rules to be applied by the member States to their own resolution funds, whose objective is to ensure that bank failures are managed with due diligence, thus avoiding contagion.

⁶ Royal Decrees 898/2009, 1667/2009 and 2031/2009, on the direct granting of support to the purchase of vehicles, Plan 2000 E to support vehicle renovation in 2010.

As far as specific regulatory measures in Spain are concerned, the new “Institutional Protection System”⁷, which has been established to facilitate the restructuring of the financial sector, is worth mentioning. The system allows for “cold mergers”, that is, a partial pool of resources in order to comply with regulatory requirements and reduce the risks of the merged parties’ balance sheets, which nevertheless allows them to maintain a certain degree of commercial independence.

From a broader perspective, the “Sustainable Economy Act”, still to be approved, will permit to implement the “Sustainable Economy Strategy” which is expected to set the foundations for a more robust development model from an economic, social and environmental point of view. The Draft Act tries to foster competitiveness, strengthen financial supervision, establish new rules regarding defaults, increase transparency for listed companies, and ease public-private partnerships. It also favours R&D, non-university education and energy efficiency.

3. The role of the competition authorities in the design and implementation of exit strategies and of a new regulatory framework

The CNC remains vigilant about the potential distorting effects on competition that recent public intervention in the economy as a result of the crisis could be creating. Therefore, attention has focused on securing that public intervention in the markets does not go beyond what is necessary to reach its legitimate objective and that competition distorting measures are removed, either as soon as they have produced the desired results, or when they have proved ineffective.

State aids granted as a result of the crisis should be targeted, proportionate, non-distortionary and temporary. Any plan to unwind the measures adopted during the crisis should be also designed in a way that competitive asymmetries are reduced and the market level playing field is re-established. On competition grounds, the CNC believes that a number of general principles should apply:

- Priority should be given to exiting from support programmes that have limited effectiveness in reaching their goals and a significant distortionary impact on markets. Measures should be ranked on those two grounds and be removed accordingly. Policymakers have now experience to detect which measures have had limited effectiveness and high distortionary effects. The accumulated experience should help design the exit strategy. Competitive conditions should be re-established as soon as possible in those markets that have been affected by the adoption of special crisis measures.
- Competitive neutrality would require a co-ordinated approach across countries (and regions within a country), i.e. economic and financial support programmes should be unwound simultaneously across different countries in order to avoid competitive distortions and reduce the risk of arbitrage opportunities. The possibilities for this approach are limited however by some highly asymmetric characteristics of the crisis among countries, which would call for more tailor-made policy responses. . Nevertheless, exit plans should be as co-ordinated as the economic and financial context allows, avoiding creating artificial arbitrage opportunities across sectors or across national borders.
- Exit plans within a specific sector should be comprehensive and not partial, i.e. they should apply in the same way to all companies within a sector in order to reduce the risk of distorting competition between firms within an industry. Both in the financial sector and in the real economy, partial measures applying to specific firms or activities create market asymmetries with

⁷ Its origin lies on the solvency Directive 2006/48, which was transposed in Spain through Royal Decree 216/2008 and Bank of Spain Note 3/2008. It was recently modified through Royal Decree-law 6/2010.

the subsequent competition distortions. The design of exit strategies should guarantee that firms within a sector compete on equal grounds and some firms are not discriminated against.

- Public support to ailing companies should not be prolonged. Both companies and financial institutions whose financial problems go beyond the current crisis and present no risk of systemic contagion should be allowed to go bankrupt (in a controlled way if necessary). Putting barriers to exit could constitute an obstacle to economic recovery. The enforcement of state aid control policies should not be relaxed. Otherwise, existing inefficiencies or industry overcapacity might be perpetuated.

In those sectors where regulation is needed, the design and implementation of new regulation should also make sure that competition is not distorted. Regulation should be proportionate to the objective pursued and should not constrain competition beyond what would be strictly necessary to reach its legitimate objective. The efficient working of markets should be prioritised in any new regulatory regime.

Assigning competition authorities strong advocacy powers is essential to guarantee that the economy does not deviate from the economic growth long-term path, i.e. that the best framework for productivity and competitiveness growth is assured.

In this sense, the CNC has the capacity to issue non-binding reports on draft new regulation and on individual state aids or state aid schemes granted, or to be granted, by the central, regional and local governments. On the basis of such capacity, the CNC has paid special attention to the inclusion of competition concerns in the design of new pieces of regulation.

Most recently, on the basis of the advocacy functions assigned by the Competition Act in force, the CNC has produced a report on the above mentioned Draft Sustainable Economy Act⁸, which called special attention to differences between the CNC and sector regulators as far as the scope and the purpose of their respective functions is concerned.

Also, the CNC has elaborated many reports on draft legislation transposing the EU Services Directive, including those on the two general/horizontal acts -the “Umbrella Act”⁹ and the “Omnibus Act”¹⁰ -, as well as reports on pieces of draft legislation on a vast number of sectors, such as retail distribution¹¹, hydrocarbons, explosives, energy and mining, healthcare and pharmaceutical services, agriculture, environment, franchises, electricity, railway transport, etc¹². The CNC considered the transposition of the Services Directive an excellent opportunity to implement good regulation principles, which would help overcome the crisis and prepare for the future. The job has been hard but the reward could be high. Generally speaking, the CNC’s recommendations have been followed. Nevertheless, there have been some divergences with certain public administrations, especially in the retail distribution field.

⁸ Available only in Spanish:
http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=35490&Command=Core_Download&Method=attachment.

⁹ [Report](#) and [Press release](#) in English.

¹⁰ Report in [Spanish](#) and Press release in [English](#).

¹¹ [Report](#) and [Press release](#) in English.

¹² See [all](#).

In addition, a Guide to Competition Assessment of draft regulation has been published¹³ whose objective is to provide guidance to legislators on how to draft new law in the least competition-harmful way. A few months after the Guide was published, and following the CNC's recommendations, a new *Law regulating the Report on the impact of new legal provisions* for the first time expressly established the obligation of law makers to assess competition issues when carrying out a report on the impact of any new piece of legislation. The Law entered into force on January 1st 2010, right after the elaboration of a *Methodological Guide for Impact Assessment of Regulation*, which contains the principles put forward in the CNC's Guide.

Regarding the monitoring of State aids awarded in Spain, the CNC issues annual reports, the first one of which, referring to 2008, was made public in July 2009¹⁴. In the second annual report, soon to be published, the CNC will present some examples in order to illustrate what should be considered "bad practices" in State aid, by applying the criteria established in the previous report, namely, that State aids must be justified -as a solution for a market failure or to achieve common interest goals-, proportional -the same results could not be achieved through other less intrusive instruments- and effective to achieve the planned goals, and that the damage caused to competition must be taken into account. In addition, the report will closely look into the automotive sector so as to examine whether public support is causing unjustified competition restrictions.

All these powers allow the CNC to monitor public interventions and to guarantee to a certain extent that they do not cause unnecessary and/or disproportioned distortions on competition in the markets.

¹³ http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=29518&Command=Core_Download&Method=attachment.

¹⁴ Press release available in English at <http://www.cncompetencia.es/Default.aspx?TabId=105&contentid=255000>, report available only in Spanish at http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=35211&Command=Core_Download&Method=attachment.

SWITZERLAND

Overview: Actions by Switzerland during the crisis

In Switzerland, the following exceptional economic policy measures were taken in 2008, 2009 and 2010 to fight the crisis:

- The Swiss National Bank has followed an expansionary *monetary policy* since the beginning of the crisis, including a policy of quantitative easing for a limited time.
- The so called special *measures to strengthen Switzerland's financial system*, which were taken in autumn 2008, comprised firstly the transfer USD 38.7 bn of at the time illiquid UBS assets to a fund entity specifically set up for this purpose (StabFund), overseen by the Swiss National Bank (SNB). StabFund's debt capital was financed jointly by SNB, which gave the fund a loan of USD 25.8 bn, and by UBS. Secondly, the special measures comprised the reinforcement of UBS' capital base by the Swiss Confederation, which subscribed to mandatory convertible notes to the value of CHF 6 bn¹.
- The Swiss Confederation followed a more expansionary *fiscal policy* in three steps: With each step, a whole set of economic stabilisation measures was released: Most notably, government investment into infrastructure was expanded and measures were taken to soften the effects of the crisis on the labour market. The economic impact of the stabilisation measures totals more than CHF 3 billion². Furthermore, it should be noted that the Swiss unemployment insurance as an automatic stabiliser contributed to fiscal expansion of more than CHF 3 billion.

Questionnaire

1. *Types of strategies to exit from government actions that were taken to fight the crisis*

The *monetary policy* measures are not directly relevant to competition policy. Hence, we do not further expand on this topic in the following, though it should be noted that the task of finding an exit strategy for the currently still expansionary monetary policy is extremely challenging for central banks all over the world. In Switzerland, a special challenge is the search for a balance between the risk of an exaggerated appreciation of the CHF on the one hand and the risk of future inflation on the other hand.

Regarding the *special measures to strengthen Switzerland's financial measures*, Switzerland's exit strategy is well progressing:

- Firstly, SNB's loan to the above mentioned StabFund has so far been reduced to a remaining US 17.7 bn (from originally USD 25.8 bn). A progressive further reduction is expected. StabFund has continuously sold those assets, for which liquidity on markets was sufficient.
- Secondly, on August 20, 2009, the Swiss Confederation sold all its UBS shares resulting from the above mentioned convertible notes to private sector investors. By selling the shares, the Swiss Confederation realised a gain of totally CHF 1.2 bn.

¹ For details, see Switzerland's contribution to the OECD roundtable on Competition and the Financial Markets, February 2009.

² See <http://www.seco.admin.ch/stabilisierungsmassnahmen/> for an overview of all measures taken.

From the beginning, the stabilisation measures (*fiscal policy*) by the Swiss Confederation were designed to be timely, targeted and - mostly important in this context - temporary. Due to the temporary nature of the measures, it can be concluded that the exit strategies were strictly defined *ex ante*. For each measure, the temporariness was assured individually, e.g. by defining a sunset clause or by limiting the funds available the respective measure.

2. *Involvement of the Competition Authority*

The Swiss Competition Commission (Comco) was not directly involved into the definition of the above mentioned exceptional economic policy measures. Monetary policy measures were led by the Swiss National Bank, fiscal policy measures were led by the State Secretariat for Economic Affairs (SECO) in collaboration with the Federal Finance Administration.

However, Comco is involved into the reforms that are currently being evaluated to limit the risks of future financial crises. Notably, Comco takes part in the working group elaborating solutions for the "too big to fail"-problem (see below).

3. *Measures that should be carried out to ensure that the market is crisis proof for the future*

Modern markets cannot be made perfectly crisis proof as risks are inherent to a market system. However, the likelihood of a crisis and its cost can be reduced by sound economic policy. A key issue is that the need for the bail out of banks has created moral hazard. The most important element to reduce the likelihood and the cost of a crisis is in our view the reduction of incentives for excessive risk taking - without harming efficient risk taking.

A first element in this context in Switzerland is the *revision of the liquidity regime* for big banks by SNB and the Swiss Financial Market Authority (FINMA). A modern liquidity regime is central to the robustness and in turn to the stability of the financial system. If a big bank is to master adverse stress situations independent of state aid, its level of liquidity must be considerably higher than specified in the current prescriptions. In collaboration with both big banks, FINMA and SNB have worked out a new liquidity regime. The new regime incorporates international trends in liquidity regulations, in particular those elaborated by the Basel Committee on Banking Supervision. The core element of the new liquidity regime is a stringent stress scenario defined by FINMA and the SNB. The stress scenario covers a general crisis on the financial markets coupled with a creditors' loss of trust in the bank. The new liquidity regulations require that the banks – in particular by holding an adequate reserve of first-class liquid assets – are able to cover the outflows estimated in such a scenario over a period of at least 30 days. These requirements are to allow the minimum time necessary for the big banks and the authorities to mitigate a crisis situation. The tightening of liquidity requirements for big banks is a result of their systemic importance to the Swiss economy. Starting on 30 June 2010 and then on a monthly basis, the two big banks must demonstrate to FINMA that they are complying with the new requirements.

A second element is the further proceeding regarding the solution of the so called "too big to fail"-problem. The Swiss Federal Council believes that measures to prevent and mitigate damages by this problem are to be taken quickly via legislation. On May 12, 2010, the Swiss Federal Council presented a resolution to parliament for the planning of a revision of the Banking Act³. The planning resolution sets out in concrete terms the Federal Council's political will to resolve the "too big to fail" issue swiftly and effectively. The work of the expert committee on limiting economic risks caused by large companies, which published an interim report on 22 April 2010, forms the starting point. The risks of systemically

³ See <http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=33084> for details.

important banks should be restricted, as more stringent capital, liquidity and risk diversification requirements will be set out in the Banking Act. In addition, measures in the area of organisation should make it possible to ensure that systemically important functions are maintained without an entire institution having to be rescued by the State. The proposal on these legislative measures should be put out for consultation in October 2010, and be adopted by the Federal Council by the end of 2010. In the event of swift consideration by parliament, the legislative amendments could come into force on 1 January 2012.

UNITED KINGDOM

1. Introduction

Competition policy needs to be an important component of the strategy for exiting recession. It is as an important driver of productivity and growth and thus of promoting economic recovery and, potentially, can support governments in securing lower costs and increased efficiency in the delivery of public services, in turn helping them reduce deficits and tackle fiscal difficulties.

Given the nature of the recent recession, the role of competition in supporting productivity and growth through the banking and wider financial system will be especially important.

While in many countries, including the UK, policy objectives such as financial stability may have been a primary concern during the financial crisis, exit strategies need to focus on long-term objectives, including effective competition. There is an opportunity for these exit strategies to mitigate some of the short-term negative impacts on competition arising from the financial crisis as well as the prospect of reinforcing the role of competition in the long-term.

Aside from the opportunity provided for competition policy to play a more important role, the market situation in some financial markets may also be creating new opportunities for competition. There are signs, for instance, in retail banking that conditions for new market entry or expansion of smaller market players may have become more favourable. For example, profitability on many lines of banking business has risen significantly, trust in established brands has been undermined by the financial crisis, and, divestments by major participants affected by the crisis (as required in the UK for some banks under the EU state aid regime) is creating the possibility for others of growth through acquisition .

But there are also risks to competition. Other short-term public policy objectives may continue to be given a higher priority than competition policy. There may be resistance to tackling some of the short-term distortions to competition that have arisen. Perhaps more importantly, the regulatory response to the crisis may itself affect competition by increasing barriers to entry or expansion, through new, tougher regulatory requirements.

It is important in this environment for competition authorities to understand and recognise the dynamics of these markets so as to inform their approach. One critical element here is to understand the nature and scale of barriers to entry, expansion and exit. Such an understanding should look beyond the immediate, possibly short-term, shape of the markets and at the more fundamental and long-term challenges to competition. It should help inform the work of competition authorities in, for example, examining relevant mergers and contributing to discussions about future regulation.

The rest of this paper focuses on understanding barriers to entry, expansion and exit, referring to a review launched by the OFT in the UK.¹

¹ OFT 1233, Review of barriers to entry, expansion and exit in retail banking. <http://www.offt.gov.uk/news-and-updates/press/2010/55-10>.

2. OFT Review of barriers to entry, expansion and exit in retail banking

The review is focused on the provision of retail banking services to individuals ('personal banking') and to small-and-medium sized enterprises ('SME banking') and will consider different types of market entry and expansion and whether barriers impact differently depending on the mode of entry/expansion employed.

Past market entry in the UK has included:

- entry from providing services to one group of customers (e.g. depositors or individual customers) to another, such as demutualised building societies lending to SMEs²;
- entry from extending a brand from one business sector (e.g. retailing) to another, such as Tesco Bank³;
- foreign entry from outside the market through mergers and acquisition, such as the takeover of Abbey National by Santander⁴, and
- foreign banks establishing a physical presence in the UK, such as Handelsbanken⁵ in the SME banking market, or using other channels such as the internet or telephone banking, such as ING Direct⁶.

Barriers may include aspects other than the costs of setting up a bank. Barriers to customers comparing and switching between banks and to establishing new business models are both likely to be important. Four areas of focus are identified for the current review.

Regulatory requirements. The review is examining the authorisation (often referred to as a 'banking licence') from the Financial Services Authority (FSA) that firms that wish to provide savings or current accounts must obtain, and key aspects of the regulatory requirements that go alongside them, especially concerning capital and funding. Proposed changes in bank regulatory requirements could affect barriers to entry, expansion and exit. The review will examine evidence on how the licensing process for deposit taking activities and the capital and liquidity requirements affect the ability of firms to enter into the provision of banking services or expand their provision of banking services. It will also examine the extent to which other regulations, such as anti-money laundering rules and consumer credit licensing

² A building society is a financial institution, owned by its members, that offers banking and other financial services, especially mortgage lending. See the BSA website: <http://www.bsa.org.uk/faq/whatisabuildingsoc.htm>.

³ Tesco is a large UK based international grocery retailer that extended into financial services initially through a joint venture with an existing bank.

⁴ Abbey National plc was a United Kingdom-based bank and former building society, acquired by Banco Santander, the largest bank in the 'Euro Zone', in November 2004 to become a wholly-owned subsidiary of Grupo Santander. Abbey was rebranded as Santander on 11 January 2010.

⁵ Handelsbanken (a retail bank in Sweden) opened its first UK branch in 1984. It now has over 40 branches. Its main strategy has been to open branches in key metropolitan areas and to build a presence at local level (as opposed to trying to market the brand nationally).

⁶ ING Direct is ING Group's marketing name for a branchless direct bank with operations in different countries, including the United Kingdom and the United States. It offers services over the Internet, phone, ATM or by mail, and focuses on simple, high-interest savings accounts. ING Direct began operations in the UK in May 2003.

requirements, form significant barriers to entry or expansion, and whether there are there any more subtle sources of regulation which nonetheless form a significant barrier to entry or expansion.

Essential inputs. Banks require access to specific infrastructure, most importantly payment systems and access to credit risk information on customers. The OFT refers to these as 'essential inputs'. Both, to varying extents, rely on actions of existing banks, given their role in the membership or control of networks and their role in sharing credit data. The review will examine the extent to which new entrants have difficulty in gaining access to these essential inputs.

Barriers to achieving scale. The review will examine the lack of switching due to customer inertia, the cost of customer acquisition, the cost of setting up branch networks and the value of an established brand or reputation.

Barriers to exit: Regulation and supervision of financial firms have proved to be necessary to prevent disorderly bankruptcy, and to protect financial stability, in many countries. In the UK, the Banking Act 2009 has established a permanent Special Resolution Regime (SRR) which provides the tools to deal with banks and building societies in financial difficulties, including powers for the Bank of England to transfer all or part of a bank's shares or business. The SRR is intended to prevent disorderly failure, which would create systemic risk, and contributes towards an important policy objective of maintaining financial stability. The review will focus on the way in which regulation and supervision of failing financial firms' impacts upon entry of new firms and expansion of existing ones and whether there are ways in which these regulations could be made more competition-friendly.

Findings of the review are due to be published by the autumn of 2010. The review is one of initiatives that the OFT will implement as part of its market study follow up report 'Personal Current Accounts (PCA) in the UK - Unarranged overdrafts'⁷. Going forward, in addition to the review, the OFT will continue to actively monitor the PCA market to ensure that there is movement towards an equilibrium that works well for consumers. It expects to review the PCA market, and the impact of the range of initiatives introduced following the 2008 market study, in around 2012.

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See the OFT website: http://www.offt.gov.uk/shared_offt/personal-current-accounts/oft1216.pdf.

EUROPEAN UNION

1. Introduction - The role of the European Commission as competition authority in contributing to the development and implementation of an exit strategy

The specific legal architecture of the EU has given the European Commission in its capacity as a competition authority a very special role in dealing with the present global financial and economic crisis. In addition to the usual powers of competition authorities in the areas of merger control (policing potential anti-competitive effects of crisis-induced mergers) and antitrust (combating anti-competitive agreements including crisis cartels), the European Commission is responsible for ensuring and enforcing compliance with the State aid rules. These rules generally prohibit government assistance which threatens to distort competition by bestowing an advantage on certain undertakings unless such support can be recognised as compatible with the common market under the material provisions of the European Treaties¹. The European Commission occupies the position of a central gatekeeper since no State aid measure can be legally put into effect without its approval. In a single market, the proper functioning of which could be undermined by unrestrained subsidy decisions of 27 national governments or even subsidy races between them, a mechanism requiring the authorisation of state aid by a competition authority on the basis of an ex-ante control of its competitive impact is of crucial importance in order to preserve a level playing field.

As EU Member State governments reacted to the crisis by providing support of unprecedented dimensions to the financial sector but also to the real economy, leading in some cases to the nationalisation of financial institutions, State aid control of this assistance made up the lion's share of the workload of the Commission as a competition authority. Unlike in other jurisdictions, emergency decisions to tackle the crisis have not been taken outside the scope of competition rules or in some cases even taking precedence over them but on the basis of and in compliance with State aid rules as an emanation of competition principles. The Commission's powers and responsibilities in this field also entail by definition a significant role in the determination and implementation of exit strategies. This contribution will therefore focus on State aid matters and set out the involvement of the European Commission in this particular context. It will first set out (under II) the Commission's involvement in the measures reacting to the crisis with a particular emphasis on the restructuring conditions that are attached to State assistance. It will then describe (under III) the Commission's ongoing work on the design of an exit strategy and conclude (under IV) with some short remarks on its role as a competition authority in the deliberations on regulation aimed at preventing the re-occurrence of comparable crises in the future.

2. State aid control as a tool to preserve a level playing field during the crisis

The systemic nature of the crisis and particularly the danger of an imminent collapse of the global financial system presented tremendous challenges to the system of State aid control in terms of the number and urgency of cases as well as of the amounts involved and the resulting potential impact on competition².

¹ Articles 107 et seq. Of the Treaty on the Functioning of the European Union (TFEU)

² In relation to the financial sector, in the period between October 2008 and 31 March 2010, the Commission took 161 decisions on crisis-related measures. Out of these, 78 decisions were taken in relation to some 40 financial institutions and 83 decisions in relation to almost 40 schemes (guarantee schemes, recapitalisation schemes, liquidity interventions, asset relief interventions). The maximum volume of Commission-

These circumstances led to the approval of support measures on the basis of Article 107 (3) (b) TFEU³ allowing aid '*to remedy a serious disturbance in the economy of a Member State*', a provision which had hardly ever been used before. As will be set out in more detail below, the recourse to this legal basis facilitated the adjustment of the application of State aid control to the particular circumstances of the crisis. It did not, however, represent a shift in the general principles guiding this process and aimed at preventing distortions of competition.

2.1 *The financial sector*

The self-evident prime objectives of the measures taken to avoid a meltdown of the financial sector as a chain reaction following the Lehman insolvency were to preserve financial stability, deal with the risk of bank failures and keeping open credit channels to the real economy. Yet the role of the Commission in the field of competition policy was not limited to supporting financial stability by providing legal certainty concerning the admissibility of the emergency measures taken by EU Member States. From the very outset the Commission also aimed at limiting distortions of competition, maintaining a level playing field and ensuring that national measures would not simply export problems to other Member States.

2.1.1 *The requirements for the approval of aid measures*

To clarify its role and objectives in the specific circumstances of the financial crisis, the Commission adopted guidance on conditions for the Member States' support to the financial sector, specifically on guarantees, capital injections and impaired assets relief measures.

Box 1.

Banking Communication of 13 October 2008 - exposes conditions under which State aid measures in favour of the banking industry can be considered compatible with the common market under Article 87(3)(b) of the Treaty EC. The particular focus is guarantees on bank liabilities.

Recapitalisation Communication of 8 December 2008 - guidance on conditions for State recapitalisations of banks (adequate remuneration, incentives for State capital redemption); closeness of remuneration to market prices is the best guarantee to limit competition distortions; recapitalisation of banks which are not fundamentally sound subject to the requirement of far-reaching restructuring.

Impaired assets Communication of 25 February 2009 - guidance on conditions for measures taken in order to relief financial institutions from their impaired assets; transparency and ex-ante valuation of assets, adequate remuneration, burden-sharing between the bank/its shareholders and the State.

These guidance documents were based on the same general principles, aiming to provide a framework for assistance to financial institutions that ensures:

- fair competition between Member States - measures taken by one Member State with respect to its own banks should not give them an undue competitive advantage compared to banks in other Member States;

approved measures including schemes and ad hoc interventions set up by Member States in the wake of the financial crisis amount to € 4 131.1 billion or almost 33% of EU 27 GDP.

³ Treaty on the Functioning of the European Union.

- fair competition between banks - measures must differentiate between beneficiary banks according to their risk profiles, to avoid giving an undue advantage to distressed or less-performing banks;
- a return to normal market functioning - measures must address how to return the financial sector to long-term viability, where banks operate without state support. This process is still ongoing.

To ensure that these general principles were properly implemented, the Commission imposed specific conditions. All general support measures need to be well targeted to the objective of remedying a serious disturbance in the economy, proportionate to the challenge faced and designed to minimise spill over effects on competitors. It would go beyond the scope of this contribution to set out these conditions for the different aid measures in detail⁴. It should be emphasised, however, that the combination of pricing rules staying as close to market conditions as possible with additional requirements such as behavioural safeguards was consistently devised with a view to providing sufficiently strong incentives for beneficiaries to exit from State assistance as soon as the economic situation permits. The recapitalisation Communication is particularly explicit on the necessity of inducing banks to redeem State capital swiftly through an adequately high remuneration, possibly increasing over time as a consequence of step-up clauses or similar features encouraging early redemption and possibly by restrictions on dividend payments⁵. This illustrates how the need for the preparation of the exit process already influenced the very design of the conditions measures had to fulfil in order to receive the Commission's authorisation.

2.1.2 Restructuring as the necessary follow-up to aid – an 'exit strategy' for individual beneficiaries

In 'normal' circumstances, i.e. outside a systemic crisis, assistance given to (financial and non-financial) firms in difficulty is assessed within the well-established framework of the Commission's guidelines on rescue and restructuring. These guidelines state that rescue operations by Member States keeping firms in business that would have otherwise exited the market belong to the types of State aid that are most distortive of competition and can only be permitted on strict conditions minimising any such undue distortions. In particular, they stipulate that every beneficiary has to undergo a restructuring process which ensures the swift restoration of its long-term viability without State support. In other words, a convincing exit strategy from dependence on State assistance at the level of the individual beneficiary is an intrinsic prerequisite for the very approval of the support measure⁶. This exit strategy needs to guarantee that the amount and intensity of aid are kept to the minimum through a significant own contribution of the beneficiary to the restructuring costs⁷. It also needs to include appropriate measures compensating for and proportionate to the distortive effect of the aid such as divestment of assets, reduction in capacity or market presence and the removal of entry barriers on the markets concerned.

These principles were adapted to the peculiar features of a systemic financial crisis by the Commission's Restructuring Communication of 22 July 2009 taking into account the systemic role of the banking sector for the whole economy and possible systemic effects arising from the need for a number of European banks to restructure at the same time. In particular, in the context of a general systemic crisis, not every difficulty can be safely attributed to the weakness of the business model of the financial institutions

⁴ In relation to guarantees and recapitalisation measures these requirements reference can be made to the note of the Commission of 10 February 2009 submitted to the Competition Committee (DAF/COMP/WD(2009)12/ADD1).

⁵ Points 31 – 34 of the recapitalisation Communication.

⁶ Where no such persuasive restructuring plan can be produced, liquidation aid enabling an orderly winding-up of the company in question would be the only alternative to normal insolvency proceedings.

⁷ This contribution is also a sign that markets believe in the feasibility of a return to long-term viability.

concerned. Some of them are in a position to weather the current crisis with limited adjustments in their operations as a response to shareholders' and market pressures. Others, which have received large amounts of State aid and with unsustainable business models, need to undertake in-depth restructuring in order to restore long-term viability without reliance on State support. None will be able to properly perform their function of lenders to the real economy until this process is undertaken.

The main objectives of the Restructuring Communication are ensuring viability in the long-term without state aid, burden sharing and limiting distortions of competition due to state aid.

As regards the return to viability the long-term and being able to operate without State support, banks should adjust their business model to reduce systemic risks. A thorough restructuring plan, demonstrating strategies to achieve viability also under adverse economic conditions, needs to be based on rigorous stress testing of the banks' business. The benchmark of long-term viability may imply different solutions across banks, ranging from limited restructuring with no divestments to an orderly winding down of unviable entities. Return to long-term viability is only ensured when the state aid provided during the crisis is either redeemed over time or remunerated according to normal market conditions. [This condition translates the principle that State aid rules apply irrespective of whether a bank is in private or public ownership.]

A restructuring plan will also need to ensure that the burden for taxpayers is limited and that the bank and its capital-holders contribute to the costs of restructuring as much as possible with their own resources, in order to address moral hazard and to create appropriate incentives for their future behaviour. This can be achieved through setting an appropriate price for State support, so that the aid cannot be used to finance market-distorting activities not linked to the restructuring process, and through temporary restrictions on payment of dividends and coupon on hybrid capital by loss-making banks. As regards burden sharing, the Commission action aims at striking a balance between financial stability and trust on the one hand and contribution of the bank, its shareholders and senior creditor to the restructuring costs on the other hand. To this end, where the state provided a significant contribution to the bank's loss absorption, temporary limitation to the payment of coupons on hybrid capital instruments or dividends on shares had often to be requested.

Lastly, undue distortions of competition caused by restructuring State aid need to be limited. Tailor-made to market circumstances of each case, measures may include divestments, temporary restrictions on acquisitions by beneficiaries and other behavioural safeguards and will tackle competition distortions between banks which have received public support and those which have not, as well as between banks located in different Member States. Attention has in particular being given to the core markets where the aid beneficiary enjoys a strong market presence and care was applied as to the need to ensure the maintenance of lending relations with other geographical areas of the single market. Remedies have also been conceived with a view to reduce barriers to entry into national markets.

2.2 *The real economy*

With the objective of reducing negative effects of the crisis in the real economy, the Commission put in place a temporary State aid framework (hereinafter referred to as 'Temporary Framework'), which is valid until the end of 2010 and provides Member States with additional possibilities to grant State aid on the same legal basis as for the crisis-related measures in the financial sector, Article 107 (3) (b) TFEU.

The Temporary Framework aimed at tackling the credit crunch that was triggered by the sudden inability of banks to finance themselves in the market, and widely affected businesses, including previously healthy ones. And especially small and medium-sized companies (SMEs).

Although Member States already have a wide range of possibilities to grant State aid for different objectives (environmental aid, rescue and restructuring aid, etc.), there was an urgent need for additional short-term measures targeted to the exceptional difficulties in obtaining finance.

By adopting a coherent framework applicable to all Member States, the Commission encouraged co-ordinated action to ensure transparency and a level playing field for businesses and Member States. The new measures contained in the Temporary Framework needed to be horizontal in application, limited in time and amount, not discriminatory.

The new framework focused on three objectives: first, to immediately unblock bank lending, thereby preserving continuity in companies' access to finance; second, to ensure that limited amounts of aid reach the recipients in the most rapid and effective way; and third, to encourage companies to continue investing in a sustainable future, including the development of green products.

On the basis of the Temporary Framework Member States may:

- Grant up to € 500 000 per undertaking to cover investments and/or working capital over a period of two years.
- Offer State guarantees for loans at a reduced premium. The guarantee may relate to both investment and working capital loans and it may cover up to 90% of the loan. The reduction of the guarantee premium can be applied during a period of 2 years following the granting of the guarantee.
- Offer aid in the form of subsidised interest rate applicable to all type of loans. This reduced interest rate can be applied for interest payments until the end of 2012⁸.
- Offer subsidised loans for the production of green products involving the early adaptation to or going beyond future Community product standards.

3. The role of the European Commission as competition authority in the design and implementation of exit strategies

The powers of the European Commission under the State aid rules which require its approval for State support automatically imply its decisive position as competition authority in the design and implementation of a strategy for gradually scaling back the availability of crisis-related assistance and returning to normal market operation as financial markets and Member States' economies at large slowly emerge from crisis conditions.

This role can be illustrated by considering the aid schemes the majority of Member States have introduced to standardise the conditions for access to government guarantees and to recapitalisation in the financial sector and for the measures under the Temporary framework in support the real economy. The authorisation of a scheme (rather than of individual aid measures) by the Commission significantly enhances bureaucratic efficiency since an approval is necessary only for the scheme and not for every individual assistance granted under that scheme provided that the conditions set out in the scheme (on pricing, behavioural safeguards etc.) are complied with. Since the current legal basis for aid measures presupposes the existence of a serious disturbance in the economy such schemes cannot be open-ended but

⁸ The subsidised interest rate will be calculated on the basis of the central bank overnight rate, instead of the one year inter-bank offered rate which is the usual reference contained in the Commission Communication for setting the reference and discount rates)

are to be maintained only as long as such exceptional circumstances prevail. They are therefore subject to a review at regular intervals⁹ which provides the opportunity to assess against the background of the evolution of macro-economic conditions whether it is justified to further extend aid schemes and if so whether the conditions have to be tightened in order to initiate or advance the exit process and to avoid a lasting distortive effect on competition.

3.1 Financial sector

3.1.1 General principles of the phasing out strategy

The interventions of Member states in support of the banking sector were necessary and justified in order to safeguard financial stability and prevented a meltdown of the global financial system. The consistent application of State aid rules has succeeded at minimising distortions of competition and preserving a level playing field at least in the short term.

At the current juncture, as financial markets appear to progressively stabilise, it is generally agreed that a strategy for withdrawing exceptional assistance has to be devised and implemented. In view of the persistent fragility in financial markets and of the risks of setbacks in the recovery process – such as the current sovereign crisis with its impact on financial institutions - exit has to be a gradual process with sufficient flexibility to take account of the specificity of the situations in different Member States and to allow an adequate reaction to unexpected market developments where necessary.

The correct timing of the different steps in the exit process is of pivotal importance. They can only be taken when macro-economic conditions and financial markets have developed enough resilience to absorb them without resurgent stress. Yet, keeping support to the financial sector at current levels in place for too long – apart from being untenable from the perspective of public finances - would enable banks with structural problems to unduly postpone necessary restructuring processes and lead to growing competitive imbalances and distortions. The resulting delay of a return to normal market conditions would turn into an obstacle to the recovery process itself.

In order to properly address these crucial timing issues and also to ensure an adequate co-ordination of measures that is key for fostering a smooth exit process the Commission co-operates closely with the ECB and Member States in order to determine when and how State aid has to be withdrawn. The decision on the requirements for the approval of aid measures such as the extension of aid schemes lies exclusively with the European Commission as competition authority but it is based on the insight gathered in an exchange of views with these interlocutors and on solid economic analysis with their input.

3.1.2 Phasing out of government guarantees covering bank liabilities as a first step of exit

The first step of this exit process based on the above principles has just been accomplished in May 2010 when the Commission announced the stricter terms on which schemes for government guarantees on bank liabilities can be maintained for the second half of 2010.

Government guarantees were chosen by the Commission as the first exit target with the endorsement of EU Member States¹⁰ since banks' severe problems in access to funding appear to have been a relatively short-term transitional phenomenon that has largely subsided since the summer 2009. By contrast, recapitalisation and asset relief as the two other main tools of State support for banks address problems that

⁹ With regard to the financial sector guarantee and recapitalisation schemes are approved for periods of six months and require a new authorisation for each prolongation. The Temporary framework expires on 31 December 2010.

¹⁰ ECOFIN and European Council Conclusions December 2009.

will hopefully continue to reduce in seriousness but are more structural in nature and more persistent as banks may still have to reinforce their capital base in the view of the possible surge of bad assets linked to the real economic downturn.

The Commission first carried out a thorough review of the patterns and trends in the use of government guarantees since the beginning of the crisis on the one hand and of the economic benefits of their use in comparison with unsecured market funding on the other. This exercise yielded the result that the issuance of unsecured bonds has rebounded and that at the same time the use of guarantees has considerably declined since the peak in the first half of 2009 in terms of both numbers of issues of guaranteed bank debt and volume of issuances. As a consequence of the improved funding environment four Member States have already discontinued their schemes altogether and one has carried out the most recent extension until June 2010 only in combination with a significant increase in the guarantee fee.

Evidence further shows that the number of banks resorting to government guarantees is shrinking. While sound institutions have largely withdrawn from the issuance of guaranteed debt this instrument is now essentially used by banks that are already under restructuring obligations and/or have a low rating. The analysis also demonstrated that, taking into account the current guarantee fees, the cost of funding with guarantees is considerably reduced relative to the cost of funding via unsecured debt in particular for banks with a lower estimated creditworthiness which enjoy a significant economic advantage.

As a consequence of the stabilisation that has occurred in most of the funding markets, the risks for financial stability at large have subsided, and the distortions of competition between those banks that issue guaranteed bonds and those that issue strictly under market conditions has become greater¹¹.

These findings confirmed the necessity to initiate the phasing-out of state aid in such a way as to incentivise banks to refrain from State support whenever possible and to ensure that banks, which have difficulties in accessing funding not because of general crisis conditions but because of structural shortcomings in their business models, have to confront these weaknesses.

On this basis, the Commission will apply two new sets of requirements for the extension of guarantee schemes for the second half of 2010, an increase in the guarantee fee and an obligation to undergo a viability review requiring banks that continue to heavily rely on government guarantees to demonstrate their long-term viability to the Commission on the other. These new conditions were publicly announced one month ago and have been endorsed by the ECOFIN Council of 18 May 2010.

The fee increase should induce banks - in particular the lower rated institutions - to seek private sector funding instead of government supported funding. Therefore, pricing of government support is gradually being brought closer to current market conditions and better reflects individual banks' current creditworthiness. Fees for guarantees granted after 30 June 2010 will therefore have to be higher than under the current pricing formula¹² at least by 20 basis points for banks with a rating of A+ or A, by 30 basis points for banks rated A- and by 40 basis points for banks rated below A-.

¹¹ This is not the case for banks that have already come under restructuring obligations and for which distortions of competitions can be avoided or compensated for in the context of the measures taken in the restructuring context.

¹² Based on Recommendations of the Governing Council of the European Central Bank on government guarantees for bank debt of 20 October 2008, available at http://www.ecb.int/pub/pdf/other/recommendations_on_guaranteesen.pdf. The credit risk element in this pricing model is based upon data that predates the most acute phase of the crisis which followed the bankruptcy of Lehman Brothers in September 2008 and does not reflect the significantly higher risk perception since the beginning of the crisis and the increased discrepancy between funding conditions of banks at the different ends of the spectrum.

The second new element is the obligation to undergo a viability review for banks that still depend heavily on government debt guarantees. A persistent failure to obtain a considerable proportion of the funding without government guarantees may indicate a lack of confidence in the viability of a bank's business model. It should be avoided that heavy reliance on guarantee schemes results in a postponement of necessary structural adjustments by banks that are not capable of obtaining sufficient liquidity in stabilised funding markets. The granting of new guarantees which takes or maintains the ratio of total guaranteed liabilities outstanding over total liabilities of a bank beyond 5% and the absolute amount of guaranteed liabilities beyond € 500 million will trigger the requirement of a viability review. A viability review is an instrument already widely used in the context of recapitalisations which consists in an analysis of a bank's long-term viability without State support that duly takes into consideration the specific circumstances of the beneficiary as well as the macro-economic conditions in the Member State concerned that have a bearing on a bank's access to financing. The review will either confirm long-term viability or point to a need for structural adjustments of varying degrees again depending on the circumstances of the individual case¹³.

This approach sends the clear signal that banks have to get ready to secure their funding without State support. At the same time it is sufficiently flexible to find appropriate solutions for Member States and banks under circumstances that may vary considerably.

3.1.3 *Next steps*

This is the very first stage of exit in the financial sector that will have to be followed by other steps – in relation to government guarantees as well as to recapitalisation and asset relief measures – as soon as the macro-economic situation permits. Given the fragility of the current situation it is too early to determine when and how the exit can be further advanced; this will depend on the state of recovery and the degree of stabilisation of financial markets which will be continuously reviewed by the Commission. The reporting obligations on the use of support schemes that Member States have to undertake are an important tool in the monitoring process in that respect.

In addition to the need for further policy measures in order to gradually withdraw the availability of State support to financial institutions in general, it will be a challenge for the Commission in the foreseeable future to deal with the multitude of individual cases in which such support has been granted to individual banks. It is and will remain an intricate task to consistently apply the principles applicable to restructuring set out above in an environment characterised by an unprecedented obligation for a sizeable segment of the European financial market players to restructure simultaneously, and this under circumstances that may vary significantly across Member States. It is the responsibility of the Commission as a competition authority to assess the restructuring plans for banks, to adopt decisions on the conformity of these plans with the State aid rules on the basis of coherent criteria and to monitor over the whole restructuring period (which can last several years) whether Member States honour the commitments they have made with regard to the restructuring process. The complexity of these tasks (and more in particular the divestment of assets, a process that cannot be followed up in detail by a competition authority on a daily basis) has led the Commission to use monitoring trustees, an innovation in the field of state aid inspired by a more common practice in relation to mergers.

In some cases restructuring will not be limited to the divestment of assets or subsidiaries but include the sale of parts of the beneficiary or even the beneficiary in its entirety. The latter situation will occur in particular where a bank was nationalised during the crisis and the restructuring process includes the return

¹³ Where a bank is already subject to restructuring obligations or to a pending viability review due to other forms of assistance the award of additional government guarantees after 1 July 2010 will be taken into account within the framework of the ongoing restructuring/viability review process.

to, private ownership¹⁴. Such a re-privatisation presents specific challenges in terms of making sure it takes place in an open and transparent process and does not create or maintain imbalances or distortions with a lasting negative impact on competition in the banking sector.

3.2 Real economy

Aid measures for the real economy are directly linked to the financial crisis in that the objective of the Temporary Framework was to unblock bank lending to companies and thereby guarantee continuity in their access to finance. The withdrawal of measures to ease financing constraints depends on the capacity of financial institutions to re-establish the supply of adequate credit to the creditworthy corporate sector. Consequently, when the financial situation normalises, the Temporary Framework should expire. The Temporary Framework is not an instrument to tackle the manifold effects of the recession as such, and may delay the necessary adaptation and restructuring if prolonged beyond necessity.

The Temporary Framework in its current form expires on 31 December 2010. In deciding on the specific design of its phasing-out, consideration will be given on the one hand to the evolution of the economic situation, and the capacity of financial institutions and markets to supply adequate funds to the creditworthy corporate sector and, on the other hand, to the appropriateness of the Temporary Framework as an instrument to sustain the economic recovery in the longer term, its effects on competition between firms and across Member States and the need to sustain Member States' efforts towards fiscal consolidation and higher quality and effectiveness of public spending.

The Commission is currently in the process of gathering and analysing information on the use and impact of the Temporary Framework as well as on the state of credit supply to creditworthy companies in order to take an informed view on the phasing-out from crisis-related support to the real economy.

4. The role of competition concerns in devising new regulation

The current multiple regulatory efforts to prevent future systemic crises in the financial sector - be it through amended capital requirements, the introduction of new tools for resolution and crisis management or by other means - fall within the responsibility of the European Commission not in its capacity as a competition authority but in its role as the institution holding the exclusive right to propose internal market legislation

Nevertheless, the institutional set-up of the Commission guarantees that competition concerns will be duly taken into consideration in the decision-making process and will influence the thrust of the Commission's initiatives. The requirement of a consultation of other interested Commission services prior to any new proposal provides a platform for the competition directorate-general to advocate solutions that are designed in full compliance with competition principles at the administrative level. Ultimately, political decisions are taken by the Commission as a collegiate body including the Commissioner for competition. In addition to this political mandate, where specific envisaged measures have a direct bearing on matters squarely falling within the scope of application of the competition rules of the Treaties the Commission is under the obligation to ensure compliance with competition law. For example, the creation of crisis resolution funds that is presently under discussions may have State aid implications since payments out of such funds administered by Member States constitute State aid if certain conditions are fulfilled. The Commission will have to see to it that these aspects are adequately reflected in the design of such funds to avoid any potential breach of the material competition provisions by their operation.

¹⁴ Pursuant to Article 345 TFEU the EU Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. They are thus neutral as to the public or private ownership of banks. Experience during the crisis shows, however, that Member States which nationalised banks during the crisis see this as a transitional crisis-related intervention and have no intention to keep them in public ownership.

5. Conclusion

The Commission as a competition authority occupies a key position in defining and implementing strategies for the exit from exceptional crisis-related support to the financial sector and to the real economy. It determines the terms on which such support can be provided in conformity with EU competition law, the necessary follow-up to such assistance in terms of restructuring to minimise distortions of competition and it is also responsible for deciding when and how the availability of extraordinary support tools is to be gradually withdrawn in order to return to normal market operation. The exit process has been initiated by tightening the conditions for government guarantees covering bank liabilities. It will be instrumental for the ultimate success of this process to properly calibrate the timing and the sequencing of its different steps in a way that is commensurate with the improvement of macro-economic conditions and ensures that exit is sufficiently well co-ordinated across the European Union to prevent discrepancies with adverse repercussions for competition while taking account of the specific circumstances which may vary considerably between Member States.

ARGENTINA

During the last decade Argentine economy suffered one crisis (2001-2002) and the effects of the international crisis (2008-2009) that affected domestic markets in different ways. This paper summarises how changes in the macroeconomic scenario generated modifications in the legal and regulatory framework and how Competition Policy was applied in that context.

1. Crisis of 2001-2002. Structural macroeconomic changes and Competition Policy

During the second semester of 1998 Argentine economy entered in a recession and in 2001 entered in the worst crisis since the thirties. Two macroeconomic factors had been identified as the main causes of the crisis. First, the growing public debt occurred during the financing the transition from public to private pension funds system and secondly, the reduction of contributions to Social Security System¹.

In that context, access to international capital was critical to finance public deficit but the former crisis of the emerging markets (South Eastern Asia 1997, Russia 1998, Brazil 1999) also affected the Argentine country risk index along 2000 (the flight to quality effect).

To sum up, by the end of the twenty century Argentine economy was in a recession, with a fast growing debt, high expensive access to international capital markets and serious difficulties to afford the maturity of the outstanding public debt.

One year later, Argentine economy was paralysed, with an unaffordable public debt, no access to international capital markets (country risk index of 1500 basics points – July 2001), massive outflow of short and long term capitals.

In the previous two years, Central Bank reserves had fallen from U\$S 30 billion to U\$S 8 billion and similar tendency had showed the deposits in financial system. Due to the high risk of a generalised bankruptcy, National Government prohibited deposits holders to withdraw money except for small weekly amounts.

At the beginning of January 2002 the President of Argentina declared in the Congress the default of public debt owned by private tenants (U\$S 88 billion) and the end of the convertibility system which was replaced by a floating exchange rate. By the end of 2002 the former convertibility parity one peso per dollar reached a quotation of 0.25 peso per one dollar².

The new economic rules were based on the “Economic Emergency Law” enacted on 6th of January of 2002. Its main clauses in relation to the financial system were oriented to solve the situation of credit takers

¹ Since 1994 most of the active workers had been contributing to the private system but this generated lack of public resources to afford payments for retired people. The same effect had the reduction in the contributions to social security as a part of a policy oriented to reduce costs and stimulate private investments.

² After this overshooting effect the exchange rate was stabilized around 0,33 peso per dollar for the following five years thanks to the purchases and sales of the Central Bank in the exchange market.

in dollars who had debts that had been increased by three times due to the devaluation effect and with no changes in incomes that were in domestic currency. Other clauses were oriented to deal with insolvency problems of the financial institutions, in particular with their liabilities in dollars.

The Economic Emergency Law had a fast treatment in Argentine Parliament and it was enacted immediately in a situation of high volatility in all macroeconomic variables. No opinion of the Competition Authority was required in its elaboration despite the fact that the Act gives the Government the power and the capacity of intervention in any oligopolistic or monopolistic market for public interest reasons. Government did not enforce these clauses however.

The reduction in GDP as a consequence of the crisis was around 20% (1998-2002) but the Argentine economy soon began to recover. Led by strong exports, it grew 8-9 % per year between 2003 and 2007³, and almost 7% in 2008. This economic performance gave solid bases to normalise financial system activity. During this period Argentine government carried out a successful restructuring of the debt in default. (March 2005)⁴.

The crisis did not produce significant changes in the banking structure. The following table shows that despite of several mergers which took place between 2002 and 2009 the level of competition continued to be high with an HHI index of 659.

Mergers in the Bank Sector

Year	Total Mergers	Mergers in Bank Sector
2002	26	2
2003	38	3
2004	45	4
2005	46	4
2006	54	7
2007	42	-
2008	46	1
2009	50	2

Just a few foreign banks closed the doors in the domestic market and some Argentine private institutions gained market share but, as the second table shows, among the big banks in Argentina foreign institutions continue accounting for an important part of the financial system (29.2 % of the deposits) which is almost the same market share that have biggest public banks (29.1) and quiet more than the group of main Argentine private banks (21.6%).

³ It has to be mentioned, also as key factors that let Argentine economy go through the crisis, increases in commodities prices, domestic inflation levels under the devaluation rates, availability of resources not used in the crises and no increases in wages due to the high unemployment rates. In relation to this last factor, the growth in GDP led a significant reduction in the unemployment rate from 22% in the worst phase of the crisis to 7% in 2007.

⁴ Basically 76% of the outstanding debt in default was exchanged for new bonds with a reduction in the principal of 65%, longer terms of maturity and reductions in the coupon rates.

Main Banks in Argentina

Bank	Market Share	Group Market Share
BBVA Banco Frances	9.9	
Santander Rio	9.8	
HSBC	5.7	
Citi	3.8	
Foreigns		29.2
Nacion	12.4	
Provincia	9.7	
Ciudad	4.8	
Cordoba	2.2	
Publics		29.1
Galicia	7.8	
Macro	6.0	
Credicoop	4.5	
Hipotecario	1.7	
Supervielle	1.6	
Argentine Privates		21.6
Others		20.1

Something similar could be said in relation to other segments of the financial and capital markets such as stock markets, insurance, investment funds and over the counter transactions where most of the outstanding public debt is traded.

It is important to note that Argentina has deregulated financial and capital markets to the extent that banks, apart from their current commercial activities, own societies that participate in such segments, namely, trading in the stock markets, investment funds, trust funds, insurance activity.

It is also remarkable that pension funds had been administrated by companies owned by one or more banks up to the third quarter of 2008. Since then a new Act of the Pension System made the National government the exclusive administrator and the funds were transferred from the private administration to the Argentine State.

2. International crises of 2008-2010

From a structural point of view, Argentine economy has a better position to deal with the international crisis than in 2001-2002 crises, especially it has no weaknesses in its fundamentals. Different factors explain this. First, there are low possibilities of financial contagious, basically because Argentine is not so expose to the movements of international capitals, on the contrary its main offer of international currencies comes from the strong commercial surplus in the balance of payments.

Secondly despite of the important outflow of capital in 2008 and 2009⁵ Central Bank reserves maintained a high level (U\$S 46.500 in the worst part of the outflow of capital)⁶.

Thirdly the reduction in public debt generated by its restructuring⁷ plus the fast growing process in the post crisis period let Argentine economy reach a low debt/GDP ratio of 45%.

⁵ Private estimations say that in 2008 was around U\$S 23.000 billion and in 2009 U\$S 15.000.

⁶ The last official data available is a reserves level of almost U\$S 49.000 billion (end of May 2010).

At the same time, in all of the post crisis years until 2008, public budget had a surplus of around 2,5-3,5 of the GDP⁸, even in the recession of 2009 the budget surplus reached 1% , while economic activity was falling (-2,5% according to the IMF estimation 2009). This positive result was possible thanks to the increase in public incomes due to the Nationalisation of the Social Security Private System.

The Argentine economy is recovering from the recession. In the first quarter of 2010 GDP grew 6,5%, and depending on the international economic performance, the growth in this year could reach even a higher level.

This positive reaction of the Argentine economy is in turn explained for local and international factors. Among them is possible to mention the policy of the national government to sustain the aggregate demand by increasing public expenditures (public works, subsidies to low income population, loans for productive investments etc.). Also the strong increase in the harvest (2009-2010 campaign⁹) and the recovering in commodity prices after their lowest level at the end of 2008.

Financial sector did not suffer the effects of the international crisis as it had happened in 2001-2002. There were no important reductions in the global stock of deposits in banks and no restrictions were adopted to withdraw deposits, on the contrary public information from the stock market shows high profits for the lasts years in the biggest private banks.

What Argentine government made is to manage traditional instruments of economic policy such as monetary instruments, exchange rate level, taxes, public expenditures, etc. In this context Competition Policy should be understood as a part of it.

The crisis of 2001-2002 and international crisis of 2008-2010 had different impact in Argentine economy. While the first was explained mainly for domestic factors that maintained macroeconomic fundamentals out of balance and with high exposition to international capital movements, the present international crises find Argentine economy in a better position to face their effects. Different state interventions permitted to have one of the most important growing processes in the international economy.

It is important to note that in neither crisis Argentine State took over the control or any form of share in the main private commercial banks (exhibited above) or in investment banks.

3. Development of structured financial instruments

As it was mentioned above Argentine regulations permit commercial banks or the controlled groups developed activities in different segments of the financial and capital markets. This was possible because in the decade 1991-2001 new legislation and regulations (including deregulations) were enacted to develop capital markets with the outcome of increasing the level of savings and financing investments.

⁷ The restructuring process mentioned, reduced public debt approximately from U\$S 190 billion to U\$S 129 billion.

⁸ In the post crisis period it was introduced a system of export duties for commodities whose rates were increased until 2008. These additional resources let public sector maintain fiscal solvency but during the first semester of 2008 new increases generated a strong conflict between national authorities and farmers that affected Argentine productions and also produced a political conflict.

⁹ Lack of rains accounted for a reduction of one third in 2008-2009 in the harvest campaign to a low level of 60 million of tons, the estimations for the present campaign reach a level of more than 90 million of tons.

Among other laws it can be cited the law of private administration of pension funds (1994), law that introduce financial trusts (1994) and former changes in the law of the Central Bank which had established just stability objectives maintaining the value of the domestic currency.

In the context of no inflation, that convertibility system guaranteed, and with the reduction in the interest rates, new conditions were created to develop financial instruments based on the access to the credit for middle income population. This was the case, for instance, with the strong expansion of credit for durable consumption goods, credit cards consumption and mortgages loans.

The growth in the demand for credit, particularly for home purchases, and in the activity of construction sector gave the incentives to develop a secondary market for mortgages that the Financial Trust Act made possible. As it is known the basic mechanism consist of transferring packages of mortgages loans from the assets of a bank to a trustee which issues securities demanded for institutional and personal investors, structured in different credit quality parts, with the cash flow of the loan payments as underlying asset. These leveraged operations let banks to expand the supply of loans beyond the limits that otherwise they would respect according to prudential regulations in charge of the Central Bank.

However in the Argentine case, being an emerging economy was different from other developed economies, namely United States, to the extent that middle income population with access to financial services was not the majority, so most of the demand for credit could be supplied by current banking mechanisms.

Before and after 2001-2002 crisis, the securities issued by financial trusts had important development including a wide variety of underlying assets but they didn't have macroeconomic relevance in terms of their chance to affect negatively Argentine economy as a whole due to the risk and volatility of the assets involved.

The only situation where financial trust played certain roll from the macroeconomic point of view was in 2000-2001 when the fiscal solvency problems were evident. Pension funds had legal limits to buy public debt (no more than 50% of the funds) but once they had reached it they began to purchase financial trust securities from off shore trustees with Argentine public debt as underlying asset (with a legal limit of 10% of the funds).

In the post crisis period with the fast growing of the commodities prices financial trust securities were oriented to give financial support for agricultural investments projects, mainly soy, strongly demanded for China.

4. Final remarks

According to the precedent description the present international crisis have more similarities with the former Argentine crises during 2001-2002 than the present Argentine situation.

As it was explained the former crisis was originated for the lack of consistency of a macroeconomic policy to sustain fiscal equilibrium with high dependence of external savings to support financial necessities of the public sector and private investments.

The macroeconomic scheme has changed since the end of the crisis. Despite Argentine economy has no access to volunteer international capital markets yet fiscal solvency, reduction in public debt after the default and the growing of the economy, among other factors, should be seen as structural changes that permit the reduction of the impact of the present international crises, and till now relatively fast recovering from it.

That is why Argentine government has not considered some alternatives to return to more free markets decisions. In that context competition policy is being developed as a part of the current economic policy. This does not mean that competition authority has restrictions to enforce Anti-Trust/Competition Law but that the final decision, that could be appealed to the justice, is made by a Secretary of State appointed for the President of Argentina, who reported to the Ministry of Economy.

The success of this process explained why public intervention in some markets should be seen as structural more than a short term reaction to the crisis.

The structural changes in Argentine economy also include the integration in global markets. The main policy in this direction is strengthening the Mercosur initiative but involve other important commercial agreements with most Latin American countries and the return to the negotiations between European Union and Mercosur, last may in Madrid, to reach a Free Trade Agreement.

BRAZIL

1. Crisis and reform of the Brazilian financial system

Brazil has a very interesting experience in regulating financial markets in periods of crisis. Indeed, during the country's military regime (which lasted from 1964 to 1985) the Law no. 6.024/73 was enacted which regulated interventions and extrajudicial liquidations of banks¹ with financial problems. Interestingly, this law was very important in that specific period because, with the oil crisis, there was a large loss of foreign reserves in 1974 creating a liquidity problem.

The first institution affected by that situation was Halles Bank in April of that year, followed by several other banks, such as Commercial Union Bank, one of the five largest in the country. Because of that, the government issued Decree no. 1.342/74, which authorised the Central Bank of Brazil (BCB) to use resources from Tax on Financial Operations (IOF), accumulated in the bank's reserves, to restore and to reorganise the assets and liabilities involved in the crisis.

However, due to the lack of transparency during the military regime, the existence of this legal device – that allowed the full coverage of all the liabilities of troubled financial institutions – might have given wrong incentives regarding bank accountability. There were several interventions in private and public banks, even after civil elections in the 1980s, such as those made in Rio de Janeiro State Bank (Banerj) and Bahia State Bank (Baneb). In response to the public reaction against the use of tax payer's money to help financial institutions, Congress, in drafting the new Constitution of 1988, expressly determined that (a) the financial transaction tax IOF should be fully allocated to the National Treasury; and (b) public resources should no longer be used in the reorganisation of financial institutions.

So, it was necessary to use new approaches to deal with liquidity problems. However banks in that period, from the late 1980s to the early 1990s, could profit a lot with the extraordinarily high inflation that Brazil experienced. Hence, BCB did not receive many demands to intervene in the financial system. However, with the institution of the new currency (the Real) in 1994 and a stabilised macroeconomic environment from then on, the situation began to change. There were important initiatives, such as the requirements for capitalisation of financial institutions, in line with international recommendations of the Basel Accords (Resolution no. 2.099/94). Also, in 1994, there were some interventions in state banks, by a Special Temporary Regime (RAET). These initiatives, however, were not strong enough as the situation at the time demanded, and, as a consequence, they did not prevent crisis in some important banks, such as National Bank and Economic Bank. The conclusion of economic experts at the time was that some other regulatory mechanism was required.

Accordingly, the government implemented the so called Programme for Promoting the Restructuring and Strengthening of the National Financial System (PROER), creating a line of credit administered by BCB to facilitate the absorption of less efficient institutions by more efficient and capitalised ones. Provisional Measure no. 1.179/95, also, favoured tax reduction for mergers of financial institutions. Access to PROER credit lines was conditional upon BCB express authorisation, granted on a case by case analysis, taking as a prerequisite some administrative changes in the rescued institution.

¹ Created by the Decree 19.479/30 and implemented by Law 6.024/74.

This programme was able to protect depositors by transferring the healthy part of the assets of the affected financial institutions to a new controller group. These operations did not cause any kind of harm or loss to BCB or to public taxes. The credit line of central bank that fostered these mergers was fully guaranteed by public bonds or by a private insurance mechanism of the financial system itself called Fundo Garantidor de Crédito (FGC). Furthermore, former controllers did not benefit from this kind of intervention, since they were still liable for their negative heritage, which was separated from the good and healthy part of the financial institution.

The Provisional Measure no. 1.182 of November of 1995 (later converted into Law No. 9.447/97), increased the powers of BCB's intervention in the liquidation of financial institutions. Thus, stakeholders, liquidators and boards of directors, authorised by BCB, were given the power to transfer assets, rights and obligations; to sell or to lease property and rights; to agree on the assumption of obligations; and to reorganise the companies. This power was vital to allow the division of the healthy part ("good bank") from the insolvent bank ("bad bank"). This same Law no. 9.447/97 gave the BCB the power to determine the capitalisation of a financial institution, as well as corporate restructuring, including merger or division.

Finally, among the most important decisions taken by the Government amid the banking crisis of 1995 was the creation of FGC, a private deposit insurance mechanism. This was probably the most promising initiative set of measures adopted, despite the financial difficulties that the institutions were facing. The creation of FGC was authorised by the Resolution no. 2.127 of 1995, followed by the approval of its rules and regulation through Resolution no. 2.211 of 1995, both by the National Monetary Council (CMN). The FGC is a non-profit civil association, with an indefinite term of duration and instituted in the form of a private company. It aims to cover deposits and investments in the event of a decree of intervention, extrajudicial liquidation or bankruptcy of a participating institution of that fund. All financial institutions make contributions to FGC, except credit unions and credit co-operatives.

Together with these mergers, there were also many privatisations of banks, especially after the Provisional Measure no. 1.514/1996. It is important to highlight that while PROER fostered mergers between troubled institutions and healthy ones in the national level, there was also PROES a similar plan made in a state level. It is noteworthy, also, that there are authors² that disagree about the need for privatisation or mergers as tools to achieve and maintain stability in the financial system.

2. Exit strategies during the current crisis

Although the U.S. government has made several attempts to contain the current crisis, some factors, such as the bankruptcy of Lehman Brothers and the volatile situations of Bear Stearns, Merrill Lynch & Company, Fannie Mae, Freddie Mac and AIG had repercussions all around the world and in many institutions, affecting global demand as a whole. Moreover, the supply of credit has gone down not only because of the crisis of confidence in financial institutions, but also due to the large amount of money laid out to save institutions in problematic positions.

Despite difficulties in some specific sectors of the economy, Brazil was not much affected by the last crisis as other countries were. Brazilian banks in fact presented very solid condition. Also, the main drive of the Brazilian Economy has been its own internal growth. Hence there was no need to take any strong remedy against this specific financial crisis.

Despite this, the government did take some steps to control crisis situations. Indeed, it enacted the Provisional Measure no. 442/2008 (converted into Law no. 11.882/2008) that facilitates the rescue of small banks and credit for exporters by the BCB. With this law aid to banks was facilitated because rediscount

² Gutierrez for instance.

operations with the BCB as collateral could be guaranteed by the credit portfolios of the financial institutions itself. Furthermore, in rediscount operations, normally done within a day, if a bank has no cash to pay such obligations it must give federal bonds as collateral. Hence, besides accepting credit portfolios as collateral, the time given by BCB for this operation could be extended. Before the Provisional Measure no. 442/2008, only banks experiencing financial risk had extended terms in these operations. Therefore, in practice, this meant that the BCB would buy the loan portfolio of an institution if it failed to repay the rediscount in the extended window operation. There could also be the possibility that part of Brazil's international reserves, invested abroad in dollars, would be used in operations similar to the rediscount window with bonds or loan portfolios guarantees. Thus, exporters would have an easier way of getting loans rather than pleading to institutions that operate abroad. Also, the Provisional Measure no. 443 (converted into Law no. 11.908/09) authorised the Federal Economic Bank (CAIXA) and Bank of Brazil to buy shares in financial institutions (banks, insurance companies and pension funds) which were in difficulties due to the global financial crisis.

Furthermore, BCB lowered interest rates and the Federal Government fostered the consumption of some specific goods (such as vehicles) by lowering taxes and having specific policies to help poor people.

The government also extended the amount of investments made in a structural plan (PAC – Plan for the Acceleration of the Economy) in order to stimulate the internal demand.

3. Competition and financial security objectives

In a scenario of systemic crisis, many countries seek to assess what the antitrust authority may consider about the merit of mergers and acquisitions. Indeed, many of the transactions, amid the financial crisis, could be taking place under the defence that they seek to avoid bankruptcy, which endanger the monetary system as a whole, resulting in losses to depositors of banks and, therefore, bringing impacts that go beyond microeconomic analysis. Antitrust authorities certainly have to deal with this tension.

In the field of market competition, there are two important debates, one regarding jurisdiction and another regarding the actual need for the Brazilian antitrust authority (CADE) to interfere in this matter.

3.1 Jurisdiction

In Brazil, there is a great legal debate about whether CADE can actually interfere in any way whatsoever in the national financial system. Even if the judiciary eventually clarifies whether CADE can interfere in this sector, one may also have to determine on what grounds antitrust interference is justified by law.

On this issue, it is important to note that, in 2001, the Federal Attorney General's Office issued a legal opinion concluding that the specificity of Brazil's banking law (Law no. 4.595/64) took precedence over the more general language of Law 8.884/94 (the national antitrust law), and thus effectively vested the BCB with exclusive jurisdiction over banks for all purposes. CADE has never acceded to this opinion, taking the position that Law no. 8884 (which was enacted after the banking law) is applicable by its terms to all commercial enterprises, and that CADE, as an autonomous agency, is not bound by a legal opinion issued by the Executive Branch.

This discussion was brought to the Brazilian Judiciary, that now has to decide if CADE can or cannot interfere in the banking system, from the standpoint of competition. The case under discussion is – *National Credit Bank (BCN) & Bradesco Bank versus CADE*³. This case started in the administrative

³ Judicial Procedure: RESP 1094218 – STJ.

sphere, when CADE fined Bradesco and BCN, since both banks failed to notify the Brazilian Competition Protection System (BCPS) within the required time frame about their merger operation⁴. However, these banks filed a suit in the Brazilian Judiciary System challenging the scope of CADE's competence regarding the financial system.

The case is still pending before the Superior Court of Justice. Bradesco and BCN pleaded to the Court to declare that BCB has exclusive jurisdiction to analyse mergers in the Brazilian financial system, independently of existing or not a systemic risk involved. CADE, on the other hand, understand that antitrust law and banking law can coexist, and antitrust authority is still competent to analyse mergers, if there is no systemic risk involved.⁵ Two Justices already voted in this case. While Justice Eliane Calmon voted in favour of Bradesco and BCN, Justice Castro Meira understood that CADE can analyse mergers in a complementary manner. Other Justices are expected to present their opinions soon. Therefore, the question of whether CADE has or not jurisdiction regarding the financial system is yet to be clarified. But it must be highlighted that even if the Superior Court of Justice rules in favour of CADE, the BCPS would not be able to interfere in financial system if mergers are skilfully construed by BACEN's jurisdiction to avoid systemic risk.

3.2 *Mergers that do not involve systemic risk and competition policy*

If systemic risk is not involved, CADE can analyse mergers. In such cases it is possible to use a tradition approach or even consider, in some extreme situations, the "*Failing Firm Doctrine*".

It is important also to mention that there were several mergers, chronologically made during this crisis, that were presented to BCPS. Therefore, CADE will have to analyse some important operations, such as the merger involving (i) Itaú and Unibanco (Merger Review 08012.011303/2008-96.); (ii) Bank of Brazil and Nossa Caixa (Merger Review 08012.011736/2008-41); (iii) Bank of Brazil and Santa Catarina Bank (BESC); among others. Recently, for example, CADE approved the merger between Bank of Brazil and Votorantim Bank (Merger Review 08012.000810/2009-85)

So, CADE will have an important role to define the competition rules of financial system, in the absence of systemic risk. On the other hand, as it was already mentioned, the extent of CADE's jurisdiction is still being discussed by Superior Court of Justice.

3.3 *On the necessity to interfere or not in the financial system*

Aside from this jurisdictional debate, there are some specific empirical aspects that must be answered before one makes any kind of normative conclusion about what should be done or not to safeguard competition in the financial sector in the post-global crisis period in Brazil. In other words, one has to ask what is desirable in terms of concentration in the sector.

⁴ CADE Merger: 08012.002381/2001-23.

⁵ The Federal Court of Appeals in this case decided that, when there is any issue concerning systemic risk of the financial system, the BCB is the sole administrative agency with jurisdiction to analyze mergers. However, when such a risk is not involved, then CADE is the administrative agency responsible to judge the merits of mergers between banks. The court also understood that the powers of CADE and BCB are distinct and complementary: There is possibility of coexistence of Law no. 4.595/64 with Law no. 8884/94, which should be applied in a complementary manner, since the first is limited to assessing the competitive issue in order to defend the stability of the financial system, while the second specifically takes care of the protection of competition itself Appeal to Writ of Mandamus no. 2002.34.00.033475-0/DF by Fagundes de Deus.

As pointed out by Tabak *et al.*⁶, there are two conflicting theoretical forecasts on the relation between concentration and the fragility of the financial system. The first hypothesis notes that a more concentrated environment leads to more stability for several reasons:

According to Beck et al. (2006), one of the hypotheses of the relation concentration-stability is that it would be substantially easier to monitor a few banks in a concentrated banking system than supervising many banks in a less concentrated system. Following that perspective, banking supervision would be more effective and the risk of contagion, as well as of systemic crises, would be less pronounced in a concentrated market. Another basic hypothesis following that line of thought is that more competition would be associated with smaller profits, which would increase the incentives for banks to assume higher risks (risk shifting). This leads us to believe that, in less competitive systems, higher market power would lead to higher profits that, somehow, would serve as protection against adverse shocks and would increase the franchise value of the bank, reducing the managers' and owners' incentives to assume excessive risks and, consequently, reducing the probability of a systemic breakdown (Hellmann et al., 2000; Allen and Gale, 2000). Finally, competition tends to increase the rates paid to the depositors, decreasing the banks' margins of gain and increasing the probability of bankruptcy (Matutes and Vives, 2000). Various other recent contributions, analysing important factors of the relation between loan market structure and some aspects of the banking sector's performance, strengthen the case for a concentration-stability relation. One of the lines of research explores the consequences of the aspects of the adverse selection and the problem of moral hazard on market fragility. Broecker (1990) and Nakamura (1993) state that a higher level of competition may make adverse selection problems more severe when borrowers that have been rejected at one bank can apply for loans at other banks. In a different vein more market power can decrease the moral hazard problems banks face as lenders. The results of Petersen and Rajan (1995) show that the credit market imposes constraints on the ability of lenders and borrowers to intertemporally share the surplus from investment projects, which would lead the banks in competitive markets to charge higher rates than the monopolist banks, when the firms are young. In the concentration-stability vision, the results obtained by Beck et al. (2006) indicate that the occurrence of crisis is less probable in more concentrated banking markets, even after controlling for differences in regulatory policies, institutional environment, macroeconomic conditions and shocks.

On the other hand, the opposite hypothesis argues that the more concentrated the structure of the banking system, the more fragile it will be. Tabak *et al.* make the following considerations on this regard:

Boyd and De Nicoló (2005) demonstrate that the standard argument of the concentration-stability vision, the one that states that market power generates higher profits and, consequently more stability, is at least incomplete, and probably false, because it neglects the effects of market power and of the costs of the loans on borrower's behaviour. According to these authors, the high interest rates charged by the banks would induce the firms that take loans to assume higher risks, which would end up increasing systemic risk. Similarly, the results presented by the studies of Caminal and Matutes (2002) show that a lower degree of competition can lead to a decrease in credit rationing, higher loans and high probability of bankruptcy, even though they reinforce the idea that the relationship between market structure and banking failure is ambiguous. The basic hypotheses in the model adopted by Caminal and Matutes (2002) is that a monopolistic bank has more incentives to monitor its clients than a bank with less market power, decreasing

⁶ TABAK, Benjamin Miranda; GUERRA, Solange Maria; LIMA, Eduardo José Araújo; CHANG, Eui Jung. *The Stability-Concentration Relationship in the Brazilian Banking System*. Working Paper 145. BCB. <<http://www.bcb.gov.br/pec/wps/ingl/wps145.pdf>> verified in May of 2010.

the credit rationing of loans. Another argument (Mishkin, 1999) is that in comparison with the less concentrated systems, the more concentrated structures would receive more government subsidies, which could create a moral hazard problem (typical of supposedly “too big to fail” institutions), encouraging those banks of greater importance to assume higher risks, increasing the system's fragility.

Tabak *et al.* point that there is some empirical evidence in favour of the concentration-stability hypothesis:

Allen and Gale (2000) analyse the US, UK and Canadian banking systems and find evidence that more concentrated systems show less financial instability. The authors argue that: i. Small banks have greater incentives to take risky behaviour; ii. Systems with large number of small banks may have problems of co-ordination and monitoring, and; iii. Larger banks are inherently more stable because of their greater ability to spread risks and they are less subject to contagion when the banking sector is subjected to some external shock. Additionally, other lines of research explore the determining factors of banking crisis, trying to find a set of early warning indicators, such as Kaminsky and Reinhart (1999) and Evans (2000), or searching for theoretical and empirical explanations for the negative events like Pesola (2005), who used panel data to analyse macroeconomic determinants for bankruptcy in the banking sectors located in Scandinavian countries, Belgium, Germany, Greece, Spain and United Kingdom, for the period between 1980 and 2002. According to the results, the high debts taken by clients combined with adverse shocks in the income and in the real interest rate contribute to increase the likelihood of bankruptcy in the banking sector. In sum, the theoretical literature does not provide a totally unambiguous view on the relation between banking concentration and financial stability.

Furthermore, Tabak *et al.* used an unbalanced panel data, with a dynamic specification to demonstrate that there is a negative relationship between Non-Performing Loan (NPL) and Herfindahl-Hirschman Index (HHI) in Brazil. According to their view this result reinforces the concentration-stability line of research. Of course, it is possible to discuss if their model as well as the variables used were suited to reach this conclusion.

On the other hand, if concentration-stability hypothesis is correct, then antitrust authorities will have a very difficult tradeoff to consider, before determine exactly how and when to interfere in financial systems. However, even when this complex tradeoff is not involved, there are many other hard questions to answer about the competitive environment itself in financial systems, regarding structural and behavioural issues.

3.4 Competition in the Brazilian financial system

There are several studies that measured the concentration of the banking sector under a structural point of view. It is important to clarify the terminology of the main measures to assess the degree of concentration, such as CR_k and HHI.

- CR_k (Concentration Ratio - CR, or concentration ratio) represents the sum of market shares (S) of the k largest firms

$$CR_k = \sum_{i=1}^k S_i$$

- HHI (or Herfindahl Hirschmann index) is the sum of the squares of market shares of the companies examined

$$HHI = \sum_{i=1}^n s_i^2$$

Although the methodology is simple, there are certain difficulties in determining accurately the concentration in the banking sector. As shown in the table below, many studies that intended to evaluate such concentrations showed some differences among themselves in regard to total bank assets in Brazil:

Table 1: HHI of Banking System in Brazil

	Nakane	Wichman e Neto	Araújo e Neto	Ponce, Araújo e Neto	Silva e Moraes
1994 – dec		---	---	---	---
1994 – jun	706	---	---	---	710
1995 – jun		---	---	---	---
1995 – dec	678	---	---	---	680
1996 – jun		---	---	---	---
1996 – dec	674	---	---	---	670
1997 – jun		---	---	---	---
1997 – dec	676	---	---	---	680
1998 – jun		---	---	---	---
1998 – dec	786	---	---	---	790
1999 - jun		---	819	---	---
1999 - dec	744	---	770	924	740
2000 – jun		790	764	---	---
2000 – dec	687	760	735	893	690
2001 – jun		660	632	---	---
2001 – dec	630	700	671	851	630
2002 – jun		700	675	---	---
2002 – dec	692	750	716	906	690
2003 – jun		820	760	---	---
2003 – dec	758	860	799	906	760

Source: Studies mentioned above

Such inaccuracy can occur because of simplifications or using different data. On the other hand these different results can cause differentiated conclusions in empirical analysis. Also, it is possible to evaluate the specific concentrations in loans and deposit.

Table 2: Number of banks and HHI of Assets, Loans and Deposits in Brazil

	Number of Banks	HHI Assets	HHI Loans	HHI Deposits
1994	246	706	990	858
1995	242	678	1001	991
1996	231	674	960	952
1997	217	676	1227	934
1998	203	786	1351	931
1999	194	744	1137	986
2000	192	687	875	902
2001	182	630	566	891
2002	167	692	596	884
2003	164	758	691	911

Source: NAKANE, Márcio I. Competition and Banking Spread: A Revision of the Evidence for Brazil. <<http://www.bcb.gov.br/Pec/SeminarioEcoBanCre/Port/VI%20-%20Concorr%C3%A2ncia%20-%204JSB.pdf>>.

Some countries analyse these markets in a greater degree of detail in the product dimension, which goes beyond the general division between assets, loans and deposits. Indeed: "Treasury services, leasing, factoring, insurance, credit cards, foreign exchange, pension funds, housing finance, loans for financing

small and medium enterprises” could be analysed separately in some cases (Nakano and Alencar). But regardless of difficulties in defining the borders of product dimension of relevant markets, most studies point to a process of banking concentration in Brazil. In this respect, Cesar Augusto Tiburcio Silva and Marcos Campos Moraes point to the fact that, in Brazil, the number of banks has reduced drastically. From 1994 to 2003, the number of banks fell from 246 to 164, a reduction of 82 entities, or one third. The mergers of smaller banks by larger banks, in recent years, apparently accelerated the concentration trend in the Brazilian banking system. The ten largest banks, which in December 1994 held 56.44% of total assets of financial system, were responsible for 67.33% of total assets of the system in 2003 (E. Silva Moraes) However, the existence of 164 banks together with an HHI between 700 and 900 points to levels of concentration lower than most banking systems around the world, according Bikker and Haaf (2002):

Table 3: Concentration in Financial Sector

Countries	HHI	CR3	CR5	CR10	Number of Banks
Australia	1400	57	77	90	31
Austria	1400	53	67	77	78
Belgium	1200	52	75	87	79
Canada	1400	54	82	94	44
Denmark	1700	67	80	91	91
Finland	2400	73	91	100	12
France	500	30	45	64	336
Germany	300	22	31	46	1803
Greece	2000	66	82	94	22
Ireland	1700	65	73	84	30
Italy	400	27	40	54	331
Japan	600	39	49	56	140
South Korea	1100	45	68	96	13
Luxembourg	300	20	30	49	118
Netherlands	2300	78	87	93	45
New Zealand	1800	63	90	100	8
Norway	1200	56	67	81	35
Portugal	900	40	57	82	40
Spain	800	45	56	69	140
Sweden	1200	53	73	92	21
Switzerland	2600	72	77	82	325
United Kingdom	600	34	47	68	186
United States	200	15	23	38	717

Source: Bikker e Haaf (2002)

Also, according to a survey by the World Bank for 92 countries, Brazil is ranked 12th in terms of less concentration in relation to bank assets. But Nakane (2002) does state that these numbers should be viewed with caution, since the data used in the studies allude to banks separately, not taking into account their respective corporate groups. Moreover, as already mentioned, the market in which financial institutions compete may have a more limited scope, as contended by Tonooka and Koyama (2003).

Geographically, also, groups of clients served by a large number of institutions enjoy the benefits of more intense competition and pay lower interest rates, while other groups served by few banks, may enjoy a weaker competition environment.

... Why do some banks prefer to operate in areas where competition is more intense instead of approaching the localities where the number of banks is lower, so that, in equilibrium, competition is similar in every market? A reason lies in the relative size of local markets. Regions where demand is relatively low do not contain a large number of banks because the potential profits are not sufficient to cover the installation costs. (...) This result has important consequences for a country like Brazil, with significant regional disparities in income and population. The data showed that the poorest and least populated regions attract a smaller number of banks. This fact restricts competition and, ultimately, the granting of credit. There is thus a mechanism that reinforces the perpetuation of disparities and justifies public policies that favour the granting of credit to poor regions (Farina and Ferreira).

Hence the competition authority must take into consideration the geographic dimension of financial competition environment. However, there are a lot of difficulties in analysing the impact of mergers in different regions of Brazil, especially regarding the availability of a good database on impacts. The BCB has a lot of information about the market, even in municipal level, but CADE does not have total access of this data, in a disaggregated manner.

Besides the evaluation of market structure, there are tests that seek to measure the "degree of competitiveness" or "market power" of the companies through its conduct. This kind of test applied to the Brazilian banking sector already used several methodologies, such as the Bresnahan and Lau 1982 methodology, the Panzar and Rosse 1987 methodology, the Jaumandreu and Lorens, 2002 methodology, among others.

Nakane (2002) was a pioneer in using the methodology developed by Bresnahan and Lau (1982) to test the market power of Brazilian banks in the segment of credit. As Nakane explained, this methodology has been used to analyse the market power of banks in Colombia [Barajas *et al.* (1999)], Uruguay (Spiller and Favaro (1984)), Canada [Shaffer (1993)], USA [Shaffer (1989)], Finland [Vesala (1995)] and a group of European countries [France, Denmark, Belgium, Germany, Holland, Spain and United Kingdom by Neven and Roller (1999)]. According to Nakane:

The empirical evidence is diverse. The above mentioned studies reach the conclusion that the banking industry is competitive in Canada, in the United States, and in Colombia. The Uruguayan banking system can be represented as a Stackelberg oligopoly model of leaders and followers. The Finnish banking system shows imperfect competition but no cartelisation. Finally, there is evidence of cartel behaviour for the European banks.

This test uses an econometric tool to see how prices behave if the demand curve is rotated. It is expected to see different reactions of prices, in this particular experiment, in a perfect competition scenario and in a cartel scenario. According to empirical evidence, the measure of market power estimated for the Brazilian banking sector by Nakane (2002) λ was equalled to 0.0017. Although its magnitude was numerically small, its value was considered different from zero at 5% statistical significance. According to the test, Brazilian banks cannot be included in any of the two polar structures, admittedly perfect competition and monopoly/cartel, but they have some market power.

Another test to measure market power is Panzar and Rosse Test. In Brazil, Belaish (2003), Araujo and Jorge Neto (2005) and Araujo, Jorge Neto and Ponce (2005) used such methodology. This test analyses the H statistics that measure the variation of profits in respect of variation of costs. The key point to understand this test is that the product of a monopoly and its profits decline to the extent that the marginal cost curve rises. By contrast, in perfectly competitive sectors, an increase in marginal cost is fully reflected in prices, which ends up increasing the total receipts as a whole. Between these two extremes lies the case of oligopolistic structures. After performing this test, using 12 specifications of demand, Belaish (2003) rejected the hypothesis of collusion. In four specifications the hypothesis of perfect competition was not

rejected. Moreover, similar to the studies of Nakane pointed out, most of the tests indicated some degree of market power that would be closer to perfect competition scenario than cartel/monopoly scenario.

There are other alternative methods, like the model developed by Jaumandreu and Lorence and applied to the Brazilian case by Petterini and Jorge Neto (2003). It should be noted that, even using different data and methodologies, all tests (Nakane, Belaïsch, Petterini and Jorge Neto) rejected the hypothesis of collusion/monopoly, but did not reject the possibility, to some degree, of market power in the Brazilian banking sector.

On the other hand, Professor Alberto Salvo considered that these techniques described above (particularly that of Bresnahan-Lau) should be used cautiously, since, besides having a series of problems with bias by technical problems, the evidence pointing to perfect competition could be dubious if the cartel is under pressure from a regulator, or if it wants to avoid detection (Harrington 2004, 2005), or if it is adopting a focal price, among many other situations. Hence, Salvo stated that pricing strategies in the real world are extremely complex and it is not possible to draw conclusions from the models mentioned above if there is or not market power relying only on very specific behavioural assumptions.

Concerning efficiency, Wichmann and Jorge Neto argued that larger banks are more efficient than smaller banks in the Brazilian system using empirical data. However, for Belaïsch the increase in bank concentration in Brazil is not due to efficiencies. Furthermore, Berger, Demstet and Strahan (1999) are very sceptical to accept the argument that the efficiencies in banks are due to mergers. This is another empirical question that must be treated properly before CADE decides to interfere or not in this sector. So, there are a lot of technical problems regarding the relationship between competition variables in the financial system that must be clarified before any normative conclusion can be established.

Of course governments must act with asymmetric information, but it must be considered that there are a lot of tradeoffs in the decision of interfering in this sector.

3.5 Public banks and competition policy

Another important tradeoff refers to mergers involving public banks. There are some authors that discuss the impact of Brazilian public banks in interest rates and in the monetary stability during crisis. For instance, Alexandre Rands BARROS understands that public Banks are inefficient institutions and do not play an important role in financial system:

“...Therefore, the banking market in Brazil works with two types of institutions. Both are profit maximisers, but one of them, the state owned banks, has a few additional restrictions on its strategy, which is to carry the burden of some public policies and to face some management inefficiencies. The privately owned banks, on their turn, do not have to carry such losses, but they also do not have access to some of these policies, which to some extent, and with proper choice of customers, could be profitable. Retirement benefits payments are exceptions in which they can engage. These disbursements have been reasonably profitable for POB, especially as an instrument to keep the fidelity of potentially profitable customers. (...) The major hypothesis of this paper is that when governments enforce state owned banks to bear part of the transaction costs of public policies and operational inefficiency, they force such banks in their optimal strategy to push prices of their services up. This increases the relative competitiveness of privately owned banks and also allows them to practice higher prices on their services, which is not matched by proportionally higher costs. Therefore, they benefit from higher profits and higher spread of interest rates paid and charged from their customers....”

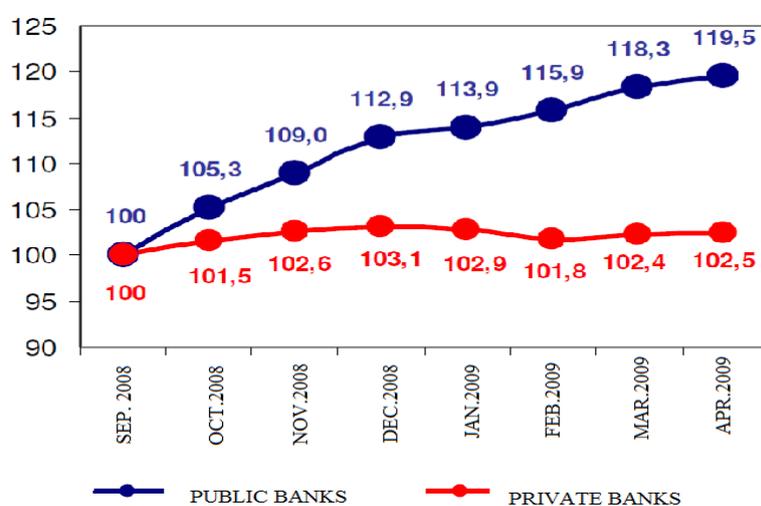
Presenting a very different approach, Celina Yumiko OZAWA argued that the existence of public banks improves the standard of competition environment. On her opinion, Bank of Brazil has different

interests compared to private banks. After estimating residual demand, OZAWA presented evidences that Bank of Brazil did not fully exercise its market power in financial system. According to OZAWA:

"The difference that Bank of Brazil has from other banks in the sample is the fact that it is a public bank. This may be one of the factors that explain that despite the availability of conditions, the bank failed to fully exercise market power that it would enjoy. A private bank, with similar structural conditions for exercising market power, would certainly exercise it, because that would maximise its profits. (...) For a state bank, however, there are other objectives, which may be political and social ones".

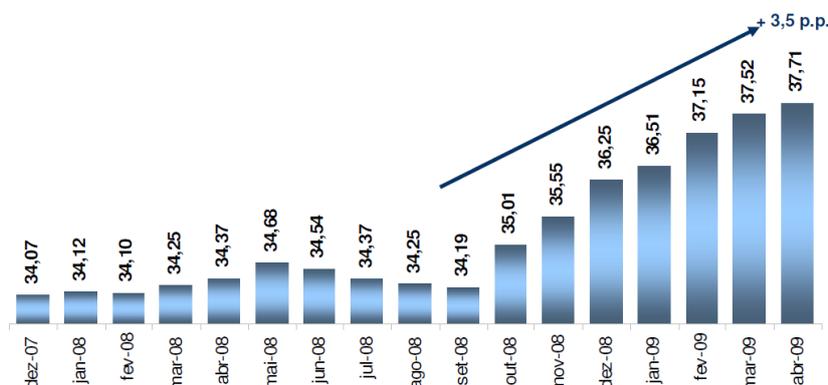
Also, Minister Guido Mantega understands that public banks had an important role to find exit strategies during the current crisis. According to his point of view, public banks had an important role in implementing anti-cyclic policies, fostering demand during crisis period.

Loans during Crisis (%)



Source: <http://www.fazenda.gov.br/portugues/documentos/2009/p220609.pdf>

Relative importance of Brazilian public banks (%)



Source: <http://www.fazenda.gov.br/portugues/documentos/2009/p220609.pdf>

By this hypothesis, the existence of commercial public banks could be justified from an economic standpoint, by the need to correct market failures in providing financial intermediation services. One of these flaws is the lack of perception of positive externalities from banking to economic growth and social welfare. The gain of each bank to offer banking services would be less than the benefit of society in having the services themselves.

Of course, there are many other theoretical aspects derived from this important debate, that maybe useful for competition policies.

3.6 *Regulatory problems*

Besides the problem of concentration itself, there are some regulatory problems specific to the banking system. According to Nakane and Alencar, the banking sector presents significant barriers to entry, which relate to the cost of establishing networks of banking agencies, regulatory requirements (requirements for establishing new banks, for example), the existence of economies of scale and scope, the establishments of networks of Automated Teller Machines (ATMs) - difficulty in acquiring ATMs and resistance to sharing them -, establishment of brand reputation, among others. Indeed, this is a sector that has some peculiarities, such as: (i) asymmetric information, (ii) customer loyalty, and (iii) transfer costs - switching costs, (iv) informational cost, and (v) moral hazard / adverse selection.

According to Nakane and Alencar, to solve some of these problems, antitrust authorities may, in specific cases, recommend both structural remedies (such as sale of branches, subsidiary banks, active lines of products) and behavioural remedies (ensuring access to share electronic networks to smaller competitors, among others)

In addition to the traditional competitive measures, it is possible to use the regulatory remedies to tackle the problems reported above, increasing the degree of rivalry. In this regard, BCB has taken pro-competitive steps to diminish the entry barriers in this sector, such as: credit portability investment accounts portability informational portability, etc (See, for example, BCB's resolutions no. 2.835/2001, 3401/2006, 3279/2005, 3402/2006, 3424/2006, and BCB's internal regulations no.3248/2004 and 3256/2004). Regarding transparency, it should be mentioned that BCB Resolution no. 2835 on the transparency of check's fees, determining the explanation of the effective rate charged and values to consumers in a very easy and understandable way. There is also the concern of BCB to disclose on its website information about charges and rates, and the ranking of complaints against the banks (see also BCB's resolutions no. 2.878/2001 and 2.892/2000 on transparency issues). Finally, there are several other laudable initiatives (in relation to regulation of credit unions, non-banking financial institutions, microcredit operations) to be credited to the BCB. Such excellent measures can and should be encouraged and enhanced by the joint relationship between antitrust and monetary authorities.

4. Crisis proof models

There could be competition solutions to crisis situations, in several manners. However, as explained above, CADE has no jurisdiction to act in this particular aspect and it is very complex to have normative conclusions, considering the inherent complex tradeoffs in this kind of situation. Some policies, however, are independent of the national circumstances and could be adopted to avoid financial crisis.

For example, it is important to educate consumers on how to administer their finances and the consequences of their actions regarding credit. Also, it is important to protect the consumers in times of crisis. For that, it is necessary to avoid bankruptcy.

Also, and more importantly, it is possible to have a security mechanism, such as Fundo Garantidor de Crédito (FGC), or to have rediscount flexible mechanisms to use in times of crisis (such as the one

approved by Provisional Measure no. 442/2008). It is important, also, to prosecute persons who are liable for causing troubling financial situations, especially for their bad managerial practices.

On the other hand, it is possible not to focus just only on national remedies, but also in some other aspects of this crisis. In the international level, for example, not withstand the merits of Triffin's dilemma, it is important to think, theoretically, if the international financial system is correctly structured. Also, from the international point of view, the idea of creating an international body that monitors the conduct of national financial systems could be very interesting to foster accountability of national regulators.

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BULGARIA

1. The anti-crisis measures of Bulgarian government

The world financial and economic crisis has expressed itself in Bulgaria in the form of economic crisis leading to worsened business climate, increasing unemployment, decrease of the GDP, the industrial production and the turnover of the industrial undertakings. Alongside with these, the payment balance marked negative values for 2009 and the beginning of 2010, the budget deficit reached 3,9% of GDP in 2009 (in 2008 there was a surplus of 1.8% of the GDP).

In this situation the Bulgarian government started wide discussion with the social partners (trade unions, business associations, etc.) with the aim to agree on adequate measures to be implemented in order to overcome the negative impact of the economic crisis. These discussions resulted in 59 measures agreed between the government and the social partners and adopted in the form of Decision of the Council of Ministers on 1 April 2010.

The anti-crisis measures in the government decision are grouped in the following directions:

- Fiscal measures-privatisation of all states minority shares in undertakings through Bulgarian Stock Exchange, raising of the taxes for big real estates and luxury cars, planes and yachts, measures to reduce the payments from the state National Health Insurance Fund, etc.];
- Measures in support of the business-lowering of the threshold of investments needed for issuing of investor certificate of class A and B for some industries or regions and for investments in the areas of education, health, culture, etc.;
- Measures to reduce the public spending-reduction of the public authorities' budgets, outsourcing of some services from the public to the private sector, etc.;
- Measures for stricter budgetary discipline-detailed schedule for the reimbursement of the money due by the state authorities and undertakings to their contractors under executed and completed contracts; measures to ensure that no penalty and interest payments will be due for these contractors during the reimbursement period, etc.;
- Measures to increase the financial resources available for the real sector-measures to increase the financial independence of the local authorities for the next fiscal year;
- Measures to support the household incomes-measures in the areas of minimum wage, pensions, social security, etc.;
- Measures to support the labour force market-measures in the areas of employment and employment rules, training of young and unemployed, measures to introduce regulation, which will guarantee fair competition and to prevent distortion of the market through monopoly power, exercised on the suppliers of goods and services, following the example of some EU Member States;
- Measures in the areas of social security systems-measures, related to pensions, health security, etc.

In addition to these measures, already agreed, Bulgarian government declared that it would continue the dialogue with the social partners and would be ready to discuss and adopt other measures, which might be considered feasible and appropriate to overcome the negative impact of the economic crisis.

2. Decisions, adopted by Bulgarian Commission on Protection of Competition on the anti-crisis measures of Bulgarian government

Art. 8, p.12 of the Law on Protection of Competition (LPC) is the legal basis for the competition advocacy powers of the Commission on Protection of Competition (CPC), namely the power to adopt opinions on draft and acting normative and general administrative acts.

Following the adoption of decision of the Council of Ministers with the agreed measures in April 2010, Bulgarian government started the preparation for their practical implementation. As part of this process, the CPC was asked on two occasions to pronounce on the compliance of specific anti-crisis measures with the competition rules. These two measures related to: 1) the possible adoption of regulation, which will guarantee fair competition and to prevent distortion of the market through monopoly power, exercised on the suppliers of goods and services (measure, which is part of the government decision) and 2) to the introduction of protective final minimum price on bread for mass consumption (proposed by a local association of bread producers).

2.1 Retail chain supermarkets case (CPC decision 495/2010)

The request for opinion from the CPC was submitted by the Ministry of Finance in relation to Measure 48-Adoption of regulation, which will guarantee fair competition and to prevent distortion of the market through monopoly power, exercised on the suppliers of goods and services, from the Council of Ministers decision of 1 April 2010. The Ministry of Finance attached to its request a letter from one of the most representative business associations in Bulgaria-the The Confederation of the Employers and Industrialists in Bulgaria (CEIBG).

With its letter to the MoF the CEIBG made an analysis of the problems, encountered by Bulgarian business and the state revenues, related to the activities of the retail chain supermarkets in Bulgaria. The analysis claimed that the retail chain supermarkets imposed clauses on the suppliers, which were not negotiable, that the annual renewal of the contracts was subject to obligatory increase of the rebates given by the suppliers, that Bulgarian undertakings were discriminated as compared with the foreign multinational companies. Thus, Bulgarian producers had been selling at loss or with no profit, compensating partially from other distribution channels.

The CEIBG analysis claimed that once the retail chain supermarkets had reached a share of 80% (compared to the current 30%-40%) in the retail sales, the pressure on the margins, given by the producers, would ruin their economic activities, and the sale conditions would render Bulgarian producers less competitive, thus leading to dominance of foreign companies' products in the retail chain supermarkets. Such a development, according to the CEIBG, would lead to the disappearance of some Bulgarian industries and of traditional national products, to the consumers' having smaller choice of low quality products, to more difficult introduction of innovative products, etc.

The analysis suggested, on the basis of the experience of some other European countries, that the above mentioned negative consequences could be avoided with the adoption of a "Law on the Prohibition of Unfair Trade Practices in Retail Sales and on the Regulation of the Relations Between Suppliers and Retail Chains". The CEIBG had attached to the letter to the MoF a Resolution of the European Parliament of 26 March 2009, discussing the big difference between the producers' prices and consumer prices,

publications from the foreign press on the Resolution, as well as legislative amendments or laws in some European countries (Romania and Hungary), regulating the relations between suppliers and retailers.

The CPC analysed the experience of some EU Member States¹ in regulating the relations between suppliers and retailers, either by the applicable provisions of the competition law, or through specific laws and regulations, as well as the EU documents on this issue².

The European Commission, for example, makes a distinction between the possible unfair business practices due to inequality of the positions during trade negotiations and the practices, involving infringement of competition rules. Inequality of the position during trade negotiations does not necessarily represent a problem, related to monopsony power as treated by the competition law. The OECD also points out, that the problems, related to the big retailers' practices, unless they represent abuse of market power, should be treated with other measures like more clear and effective remedial actions for trade disputes.

Therefore, on the basis of this distinction, the CPC outlined some possible legislative solutions to the issue with the relations between suppliers and retailers:

- **Preservation of the current legislative framework in the field of competition law**
 1. CPC considered that the competition rules were general rules, applicable to all economic sectors. The introduction of sector specific competition rules were justified only where there were substantial and lasting market problems, which could not be resolved or remedied with the existing instruments of the competition law or the self-regulating market mechanisms. The negative side of this approach was that the competition provisions were only applicable in cases of monopsony power, but not in cases of inequality of positions during negotiations, which fell outside the scope of the competition law and the competencies of the CPC.
- **Amendment of the competition law through the introduction of prohibition of abuse of significant market power**
 2. The CPC noted that such amendments to competition laws were made in some EU countries, like Hungary and Ireland, but the application of these new provisions did not remedy the market failures and therefore these countries were considering some other possible approaches to the problem.
- **Introduction of special sector regulation**
 3. This approach involved two options - adoption of special provisions in the area of unfair competition or adoption of Fair Trade Law.
 4. In the case of the first option, the CPC was of the opinion that such special rules of competition for a specific sector were possible, but they had some limitations. As the competition law is part of the public law, it regulates the relations between the state and the legal person. The public law protects the public interest and therefore sanctions imposed for infringements of the competition

¹ Czech Republic, France, Germany, Hungary, Ireland, Latvia, Portugal, Romania, Slovak Republic, United Kingdom.

² Commission Staff Working Document - Competition in the food supply chain Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A better functioning food supply chain in Europe {COM(2009) 591 final}.SEC/2009/1449 final.

law cannot protect in full the rights of the persons whose interests were damaged as a result of unfair business practices.

5. If the second option was to be chosen, a Fair Trade Law would be made part of the private law. The CPC was of the opinion that the unfair trade practices were legal actions, which were performed on the basis of negotiations between the persons (retailers and suppliers) and the legal disputes between them could be resolved through negotiations or through adjudication by a court or arbitration. The competent authority for the adjudication could be independent arbiter, a court or an ombudsman (as it is the case in the United Kingdom).

- **Initiative for raising the awareness on the fair relations between suppliers and retailers**

6. This solution involved possible information and media campaigns in order to raise the awareness on the rights of parties. Another approach was the adoption of Code of conduct or Best Practices Code. CPC pointed out however that this second option should not be used for anticompetitive practices like standardisation of the contracts, exchange of sensitive information and others, which fell within the scope of the competition law as prohibited agreements, decisions and concerted practices.

- **Initiatives to adopt measures by the European Commission and National Competition Authorities of the EU Member States**

7. In conclusion, the Commission on Protection of Competition stated that the adoption of any measures in order to resolve the problems between suppliers and retailers should be taken very carefully, after detailed research of the market problems, impact assessment and wide public debate.

2.2 Introduction of price regulation on bread market case

The CPC was consulted in May 2010 by the Ministry of Finance on a proposal for setting a minimum protective price for bread. The consultation took place on the initiative of one of the country's branch associations, the Federation of Bread Manufacturers and Confectioners in Bulgaria. The Federation's initiative, taking into consideration the announced as an anti-crisis measure intention of the government to directly regulate markets in order to prevent monopoly pressure on suppliers and to guarantee fair competition, aimed indeed at protecting manufacturers of the so called "mass consumption type" bread (three types of bread considered as forming a separate relevant market due mainly to national traditions product characteristics) from alleged dumping practices of larger manufacturers consisting in selling the product below costs.

At this occasion, the CPC took the opportunity, once again, to emphasise the risks direct market regulation, beyond the cases of market failure, bear for the proper functioning of competition mechanisms. Indeed, the commission explained in its opinion that regulation of prices would be justified only where market conditions and/or structure (as oligopoly structures, market share symmetry, high barriers to entry etc.) are such as to preclude effective competition on prices to occur, thus leading to the so called "market failure". The commission reminded that any intervention based on a different understanding, such as, for instance, this to protect market players from failure under the economic crisis, is a risky enterprise for it artificially supersedes sound market forces for the sake of obtaining certain market integrity. The commission took, furthermore, the view that the economic crisis should not be used in general as a pretext to set aside effective competition principles and, where this is necessary notwithstanding, such regulatory measures need be phased out immediately after the conditions on the market show signs of recovery.

Further to the above preliminary remark, the CPC analysed whether market conditions were such as to require a regulatory intervention from the government and discussed as well potential effects that setting of a minimum price for bread could have had on this particular market.

Indeed, the commission had a detailed view on the market in question since, in the recent years, it had carried out two cartel investigations and a sector inquiry. One of the investigations had led to a cartel sanctioning decision, which has recently been confirmed by the Supreme Administrative Court. The cartel in this case had involved anti-competitive price setting practices enforced among members of one of the market's branch associations. Based on this example, the commission reminded that attempts to artificially set prices in this market had been made in the past which attempts materialised in the cartel in question. Moreover, the CPC stressed on the fact that the mere existence of a cartel aiming at influencing market prices was a proof on its own for the existence of sound competition on prices. Therefore, the commission was of the opinion that the conditions for direct price regulation were not met.

This conclusion notwithstanding, the CPC further discussed the potential effects on competition in case a minimum price for bread was indeed introduced. It first raised the question on how would such a minimum price be determined without discriminating among manufacturers having different production costs. As costs are in fact influenced by, among others, the production volume (large production chain or hand made production with limited volumes), the existence or lack of own distribution chain and/or stores, they are likely to differ from one manufacturer to another. Hence, setting of a unique minimum price for a particular type of bread would necessarily lead the government to favour one costing model over another. Thus, a potentially high minimum price would lead to a margin squeeze that, in the commission's view, was likely to lead to the exclusion of smaller and some of the medium sized manufacturers, eventually ending up with a detrimental to the competition market concentration.

Conversely, an artificially low minimum price would guarantee the survival of ineffective manufacturers whom would otherwise had been pushed out of the market, had the natural market pricing mechanisms been at play.

The commission's conclusion was that at no occasion could artificially set prices supersede prices set as a result of effective competition.

Furthermore, in a response to other justifications for the introduction of minimum price for mass consumption type bread as product quality assurance or measures to combat informal economy, the CPC reminded that there were different governmental instruments available for tackling those problems and that setting of minimum price was not among them as it could not, on its own, guarantee observance of quality regulations or acquittal of tax obligations.

The CPC concluded its opinion by thoroughly presenting antitrust and unfair competition provisions that were to be used instead of direct price regulation for combating potential market predatory practices or other unlawful and exclusionary practices in the sector in question.

In a note of conclusion, it is worth pointing out that the government's approach to consult the national competition authority so as to avoid effective competition principles being put in peril while trying to find the most appropriate remedies for tackling the economic crisis is, in the commission's view, the correct way for ensuring sustainable market development in the crisis' aftermath.

RUSSIAN FEDERATION

The Government of the Russian Federation and the Bank of Russia began to develop the anti-crisis measures in September 2008 when the global financial crisis started to affect the Russian economy. In November 2008 the President of the Russian Federation approved an Action plan aimed at improving the situation in the financial sector and certain economy sectors. Currently, the implementation of this plan is substantially completed. The adopted anti-crisis measures have helped to prevent expansion of the crisis and its deep penetration to the foundations of the economy.

However, according to the FAS Russia, within the frameworks of the emergency measures some financial organisations received some privileges. For example, the Federal Law No. 173-FZ of 13.10.2008 "On additional measures to support the financial system of the Russian Federation" provides for that "Vnesheconombank" gives subordinated loans to only 3 credit agencies without securing at an annual rate of 8%. Besides, prior to December 31, 2009 "Vnesheconombank" could provide subordinated loans to the Russian credit organisations without securing at an annual rate of 8% up to 31 December 2019 provided these organisations comply with certain conditions. One should take into account the special status of the "Vnesheconombank" provided for by the Federal Law No. 82-FZ of May 17, 2007 "On Bank on Development", therefore all the actions taken within the anti-crisis strategy were legally accepted.

Besides, the Federal Law No. 175-FZ of 27.10.2008 "On additional measures for strengthening the stability of the banking system by December 31, 2011" cancelled the requirement to obtain the Bank of Russia's and the FAS Russia's prior approval for purchasing banks shares by investors in accordance with the plan of participation of the state corporation "Agency on Deposit Insurance" in preventing banking failure. This condition is valid for the banks that have a legally confirmed rescue plan of the bank.

The FAS Russia implemented certain policies to reduce administrative burden on economic entities during the global financial crisis, in particular, it reduced the time for examining the notifications on transactions from 90 days set by the Federal Law No. 135-FZ of 26.07.2006 "On Protection of Competition" to 30 days in order to hasten the process of making transactions by the companies. In addition to that the period of notifications examination for acquisition of shares, assets and rights in respect to financial institutions was reduced to 5 days in certain cases.

In general the powers of the FAS Russia have not been changed during the crisis and the FAS Russia's control over the economic entities remained at pre-crisis level.

The FAS Russia believes that competition policy is a key factor that determines companies' competitiveness and citizens' living standards and the main instrument of country's socio-economic development. Thus, it is vital to follow the principles of competition policy in order to ensure financial stability in the country and prevent the possibility of crisis in the future. In this connection, the FAS Russia considers that the anti-competitive measures should be abolished depending on the improvement of economic situation.

Moreover, during the implementation of anti-crisis measures the FAS Russia proposed to change some regulations aimed at supporting particular industries, but at the same time restricting competition. In particular, economically unjustified requirements to the banks were removed and thereby access of credit institutions to the preferential car loan programme was expanded. These requirements were prolonged for

2011. The FAS Russia contributed to the considerable extension of the list of cars for concessional lending programme, including increase of the maximum price for cars that can be included into the list

The Programme on Competition Development in the Russian Federation for 2009 – 2012 and an Action plan on its implementation approved by the Decree of the Government of the Russian Federation No. 691-r of 19.05.2009 is currently implemented in the Russian Federation. The FAS Russia considers that the development of competition through realisation of this Action plan will contribute to the stable financial system in the country.

In order to prevent the possibility of financial crisis in the future and at the same time to ensure transparency and clarity of financial services for consumers the following steps were taken.

- i) In order that consumers can obtain complete and reliable information about consumer properties and characteristics of the financial services, the FAS Russia elaborated the following proposals:
 - introduction of minimum standards for financial services, revealing the content and condition of services provided by respective financial institutions;
 - elaboration of legislation on introduction of standards for disclosure of information on financial services that describe a single form of provision of the most essential information about the financial product.
8. These measures will provide the consumer with a real opportunity to compare financial products and make reasonable decisions.
- ii) In order to prevent excessive debts of borrowers which can threaten the interests of the credit institutions depositors, the FAS Russia considers it necessary to elaborate a number of legislative measures, such as:
 - setting the maximum size of monthly payment on a loan with respect to the borrower's income, for example, at 50% level for consumers with income below the national average and 65% for other consumers with an income equal to or greater than the national average;
 - restriction of the maximum interest rate on the loan, if there is no legislative prohibition on any "hidden" commissions and fees, on the maximum size of the full cost of the loan;
 - setting the maximum size of borrower's liability for violation of terms of return of periodic payments on the loan, which must be determined in proportion to the size of outstanding debt and the period of delay;
 - imposition of liability for credit agencies reflected in the fact that the creditor has taken no action to recover the loan amount if he has information about such a possibility;
 - establishing obligations of credit institutions to provide borrowers with a formal written information about the amount of debt on the loan, and a new schedule of payments on the loan the same day of applying to the office of this credit agency;
 - providing individual borrowers with the opportunity of personal bankruptcy.

In addition, the FAS Russia has elaborated proposals to remove from the regulations the excessive requirements to financial institutions that limit access to financial resources and create unequal competitive conditions including the placement of credit institutions of budget funds on deposit, credit, and the Bank of Russia, etc.

In particular, according to the FAS Russia the requirements can be considered excessive if the financial organisation has a particular level of long-term credit rating or reliability or a certain amount of assets or equity as well as equity ownership in financial organisations in the Russian Federation or in the Bank of Russia at a rate that allows to influence the decisions of these lending institutions on issues of competence of the general meeting of their founders (participants).

CONTRIBUTION OF PROFESSOR THORSTEN BECK ET AL.*

Bailing out the Banks: Reconciling Stability and Competition

**An analysis of state-supported schemes for
financial institutions**

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Bailing out the Banks: Reconciling Stability and Competition

An analysis of state-supported schemes for financial institutions

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Glossary

ABS	Asset Backed Security
AMC	Asset Management Corporation
BCM	Bank Crisis Management
BIS	Bank for International Settlements
CDO	Collateralised Debt Obligation
CDS	Credit Default Swap
EBA	European Banking Authority
EDIC	European Deposit Insurance Corporation
ECB	European Central Bank
EFC	Economic and Financial Committee
ESA	European Supervisory Authorities
ESFS	European System of Financial Supervisors
ESRB	European Systemic Risk Board
ESRC	European Systemic Risk Council
FDIC	Federal Deposit Insurance Corporation
FDICIA	Federal Deposit Insurance Corporation Improvement Act
LCFI	Large Complex Financial Institution
MoU	Memorandum of Understanding
OTC	Over the Counter
OFT	Office of Fair Trading
PCA	Prompt Corrective Action
RBS	Royal Bank of Scotland
SIV	Special Investment Vehicle / Structured Investment Vehicle

Introduction

The continuing crisis has been exceptional in its intensity and global reach. It began as a financial crisis and it became an all-out economic crisis, requiring a wide range of globally-coordinated policy responses: monetary and fiscal as well as regulatory responses, not to mention steps to avoid the trap of protectionism.

Much has already been written on the subject,¹ and this report will not try to address the current crisis in its entirety. Since its main focus is on bank bailout plans, we will not discuss trade and macroeconomic aspects (except to emphasise that bailout plans should not threaten the sustainability of public finances).

This report will concentrate on two specific aspects of policy: financial regulation and competition policy. These are inevitably intertwined. Since the Great Depression policymakers have struggled to define the right mix of competition rules and regulations specific to the banking sector. The Great Depression led to the discontinuation of most standard competition policies in banking in order to foster financial stability. This objective was clearly achieved, but at the cost, over succeeding decades, of stifling innovation and imposing a high burden on consumers. This led in turn, from the 1970s, to a swing of the pendulum towards deregulation, with more competition and innovation but also with many banking crises (e.g. in the US in the 1980s and in Scandinavia and Japan in the 1990s, in addition to the many emerging-market crises). Each time, regulation did try and adapt, in a global fashion, leading in particular to the Basel I and II regulatory frameworks.

Obviously, this has not prevented the massive crisis that exploded in 2008, leading to the two unavoidable questions that accompany every such episode: (1) how to deal with the current crisis; and (2) what lessons the experience offers for reducing the likelihood of another crisis and mitigating its impact? This report will address these two questions, with special emphasis on competition policy, and in particular on state aid control. It is important, furthermore, to put these policy responses in the context of the overarching architecture of regulatory policies, because the question of the link between competition and stability in the banking industry depends on the ability of the various levers of prudential regulation to prevent excessively risky behaviour by bank managers and shareholders.

The crisis has provoked two common but quite different reactions concerning the role of competition policy in the banking sector. One reaction has been to consider

1 Just to focus on CEPR/VoxEU outputs, see for example the recent ebooks edited by Baldwin (2009), Dewatripont et al. (2009) and by Baldwin and Evenett (2009), as well as the two ebooks collecting Vox columns on the crisis edited by Felton and Reinhart (2008, 2009). VoxEU.org has published two other relevant ebooks, both edited by Baldwin and Eichengreen (2008a, b).

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that financial stability should take priority over all other concerns, including those of traditional competition policy; and therefore, that the 'business as usual' preoccupations of competition regulators should be put on hold, and the normal rules suspended for the duration. Another reaction has been to fear that intervention to restore financial stability will lead to massive distortions of competition in the banking sector, and therefore to conclude that competition rules should be applied even more vigorously than usual, with the receipt of state aid being considered presumptive grounds for suspecting the bank in question of anti-competitive behaviour. As will be seen, in this report we endorse neither of these points of view. We reject the idea that the crisis requires the suspension of normal competition policy rules; in times of crisis they are more important than ever. However, we also believe that the competition rules appropriate to the banking sector are not the same as those that should apply to most other sectors. The reasons are set out in detail below, and result from the fact that bailing out one bank in an episode of crisis helps its competitors. State-aided banks have a different relation to the rest of the economy than state-aided firms in other sectors, and the rules of state aid policy should reflect these differences. However, this is not equivalent to saying that competition policy in banking does not matter in a crisis. On the contrary, there should be a thorough competitive assessment of the banking sector following the bailouts.

This report focuses on general economic principles that should be kept in mind when facing crisis-induced bank bailouts. It then discusses the reaction by competition authorities to the current crisis. It is fair to say in this respect that they tried to strike a balance between the insistence on competition concerns and the need for urgent action to respond to the financial crisis. Nevertheless, the specific characteristics of banking need to be acknowledged more explicitly, in particular because the crisis has had sector-wide competition implications which measures targeting the individual recipients of aid are not well suited to address.

Main conclusions of the report

The various methods of helping banks, such as purchasing toxic assets (perhaps to be put in a bad bank), recapitalisation or providing guarantees, should have three objectives in mind: (i) the need to stabilise the financial system; (ii) the need to restart lending; and (iii) the need to avoid distortions of competition. Although in some respects there is a balance to be struck between these objectives, there is no fundamental trade-off between the aims of financial stability and competition: in our view, reformed prudential regulation should take care of potentially excessive risk-taking, which means competition policy rules can then apply in banking as in other sectors of the economy, once the crisis has subsided.

Our conclusions on *general economic principles* fall under three main headings.

- **State aid principles *are* different for banks**

Bank bailouts can help competitors

It is important to recognise that in the banking industry, in times of crisis, the fact that one firm is being helped could well imply a positive externality for its

competitors, either because it prevents systemic problems, or because these competitors are themselves its creditors, and so are indirectly also bailout recipients. This means that bank bailouts do not necessarily require 'compensation' for competitors, in contrast to the normal assessment of state assistance in other industries. This does not detract from the fact that in the medium- to long-term, the survival of less efficient banks can hurt their competitors and the whole banking system.

New lending needs to be supported

In periods of generalised bailouts, remedies that will tend to contract new lending must be avoided, although the economic crisis means the desired amount of lending will decline and the credit-worthiness of some borrowers will have declined.

- **Competition policy should apply, but conditions on bailouts must reflect the specifics of banking**

Standard competition policy should apply to banks

There is no case for applying weaker competition policy criteria to banks, because competition and stability are not incompatible. The data show that the share of profits of financial institutions, in GDP, had been growing steadily over time until 2008. Even if some of this was an unsustainable bubble, it was not a situation in which trouble would have been unavoidable whatever the design of regulation. The problem was clearly not one of competition leading inevitably to banking fragility. Proper prudential regulation should therefore be sufficient to allow standard competition policy principles (Articles 81 and 82 and merger regulations) to be applied: there is no need to weaken standard competition policy for banks. Nor should competition policy be applied more strictly in a crisis; it should be applied with sensitivity to the circumstances that distinguish banks from other kinds of state-aided firms.

Behavioural restrictions may distort competition

Standard competition policy imposes both structural and behavioural restrictions on firms, and there are no grounds for applying these less vigorously to banks in a crisis: leniency in merger approval or greater tolerance of predatory behaviour are no more justified for weak banks than for any other financial or non-financial firm. However, the opposite tendency also needs to be avoided: in particular, there is no case for specific behavioural restrictions following bailouts that would put the rescued bank at a competitive disadvantage with respect to competitors, such as caps on the compensation of new hires (when banks need fresh talent to clean up the mess created by previous executives), or limitations on their pricing strategies relative to competitors.

Moreover, in periods where many banks have received bailouts, there are good reasons to avoid imposing conditions on the receipt of state aid that require generalised balance sheet reductions. These are sometimes justified by analogy with other sectors (such as manufacturing), where the crisis conditions that lead to bailouts are often an indicator of structural overcapacity in the sector. In banking, by contrast, bailouts have been provided due to the fear of a credit crunch – that is, of

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inadequate activity in the sector due to the efforts of weak banks to recapitalise. Imposing balance sheet reductions as an automatic condition of state aid therefore does not have the rationale that it often has in other sectors of the economy.

This does not imply that concerns about balance sheet growth are unjustified: on the contrary, limiting growth through acquisitions does make sense as a way to prevent the recipients of a bailout gaining an unfair advantage. And, in fact, there is a case for requiring balance sheet reduction in the case of banks whose prior overexpansion was the reason for their needing a bailout. This being said, a lot of restructuring in the sector will be desirable following the crisis, and there is no reason to prevent acquisitions which are compensated by divestitures and therefore avoid net growth of balance sheets. This should, however, be accompanied by an assessment of the competitive situation in the sector taken as a whole.

Bailouts should not favour banks' domestic assets

Bailouts should not be permitted to lead to any move away from the single market, either through national governments directing their own banks towards domestic lending, or through the imposition of remedies that would lead banks to spin off foreign rather than domestic activities.

- **The need for stability justifies 'real' but not over-generous aid**

Accounting changes are dangerous

In cases of bank insolvency, such as those we are experiencing in current conditions, 'real' bailouts are needed. Changing accounting rules in order to pretend things are fine is inappropriate: this just means allowing insolvent banks to go on rather than cleaning them up, which would result in inefficient lending – ie, leading either to a credit crunch (as in Japan in the 1990s), or to 'zombie lending' (as in the US Savings and Loans Crisis in the 1980s).

The amount of the bailout should be the minimum necessary

While 'real' bailouts are needed, Governments must avoid being 'overly generous' in bank rescues; they should avoid plans that give such banks extra funds that would, for example as discussed above, allow them to start buying other financial institutions that are in trouble.

Equity holders must bear as much of the bailout burden as possible

Minimising aid means in particular that, to the extent possible, bailout plans should wipe out initial equity holders, in order to reduce potential moral hazard. However, this can be overstated, as the regulatory environment will clearly change after the crisis, and as there is a danger of negative externalities (including between member states) if a government treats shareholders too harshly. The key criterion for European authorities should be to insist that the sustainability of public finances is not threatened.

More of the burden should be placed on 'junior creditors'

Moral hazard and fiscal considerations also point to imposing losses on junior creditors, something which has been too much overlooked in the 2008-2009

bailouts.² This may be because of the fear of causing panic among creditors – but this fear is overrated: separating out the claims of junior creditors from those of senior ones may well encourage the latter to lend more, rather than less freely. Of course, one should be careful about second-round effects: if junior creditors are financial institutions too, such liability re-evaluations may simply transfer the problem; and European authorities may want to give careful attention to this argument in the case of foreign junior creditors, whose interests would naturally be neglected by member states.

Sunset clauses/exit strategies are needed

The difficulty of monitoring and enforcing behavioural restrictions on the assisted banks, and of designing restrictions which do not distort competition, make it imperative to include an end date or exit strategy in bailout plans.

Governance of banks needs strengthening

For the same reason, certainly for the duration of the state aid and in many cases permanently, stricter governance of the banks rescued is needed. The prior standard corporate governance framework proved inadequate.

Other implications for regulation

We also make a number of recommendations in terms of the over-arching regulatory architecture:

Regulation is needed for non-deposit-taking institutions

While it is true that deposit-taking institutions deserve special attention, other types of institutions also need regulation if they are 'too big to fail' or 'too interconnected to fail'. Otherwise, this can quickly lead to the rapid development of more lightly regulated entities, leading to distortions of competition and inefficiencies. In this respect, the tax treatment of financial institutions has important prudential and competition implications, and dangerous loopholes that currently favour the shadow banking sector, encouraging leverage and risk taking, must be closed. There should also be a review of the capital charges that apply to lending by banks to the shadow banking sector.

No need to prevent universal banking

There is no need to try to prevent universal banking, but the right capital charges are needed for various business lines or products. What is dangerous is not financial innovation *per se*, but 'excessively' risky uses of such innovation. This means higher capital charges are needed on structured finance products and other off-balance-sheet transactions, and these should no longer be linked to the ratings they receive (since ratings are particularly inflated for non-transparent products). Further consideration

2 Note that we use the generic term 'junior creditors' here to include the various financial instruments that are 'in-between' equity and senior debt in terms of priority were the bank to go bankrupt, from 'hybrids' until subordinated debt.

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should be given to the idea of having very high charges beyond some threshold volume for each bank offering new financial products, at least until their properties are understood.

No direct limits on bank size needed – but growth should be made more costly

There are risks associated with big banks, in particular the danger that they are too big to fail, and the moral hazard to which this gives rise. This is all the stronger because bigger banks have more lobbying muscle. However, there is value in having a single market in banking just as in other sectors. Of course, this should be accompanied by proper centralised regulatory, supervisory and burden-sharing arrangements. The way to deal with the risks of size is not to impose arbitrary limits, but to apply deposit insurance premia or capital charges that increase in percentage terms when banks get bigger.

Macro-prudential regulation should supplement the current Basel regulatory system.

It is crucial to limit the procyclical effect of the current regulation, for example by introducing procyclical capital ratios, in order to limit the need for banks to deleverage during recessions. This could take the form of dynamic provisioning (as already done in Spain), capital ratios indexed on macroeconomic variables (see Repullo et al. (2009) for an example using GDP), or capital insurance (along the lines of Kashyap et al. (2008)). Using the options provided by Pillar 2 of Basel II, which leaves it to each country to set an additional layer of capital, has proved inadequate, due to competition amongst regulators limiting this additional capital.

Simpler fixed rules are needed to protect regulators

Regulation should seriously and explicitly take into account the gaming between regulators and private actors, which takes place either through potential lobbying and capture, or through financial innovation that aims at regulatory arbitrage.

More centralised supervision and resolution capacity is needed in Europe

To address cross-border bank failures, there is a need for more centralised regulation and supervision and in particular ex ante burden-sharing agreements in Europe.

Assessment of the policy responses so far

State aid control

DG Competition has been very active since the Autumn of 2008. As stressed earlier, it has struck a balance between the insistence on competition concerns and the acknowledgement of the specificities of banking. We agree with its general approach, in particular, its general 'permissiveness' towards broad-based plans (as of December 17, 2009, it had adopted without objections all 66 of the 67 temporary sector-wide aid schemes), and its focus on only those banks that received significant individual help. (As of December 17, 2009, it had adopted 81 decisions on individual cases related to the financial crisis, of which 75 raised no objections to the aid). It does not mean, however, that its potential concerns, detailed in its Communications, did not

have an impact on the many plans and cases being put forward. In particular, it was very useful for DG Competition to insist on avoiding overgenerous help, and on encouraging exit strategies.

As far as those cases where remedies were imposed, we understand the desire to counter moral hazard by insisting on balance sheet reductions. This being said, we want to stress again the fact that the implications of bailouts on competitors can be quite ambiguous in the banking sector. Our feeling is that the key concern of competition authorities should be the restoration of a 'level playing field' among banking competitors, with sufficiently dynamic competition. In this respect, it is important that the insistence on minimum aid and on exit strategies do not lead to undercapitalised banks. Similarly, it is important that balance sheet reductions do not lead to a retreat of banks within their national borders, thereby contradicting the goal of a single market in this sector. Finally, our biggest worry concerns behavioural restrictions imposed on bailout recipients. While it makes sense to avoid the unfair advantages that public money would give to such recipients, 'tying their hands', for example by preventing them from being 'price leaders', seems to us to be both hard to enforce and misguided: it is much better to ensure that these banks are adequately capitalised and then enforce competition on all players in the market.

Of course, this criticism has to be mitigated by the fact that competition authorities do not live in a first-best world: while we strongly feel that financial stability, and in particular the prevention of moral hazard, is mainly the job of prudential regulation and not of competition authorities, the latter have to live with whatever prudential regulation exists at present times. Erring to some extent in the direction of moral-hazard prevention in competition policy can therefore be justified partially (but not fully) by the excessively slow reform of prudential regulation, a topic we now turn to.

Prudential regulation reform

Let us start with a note of caution here. Regulatory reform is currently only 'work in progress', some of which requires complicated international negotiations – that is, for example, as far as macro-prudential regulation, accounting conventions, or the treatment of the shadow banking sector, are concerned. Our assessment can therefore only be partial.

This being said, the recent European Banking Authority (EBA) proposal and Bank Crisis Management (BCM) Communication constitute a step forward in the design of a post-crisis financial regulatory regime that better coordinates supervision in Europe, a key requirement to preserve a single market in banking. Still, the loss of supervisory authority will presumably be aggressively opposed by some countries, such as the UK, for which the financial industry is a strategic one. This could lead to weak European regulation dominated by national regulators. So, although moving in the right direction, there are some reasons for concern. First, the key issue in terms of efficiency is the need to define a European bankruptcy regime, which is only vaguely invoked at the end of the BCM Communication. Second, the issue of burden sharing, also mentioned in the BCM Communication, will be a permanent source of disagreements among countries, precisely because the European bankruptcy regime has not been harmonised. Indeed, why would one country's taxpayers provide capital for an institution in another country that has been badly managed, badly supervised and

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badly regulated, especially if the main beneficiaries are the distressed institution's shareholders, or even subordinated debt holders? Third, the EBA proposal pursues two objectives at the same time: European consistency and integration on the one hand, and the creation of a new post-crisis financial regulation on the other. Although they are not incompatible, there is a risk that, as the European economies emerge from the crisis, the first objective ends up dominating the second, and regulatory reform is postponed until the next crisis.

Structure of the report

This report falls into four parts. The first (in sections 1-2) will set the stage by discussing why banks are special and how competition interacts with bank stability. The report will then discuss (in sections 3-4) the characteristics of the crisis and outline European bank rescue plans and the European Commission response so far (as summarised by the Communications which are meant to set the stage for its planned evaluation, according to state aid control rules, of the bank bailouts that have taken place since autumn 2008). Sections 5 and 6 turn to two key aspects of resolving the current crisis, namely burden sharing and competition issues. Finally, section 7 will discuss the necessary changes to prudential regulation in order to minimise the danger of future crises.

BIAC

1. Introduction

The Competition Committee of the Business and Industry Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee on exit strategies.

During the last few years, businesses around the globe experienced one of the worst financial crises in recent memory. The financial crisis precipitated a drop in investor confidence, causing a decline in global stock markets and the devaluation of virtually all traded securities, and a decrease in available capital and liquidity as many affected institutions began to call in loans that otherwise would have made funds available to various operating businesses and industries.

Governments around the world were required to respond on an unprecedented scale. Efforts included:

- initiatives to stabilise the banking industry (including bailouts),¹
- injections of capital through both monetary and fiscal policy, and
- support of other large industries, some of which were already in a weakened state when the crisis began.

While the effects of the crisis are certainly still being felt, there have been some promising signs that the economy is beginning to stabilise. As the economic situation improves, measures implemented by governments on an emergency basis will need to be phased out, and incentives to facilitate "exiting" need to be carefully thought out and implemented. These exit strategies will have important implications both for bringing the current crisis to an end and for helping to prevent future ones.

Accordingly, with respect to exit strategies, there should be a twofold objective of ensuring: (i) competitive distortions created by emergency measures adopted during the financial crisis are eliminated; and (ii) more lasting policies are set in place to help make the market less prone to future crisis.

This paper will discuss the role of competition policy in furthering both of these objectives. In sum, while governments have in recent years had to undertake significant interventions in the marketplace to prevent a further and more drastic collapse of the global financial system, such measures were designed to be temporary. By working in tandem with sector-specific regulation in financial services (so as not to jeopardise financial stability) competition policy can be a valuable tool in helping to shape a post-crisis environment free of distortions caused by required government interventions so that the long-term benefits inherent to competitive markets are realised. In like manner, competition policy itself can act as both a stabilising and an innovation-promoting factor that will reduce the risk of a future financial crisis.

¹ Stabilisation efforts included: guaranteeing deposits, buying up "toxic" assets, providing liquidity facilities, recapitalising viable banks and providing aid to weak banks to prevent their failure. Stabilisation efforts also included monetary and fiscal stimulus measures (such as slashing interest rates, quantitative easing, cutting taxes and boosting public spending).

2. Responses to the global financial crisis

BIAC has submitted two papers to the OECD addressing the role of competition policy in respect of the financial crisis.² BIAC has recognised that principles of competition policy need to be co-ordinated with regulatory measures aimed at fostering economic stability.

In these papers, BIAC noted that the financial crisis was not caused by failure of or a lapse in competition policy or competition law enforcement. Rather, as several commentators and governments have recognised, irresponsible risk-taking and a lack of proper regulatory oversight by financial sector authorities in various countries in relation to key areas, have been identified as the principal causes of the crisis.

- In a recent speech, EU Commissioner of Competition Joaquín Almunia stated: “The financial crisis demonstrates very clearly how a lack of effective regulation created incentives for financial institutions not to compete on the basis of the best long-term business models. Rather, they were incentivised to pursue excessive risk-taking in order to achieve short-term gains.”³

Government responses to the financial crisis had to be significant and fashioned in a hurry, particularly for those countries that were most directly affected.

- For example, in the period from October 2008 to mid-July 2009, the European Commission approved a large number of guarantee and recapitalisation schemes. The total volume of the approved guarantee measures covered loans amounting to € 2.9 trillion, and the total amount of funds committed to the recapitalisation measures amounted to € 313 billion.⁴
- In the United States, the *Recovery Act* passed by Congress and signed into law by President Barack Obama in February 2009 created a \$787 billion recovery package.⁵

The rationale for such efforts was to prevent the collapse of banks, which would have produced more serious problems for the wider economy. Unlike failures in other sectors, the failure of one bank can cause negative repercussions across the industry through direct contagion effects (depositor run, market run, interbank claims, payment system, etc.) and indirect adverse effects on financial and collateral markets.⁶

² See BIAC paper presented to the OECD Competition Committee Roundtable on Competition and the Financial Crisis: “The Relationship between Financial Sector Conditions and Competition Policy”, February 17-18, 2009 (DAF/COMP (2009)11/ADD1, pages 293-301). See also BIAC paper presented to the OECD Competition Committee Roundtable on Competition, Concentration and Stability in the Banking Sector, February 17, 2010.

³ See Speech of J. Almunia, “Competition v. Regulation: where do the roles of sector specific and competition regulators begin and end?”, March 23, 2010, page 4 (source <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/121&format=HTML&aged=0&language=EN&guiLanguage=en>).

⁴ See E. Adler, J. Kavanagh and A. Ugryumov, “State Aid to Banks in the Financial Crisis: The Past and the Future”, *Journal of European Competition Law & Practice* 2010, Vol. 1, No.1, p. 66.

⁵ See <http://www.recovery.gov/FAQ/Pages/ForCitizens.aspx#whatisrecoveryact>.

⁶ See “Bailing out the Banks: Reconciling Stability and Competition”, Centre for Economic Policy Research (source: http://www.cepr.org/pubs/other/Bailing_out_the_banks.pdf). See also BIAC paper presented to the OECD Competition Committee Roundtable on Competition, Concentration and Stability in the Banking Sector, February 17, 2010.

While these efforts may have been necessary to prevent an even greater financial collapse, there was general agreement that such interventions were meant to be temporary and that, once stabilised, normative principles of market-based competition would be allowed to function without distortion.

The present question of what are the most appropriate strategies and mechanisms for governments to utilise in phasing out their emergency measures (exit strategies) is fundamentally important.

- For example, exiting too quickly may stifle the economic recovery, while exiting too slowly or in an incomplete fashion can lead to other economic problems (e.g., budgetary crises, inflation, etc.)⁷ or longer term economic distortions. In fact the recent financial troubles afflicting Greece indicate that there are likely to be further significant manifestations of the global financial challenge.⁸
- Thus, serious attention needs to be paid as to when the exit should take place and how it should be carried out.

3. The role of Competition policy

As discussed in BIAC's previous submissions, competition policy had an important role to play during the financial crisis. For example, BIAC noted that:

- Competition policy could work in tandem with sector specific regulation, especially in relation to the financial services sector (e.g., financial regulators could apply their expertise in adapting standards of prudence to the crisis condition while competition authorities could still apply normative competition principles in their review of business conduct and significant acquisitions).
- To the extent that mergers were used as a tool to absorb or rescue a troubled institution, competition law enforcement agencies showed the ability to complete even large and complicated reviews in an expeditious timeframe where the circumstances warranted.
- Effective co-ordination and co-operation among domestic competitive law enforcement agencies were important since an uncoordinated review by any single agency could have prevented or delayed a necessary multinational transaction at a time when expedition was of the essence.

Competition policy can also play an important role with respect to a responsible phasing out of emergency government measures that have served their purpose. As Joaquín Almunia recently stated: "In these times of crisis, it is more important than ever to have a voice reminding governments, business and citizens, of the decisive role of competition policy in a successful exit strategy from the crisis."⁹

⁷ For example, *The Economist* attributed the following comments to Dominique Strauss-Kahn of the International Monetary Fund: if countries start cutting budgets a year late, they will have an unnecessarily large debt burden. If they tighten too early, and the world economy relapses, the mess will be far bigger, not the least because policymakers will be all but out of ammunition. See "Withdrawing the Drugs", *The Economist*, February 13, 2010.

⁸ The crisis involving Greece also raises important questions about the impact on global competition resulting from the bailout of a country, as opposed to bailouts applicable to financial or other institutions.

⁹ See Speech of J. Almunia, "Cooperation and convergence: competition policy in the 21st century", April 27, 2010, page 5 (source: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/183&format=HTML&aged=0&language=EN&guiLanguage=en>).

In short, competition policy can be a valuable tool in helping to shape a post-crisis environment that strives to remove distortions caused by required government interventions. In particular, competition policy assists in:

- Withstanding tendencies towards protectionism that may be induced by recent government interventions, by keeping markets open and transparent.
- Ensuring restoration of incentives to responsible risk-taking (not too great and not too little) by businesses in order to promote and foster innovation.
- Generating empirical evidence to guide future policy action and the implementation of solutions.

These measures also would reduce the risk of a future financial breakdown.

That being said, BIAC recognises that competition policy is not and should not be applied in a vacuum. BIAC agrees with the findings of the OECD secretariat that:

“The interface between competition and stability is therefore complex, with the latter taking priority in crises. But as we move through the crisis towards phasing out emergency measures, including divestment of government investments in banks, it will be important to foster corporate structures that enhance both stability and competition. To the extent that this can be accomplished during the crisis phase, the credibility of policy measures will be increased.”¹⁰

As explained in BIAC’s previous submissions, markets function most efficiently when they are open and competitive, and there is normally little need for regulation except in situations where a market or sector has certain unique characteristics that make intervention through regulation prudent.¹¹

With the onset of the financial crisis, much has been said about reforming regulation to limit or prevent future crises. Suggested reforms include: the introduction of macro-prudential regulation, ensuring that regulation takes into consideration potential ‘gaming’ between regulators and private actors (e.g., either through lobbying efforts or through financial innovation aimed at regulatory arbitrage), and expanding the regulatory umbrella to non-bank financial institutions (such as investment banks or insurance companies).¹² Moreover, globalisation is identified as having “underlined both the current limits of, and need for, improvements in international co-operation in banking regulation and supervision”, especially given the growth of international banks and the reliance on national supervisors.¹³

Whatever reforms to regulation are implemented, competition policy has an important role to play moving forward. Competition policy-makers and financial regulators will need to work together to co-ordinate structures that can enhance both stability and competitiveness in the system. Such co-operation should focus not only on establishing a system that would prevent crises from recurring, but it should also

¹⁰ See “Finance, Competition and Governance: Strategies to Phase Out Emergency Measures”, OECD Paper prepared for the G20 Meeting in London on April 2, 2009, page 10 (source: <http://www.oecd.org/dataoecd/52/23/42538385.pdf>).

¹¹ The banking sector (indeed the whole financial services sector) is a prime example of such a sector. Hence, it is one of the most regulated sectors of the economy.

¹² See “Bailing out the Banks: Reconciling Stability and Competition”, Centre for Economic Policy Research, pages 67 and 68 (source: http://www.cepr.org/pubs/other/Bailing_out_the_banks.pdf).

¹³ *Id.*, page 68.

look at correcting market distortions caused by government interventions that retard or impair the innovation and efficiency gains that competition can foster.¹⁴

To this end, competition policy can play a similar role after the crisis as it did during the crisis – e.g. working in tandem with financial services regulators to establish the appropriate balance of regulatory constraints and competition norms in the review of business conduct and significant acquisitions. For example,

- As a means to prevent a financial meltdown and massive contagion, governments aided some fundamentally non-viable banks (e.g., banks that could not cover losses over the business cycle) that were at risk of failing. While, at the time, such efforts may have been important to prevent contagion (given the unique nature of the financial services sector), this is no longer true as the crisis recedes. Post-crisis, policy makers need to recognise that saving individual banks may no longer be necessary to saving the system.
- Competition policy also will have to adapt to the different circumstances that now exist following the financial crisis. Significant restructuring and possible consolidation in many sectors may occur as part of the aftermath of the financial and economic crisis. For example, competition/antitrust regulators will need to be able to make decisions quickly in the case where mergers involving ‘failing firms’ arise.

Such actions will require greater global dialogue and co-operation. As we have seen, financial crises are not confined to geographic borders. Solutions must be found on a global scale. As recognised by Joaquín Almunia “fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions.”¹⁵

4. Conclusion

Going forward, measures will need to be taken to allow a return to a normal functioning of markets, particularly in the banking sector.¹⁶ The goal should be to ensure a return to the functioning of normative competition principles and a level playing field for market participants, while at the same time recognising the existence of a different underlying regulatory environment than existed before the financial crisis.¹⁷ In

¹⁴ *Supra*, note 10, page 10. See also the following quote on page 5: “Many of the bail-out operations for banks have been firm-specific and adversely affect the competitive environment. Such measures can have negative long-term consequences, even if they are not formally inconsistent with established national and EU competition policies or WTO rules.”

¹⁵ *Supra*, note 9, page 3.

¹⁶ For example, Peter Freeman describes the merger of Lloyds/HBoS as being “cleared by the Secretary of State to preserve financial stability, although the OFT had identified competition issues in some markets”. He continues: “[t]here is a continuing need to assess the competitive effects of this merger”. See P. Freeman, “Too big to fail, but not too big to be unbundled? Investigating the banks – The importance of Competition”, *St. Gallen International Competition Forum*, May 20, 2010, page 6 (source: http://www.competition-commission.org.uk/our_role/speeches/pdf/pjf_st_gallen_20_05_2010.pdf).

¹⁷ See Speech of J. Almunia, “Europe 2020: for competitive and sustainable industries”, dated April 16, 2010, page 3 (source: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/165&format=HTML&aged=0&language=EN&guiLanguage=en>).

this manner, competition policy itself can act as a stabilising force and provide greater certainty and predictability for businesses.¹⁸

¹⁸ While it is “not the task of competition authorities to take steps to enhance competition which may damage prospects for economic recovery”, as Peter Freeman brings out, there are a number of lessons that can be learned from recent events, including the following: financial markets are not necessarily self-correcting; and the rescue measures and accompanying regulation can, themselves, stifle competition; banks are of central importance to economic activity but they are also commercial organisations selling products and services to customers and can enjoy market power which can be exploited in a harmful way; and while, in extreme cases, it may be necessary to override competition law to preserve financial stability, there is no logic in a permanent exemption for banks from competition law. See P. Freeman, “Too big to fail, but not too big to be unbundled? Investigating the banks – The importance of Competition”, *St. Gallen International Competition Forum*, May 20, 2010, page 6 (source: http://www.competition-commission.org.uk/our_role/speeches/pdf/pjf_st_gallen_20_05_2010.pdf).

SUMMARY OF DISCUSSION

The Chairman began by noting that this Roundtable would be the last of five related to competition issues arising from the global financial and economic crisis. As the world economy was now looking a bit healthier, it was appropriate that the topic for today would be exit strategies, a topic that covered several somewhat different issues. He first called on guest speaker, Professor Thorsten Beck, Chairman of the European Banking Centre at Tilburg University, to open the discussion.

1. Professor Beck's views of the financial sector

1.1 Special features of the banking sector

Professor Beck addressed the question of why the banking differs from others, and why this affects both the emergency measures taken during the crisis as well as subsequent remedial measures and exit strategies. A particular feature of the banking sector is that institutions trade heavily between themselves as well as with the general public. Thus state aid, direct aid and recapitalisation for particular institutions can actually help their competitors by reducing contagion, negative network effects, interbank links and panic. And unlike in other industrial sectors that were bailed out, for example some companies in the automobile industry, there was no generalised overcapacity in the banking sector before the crisis. Hence intervention was justified in the midst of the crisis for troubled banks that had a large weight in the financial system. But bailouts are nevertheless distortionary, if not in the short run then definitely in the medium to long run, because they reduce the marginal costs of the assisted institutions and encourage excessive risk taking in future by creating the expectation of being bailed out again if necessary. Thus bailouts should be minimal and have clear sunset clauses attached as an exit strategy. Professor Beck felt that the US authorities had done a better job than Europeans of stating in advance when guarantees would expire, when government would divest itself of its stakes in banks, and what kinds of additional aid could be made available if needed.

1.2 Remedial measures

Professor Beck went on to say that subsequent remedial measures imposed as a condition for bailouts need to be analysed carefully, because they can harm competition, not restore it. Imposition of price restrictions on the aided institution creates rents for its competitors, hiring restrictions can delay recovery, and restrictions on mergers and acquisitions can undermine reallocation of financial assets. Similarly, forced and rapid divestiture of assets can trigger a downward spiral of asset prices, while requiring aided institutions in Europe to divest themselves of assets in another European country can undermine the idea of a unified European financial market. Rather than punishing bailed out institutions, it would be better to focus on why some institutions needed bailing out in the first place, including questions of governance and regulation. Beck was of the opinion that some types of tighter regulation that had been proposed, such as separating commercial and investment banking, restricting the size of banks, sharply raising capital requirements and giving bank supervisors more powers to intervene, did not have a good historical record in practice. Implementing mechanisms to make banks internalise the costs of risky activities, for example linking capital charges to the size of the bank, would better deter banks from undertaking the activities that are too hazardous.

1.3 *Bank resolution*

Professor Beck noted that the crisis had shown that the bank resolution framework had broken down. Bank failure was not something that should be avoided at all costs, but rather part of the normal market process. However, handling failure by liquidation results in network costs for other banks, while putting in public money destroys market discipline. Hence an alternative to both is needed, for example, mergers or bridge banks as in Latin America. Another issue, especially within Europe, is that banks may operate in several countries, but their regulator is located in only one, which can result in distortions and delays before action is taken. Additionally, a bank might be too big to fail in a small country, but not at the EU level, which could give scope for more options.

1.4 *The role of the competition policy authorities*

Professor Beck was of the opinion that there is an important role for national competition authorities when it comes to consumer protection and transparency, but also for conducting competition reviews in the banking sector with a different viewpoint from those of the stability-oriented central banks and bank regulators.

1.5 *Discouraging risky activities*

Taxing the banking sector to make them participate in the costs of the crisis is a valid argument, but using the revenues to create a fund to help cover the bailout costs of a future crisis might well encourage just the sort of risky activities that one should prefer to discourage. A differential tax depending on the riskiness of an activity would be healthier, but again not if the revenue were used to build up a reserve fund. Imposing a transaction tax on banks' activities is a bad solution, because it puts sand in the wheels of the market, could exacerbate volatility and would most likely be borne in the end by bank clients.

2. *General discussion: the role of the competition agencies*

The Chairman noted two reasons for this roundtable. The first was to share ideas about what competition authorities can or cannot do in the case of exit strategies. The second was to bring ideas to the wider debate at OECD level where many committees were looking at the exit strategy issue. Thus the general picture outlined by Professor Beck was a good starting point, and the rest of the debate should focus on what the competition policy authorities can bring to the table, and what and where their limitations are. He called on guest speaker Mr Hans-Helmut Koch, Chair of the OECD Committee on Financial Markets, to take the floor.

2.1 *Exit, but not to business as usual*

Mr Koch emphasised that when discussing exit strategies, one has to be clear why there was entry in the first place, and it was because the markets had become dysfunctional. So short-term stability policies were necessary, and some unconventional measures were taken to deal with problems that were on a scale that had not been seen for many years in northern Europe or the US. But in the medium to long term, competition goals must play a role, and exit strategies must try to ensure that markets will not again become dysfunctional. We need to know what kind of financial system we would like to see emerge, not necessarily identical to the old one, and the competition authorities must play a role in creating it. In the medium term, to reconcile stabilisation and competition issues, financial institutions need to have more and better quality capital. Institutions that are too big to fail pose not only a threat to stability, but also to competition, as such institutions are in effect subsidised, able to borrow at lower rates than their smaller competitors, and so should be taxed more heavily. Exit strategies have to be designed to encourage more and better capital, to get out of guarantee schemes, given that market signals are not reliable at present, and to deal with troubled assets. Also in the longer term, there is the issue of servicing the large increase in

public debt that occurred because of the crisis, and which helped to buy time, but also postponed adjustment.

The Chairman noted that a number of themes ran through the written contributions on exit strategies, and he called on BIAC to discuss ideas on what the goal is as competition authorities implement exit strategies.

A delegate from BIAC underscored the importance of reinstating market efficiency, which had been harmed during the crisis from an allocative and operational viewpoint as a side effect of the necessary emergency measures. Hence the focus for exit strategies should be on removing the distortions. Over time, some emergency measures become state aid if they remain in place, and therefore potentially distorting. Particularly in the non-financial sector, some emergency support measures were of a dubious nature, and the competition agencies should co-operate with other regulatory agencies on a global scale to identify and remove such distortions as quickly as possible.

As regards the financial sector, most of the emergency measures were to counteract the lack of liquidity, so once liquidity returns, those measures are no longer justified and should be withdrawn. They should then be replaced by market structures that promote efficient operation and eliminate risks to competition from state aid measures. One can expect significant changes in the regulatory environment for financial institutions, and the competition agencies will need to co-operate much more closely with the relevant regulatory agencies in designing such changes. For example, at the height of the crisis, contagion was a real risk and non-viable banks had to be propped up. To the extent that contagion is no longer a risk, non-viable banks can be allowed to fail without having a systemic effect. In addition, during the crisis, there were mergers which could not be adequately reviewed by the competition authorities because time was of the essence, but consultation between regulators and competition authorities must be assured going forward. Since financial markets are global in scale and reach, a global dialogue among agencies is crucial, so as well as national competition agencies talking with national regulators, they should also continue to talk with each other.

2.2 *The design of exit strategies*

The Chairman raised the question of timing of action on exit strategies, a topic that had been noted by the Netherlands and the EU.

A delegate from the Netherlands underlined that exit strategies should be transparent and based on objective criteria, but that this makes them difficult to specify. In the case of capital support to individual institutions, those institutions will decide when to exit, but such support should be accompanied by incentives for early exit. As regards debt guarantee schemes, the state itself will decide when to exit, ideally when interbank markets are again functioning effectively – but this may be difficult to judge, especially as they may not function in the same way as before the crisis even in the longer term. It is possible that interbank rates were not actuarially fair before the crisis and did not adequately reflect counterparty risk. As regards privatisation, the state will want to maximise its return, but again, markets might not value bank assets in future in the same way as in the past, and there remains a good deal of uncertainty. So the state should wait until it is assured of a good return.

2.2.1 *Restructuring and exit: the EU view*

The EU delegate noted that the fact that despite the crisis and the need to ensure liquidity, competition rules remained in place, and no big banks failed in Europe. The EU treaty allowed Brussels to take special measures regarding guarantees and recapitalisation, with the distinction drawn in the latter case between sound and distressed banks. Distressed banks had to undergo restructuring, a process that is allowed to take

up to 5 years, significantly longer than in the non-financial sector. The restructuring includes three elements: a credible plan from the institution to allow it to survive without aid in the longer term; burden-sharing via an owned contribution from the bank and shareholders; and measures such as divestments or price leadership, acquisition or market opening bans, to level the playing field with non-aided banks. In response to a question about the distorting effects of a ban on price leadership, the banks involved were already distorted, so if there were no price leadership ban, there could be unfair competition. About 40 banks are undergoing restructuring, and the overall size of the rescue package is 4 trillion euro, of which 3 trillion are guarantees, and of which only one third have been used. The guarantees had been approved only until 30 June this year, but they will be continued on stricter terms in the Netherlands and have been phased out in the UK, France and Italy. Most of the existing use of guarantees is by banks that are under restructuring. As regards divestments, several criteria are involved, and in practice can lead to over 50% of balance sheet reduction, a major step.

2.2.2 *The non-financial sector*

As well as aiding the financial sector, the EU also has a temporary framework for the real economy, exclusively aimed at restoring access to finance, and which will normally be phased out at the end of this year.

2.3 *Do competition agencies really influence exit strategies?*

The Chairman raised the question of to what extent the competition authorities actually influence the design of exit strategies, something which can differ considerably from one country to another. Some countries may have limited or even only informal means to intervene, whereas others have an official public advocacy role in the design of both the response to the crisis and to exit strategies. For example, the Belgian contribution suggested that their competition authority's influence is indirect and informal via discussions with the Minister for the Economy, the central bank and the financial regulator.

A delegate from Belgium said that the Belgian competition authorities had no powers regarding state aid, but all measures taken by the Commission qualified as state aid under EU law. If competition officials had been concerned with any measures, they would have raised them in private discussions. But they felt that they would not have gone beyond the Commission's exit strategy in any case. The real risk at the beginning was that all would go their own way, but that was avoided. Regarding exit strategies, the delegate felt that it was important to be cautious because not all institutions were ready to exit.

A delegate from Germany explained that Germany had not submitted a contribution because their experience was quite limited. The German government had created a fund to grant state aid, and for the first time, the Bundeskartellamt was consulted. Whenever there are reasons to withhold state aid, the government can rely on the Bundeskartellamt to give expert opinions on market conditions and the position of the company in a market. Perhaps this is simply a reaction to the crisis, but perhaps they will continue to be able to give advice in future, including in the financial sector.

The Chairman said that Spain's competition authority had been very active in the design of remedies and state aid. He wanted to know if this was due to a formal provision in law, or simply because the government wanted to hear their views. Also, the CNC intends to publish a report on state aid, including some examples of "bad" aid, and he wanted to know in what context they had been able to prepare and publish the report.

A delegate from Spain explained that the National Competition Council advised public administrations during the crisis because a new law enabled them to do so at both the national and regional levels. This involved a great deal of extra work, of course, because the CNC had to examine regulations in

many different areas. The delegate felt that the CNC's opinions had been taken into account, and more so at the national than the regional level. On the advice of the CNC, a law was passed ensuring that the production of a memorandum of impact regarding new laws must also cover competition issues.

As regards state aid, the CNC's 2009 annual report covered the year 2008 but did not focus specifically on state aid during the crisis. The second report, now in progress, will present some examples of state aid during the crisis which the CNC considers to be bad practice. They include aid given to consumers, for example encouraging them to replace old cars by less polluting new ones via subsidies to purchasers, complemented by discounts offered by manufacturers. This was a typical crisis state aid, limited in duration and amount, but including some anticompetitive restrictions on the origins of the cars and the residence of the purchasers. Furthermore, the size of the subsidy was not tightly related to the pollution characteristics of the cars purchased. The CNC wished to draw attention to these features, without challenging the aid programme overall. The CNC is also taking a firmer stance on state aid in general, for example advising public administrations to notify the EC of some features of proposed regulations.

The Chairman invited Denmark to explain why the competition agency had been involved in designing the guarantee scheme. Was this a legal requirement, or was the Danish government particularly sensitive to competition issues?

A delegate from Denmark explained that the competition authority's involvement in the response to the crisis was not mandatory in Danish law, but the government was well aware of the importance of competition and of adhering to EU rules regarding state aid. The competition authority has a small unit responsible for guiding all governmental bodies on EU state aid rules, and during the crisis, the authority consulted with and advised the government, and also consulted with the EC. The Danish guarantee scheme was set up in October 2008, before the Commission had issued guidelines, so this involved the authority in a great deal of effort. Subsequently, the role of the Danish competition authority with respect to the guarantee scheme and trust banks was to ensure adherence with the EC guidelines, and to co-ordinate dialogue with the Commission.

2.4 *Exit strategies: getting the timing right*

The Chairman again called on Denmark, asking it to elaborate on the timing and involvement of the competition authority. When the guarantee scheme expired, two other programmes were mooted, one on recapitalisation, one on the handling of distressed banks. Was this necessary because the guarantee scheme had expired too early? Did the Danish authorities feel that the transition to other schemes was necessary because the market had not yet got back to normal?

The delegate from Denmark explained that the new measures were designed to reassure markets that distressed banks would continue to be handled in an orderly way after 1 October 2010, when the mandate of the government company set up to take over distressed banks expires. The unlimited deposit guarantee will be replaced by a standard deposit insurance covering up to €100,000. Any bank that does not comply with the solvency requirements must choose either to go into bankruptcy or to be taken over by the government company set up for this purpose, and which is responsible for winding up such banks. The advantage of the second approach is that business as usual will continue for clients for a while after the takeover, except that no new business will be permitted. Winding down will be gradual, whereas if the bank went directly into bankruptcy, there could be severe economic and social consequences. Any costs will be financed by the banking sector via the deposit issuing scheme, and this represents a withdrawal of public support for the financial sector, though the state will guarantee additional loans if the deposit insurance fund has insufficient means.

The Chairman invited Switzerland to elaborate on their contribution, which explained that there were sunset clauses or limits to funds to ensure that the measures taken to alleviate the crisis would be limited in time. But some delegates had stressed the need for flexibility and the risks of premature exit. Did the Swiss in the end have to delay the application of sunset clauses?

A delegate from Switzerland said that one has to distinguish between fiscal and monetary policy measures on the one hand and interventions in the banking sector on the other. As regards the former, there are indeed sunset clauses which will automatically bring those measures to an end at the end of 2011. With respect to the bank interventions, the government indirectly and directly acquired 6 billion Swiss francs of UBS equity, and the central bank loaned 54 billion to set up a fund to acquire toxic assets. Both were limited in extent, but not in time, at least not legally. One cannot enter into the stock of a company, or acquire toxic assets, in a limited way. The intention was eventually to exit, and indeed the stock was sold one year ago at a profit. The fund that acquired the toxic assets has already sold half of them, at a profit, but in the end there might be a loss or a profit. But it is important to note that there was an intervention that distorted competition, whether the government makes a profit or a loss. UBS now has an implicit guarantee that it is too big to fail, and also the second bank, and there remains a discomfort with the way the financial system was operating. Such competition-distorting effects can be liquidated by exits that take this into account, for example participation of the banks in the interventions that helped them.

2.5 *Successful exit? The Australian case*

The Chairman then called on Australia to discuss its policy interventions during the crisis, and which had mostly been phased out by end-March 2010, in particular the guarantee scheme. How and why had exit proved comparatively easy?

A delegate from Australia explained that their guarantee scheme, like others, was intended to ensure that authorised deposit-taking institutions (ADIs) would have uninterrupted access to wholesale funding to help maintain stability. It succeeded in this aim, and the government announced in February 2010 that it would be closed, on the unanimous advice of the Council of Financial Regulators. The intention to exit when conditions improved was clearly signalled to market participants at the outset, and notice of closure was given two months before the scheme was closed. Use of the scheme was quite low during this window. Some argued that the scheme disadvantaged low-rated institutions because it set a fee schedule depending on the institution's credit rating, so high rated ADIs paid high fees to access the guarantees. But the fee schedule was set on the unanimous advice of the Council of Financial Regulators, and designed to reflect market pricing, so it is difficult to substantiate the view that it was anticompetitive, especially as institutions rated below AA increased their reliance on wholesale funding during the operation of the scheme.

2.6 *Structural versus behavioural policy orientations*

The Chairman raised the issue of the trade-off between structural and behavioural means of dealing with the restructuring of banks receiving state aid under the EU rules. The Netherlands' contribution expressed some reservations about the way that the ING case had been dealt with, so the Chairman invited them to explain their difficulties.

A delegate from the Netherlands first complimented the EC on the way they had dealt with the large number of state-aid cases during the financial crisis. With respect to the ING case, the Dutch competition authorities were satisfied with the structural remedy imposed by the Commission, which obliged ING to sell certain branches, because this could encourage competition. The Dutch authorities understood and welcomed the desire to avoid discrimination between different institutions. It must be remembered that behavioural remedies for banks receiving state aid limit their business opportunities, possibly limiting

competition also, most clearly in the case of a price leadership ban. But much depends on context: Dutch financial markets are oligopolistic in many areas. A price leadership ban may well hinder or limit competition in such cases.

In response, an EU delegate said that the EU could not discuss individual cases that were still before the courts, but agreed that in general a price leadership ban could have a different impact depending on the characteristics of the market. But neither should it be forgotten that the bans were imposed because the banks in question were receiving state aid and could use such support to undercut prices and gain market shares. However, these bans are temporary, and they were imposed on all markets in which the institution was operating.

The Chairman noted that the evidence so far was that exit strategies are hard to design, that competition authorities were involved to different degrees in different countries, that *ex ante* information about limits is useful, but that sometimes flexibility has to be kept in mind, and that instruments used in restructuring can be open to question, or have different effects in different contexts.

2.7 *Stability versus competition: must there be a trade-off?*

The Chairman went on to say that there had been two contributions which claimed that no exit strategy was required because measures to safeguard stability in the financial sector were themselves pro-competitive, which raises the question of why they had not been implemented before the crisis. Australia's contribution identified three such policy measures, namely the financial claims scheme, the extension of the RBA open market operations, and the adoption of the Corporation Short-Selling Act (2008). These measures were adopted for stability reasons, but they turned out also to be pro-competitive.

A delegate from Australia emphasised that there was a question of nuance. The measures were implemented for stability reasons, and were not necessarily pro-competitive in an absolute sense. Rather they helped prevent a greater diminution of competitive pressure than would otherwise have been the case. This was particularly the case with the financial claims scheme. This scheme applies to deposits held in ADIs as mentioned earlier, and pays out the funds deposited to clients of insolvent ADIs, up to a cap. Work on the scheme had already started in 2004 and the Treasurer played a major role in developing it. It was brought forward at the time of the crisis, because there was a flow of funds from smaller to larger institutions that could have undermined the stability of the smaller institutions. So bringing in the scheme at that point was not only the beginning of a long-term measure, but it also acted to preserve the competitive position of the smaller institutions.

The extension of the RBA's market operations during the crisis did not need to be as extensive as those implemented by other central banks because the Australian financial market was relatively flexible and the central bank had a wide range of counterparties for its liquidity-augmenting operations, which did not require changing eligibility criteria or new facilities. Financial conditions normalised and the demand for extra liquidity has diminished. The instruments remain in place. On the short selling issue, the government took action because of their concerns about market conditions at the time. The government has since passed a law that permanently bans naked short selling, clarifies access powers to regulate all aspects of short selling and creates a framework for disclosure. But again, these are measures that they intended to stay in place.

A delegate from Italy stressed that state aid is highly political and that the Commission comes under great pressure to allow it, usually because the firms involved are considered to be strategic and are major employers. The usual outcome is that the aid is permitted, including in the financial sector. To reduce moral hazard, the Commission introduces behavioural remedies such as a cap on compensation. But if these caps are binding, the best people go elsewhere, and the distressed bank will be worse off than before.

The same argument applies to price leadership bans, bans on mergers, and forced sales of subsidiaries. The best way to avoid moral hazard is by not allowing state aid in the first place.

The Chairman agreed that it is not easy to control state aid. He noted that the UK contribution said that “Aside from the opportunity provided for competition policy to play a more important role, the market situation in some financial markets may also be creating new opportunities for competition.” He asked the UK delegation to expand on this optimistic assessment.

A delegate from the UK explained that well before the financial crisis, there was concern in the UK about the lack of competition in the provision of banking services to individuals and small and medium-sized companies. The result of the crisis was to put 2 of the 4 major British banks, RBS and Lloyds banking group, into government hands, as well as a number of smaller banks, including Northern Rock. As a condition for the approval of state aid, the two biggest banks were required to make substantial divestments, which provided opportunities for restructuring the market. In addition, there had been significant entry into the UK banking sector by European banks such as Santander, and a significant expansion of its activities in the SME sector by a Swedish bank. As a result of the crisis and a lack of consumer confidence in the major banks, there has been interest for Tesco (a major international retail chain that operates in the UK) and Virgin, now known as Virgin money, to develop a consumer franchise in banking services. Another bank, Metro, will open its first branch in July 2010, and others have been experimenting with new channels of banking, including internet banking.

The UK delegate went on to explain that during the crisis, the UK government created a stability exception to the normal application of the competition rules for mergers. In the case of the Lloyds TSB and HBOS merger, the government gave itself the ability to balance competition concerns against financial stability issues. Now that things are back to normal, any merger transaction would be subject to the major UK and EU competition rules. Furthermore, there is at least the possibility of significant change in the market place and the UK competition authorities engaged in active advocacy with the government and announced a study that will look at the conditions in the market place as they are now, and how incumbents now face new entrants. It looks at the impact of regulatory requirements on big banks and on new entrants, barriers to entry, barriers to exit, and essential inputs, such as payments to financial payment systems. The interesting question is, where do the competition regime and institutions fit in? The UK government announced only two hours ago the creation of an independent banking commission, chaired by the former Director General of Fair Trading, John Vickers, known to many of those present. It will look at all issues affecting the structure of UK banking, and the appointment of John Vickers indicates the importance which the UK attaches to competition in the banking sector. Finally, the experience of the past 18 months emphasises the importance of the flexible use of advocacy powers and the use of less formal tools to bring about change in the market.

Another UK delegate remarked that it has been obvious for some time that a comprehensive review of the system after the crisis is needed. A spate of reviews called for this before and after the recent election, and the different parties have come at it from different directions. It is not easy to see how the competition authorities are able to do this because the mix of prudential and competition issues is dense and entangled. They need to be treated, and they need to be identified and separated when necessary. But the main priority is to undertake such a review. Banking enquiries are notoriously difficult because each issue is complicated, full of data and it can take a couple of years just to get to the bottom of one small sector. About 10 years ago, the previous government announced a comprehensive review of banking competition, and it was generally recognised to have done a good job although it had difficulties getting comparable data as it did not have formal information-gathering powers. It also concluded that personal banking was competitive, or becoming so, so its conclusions need to be revisited. In this context the terms of reference for the Vickers review are interesting as they include reporting on and making structural recommendations

about competition in the retail and commercial banking sector, as well as prudential measures, Glass-Steagall, and other issues.

2.8 *Exit strategies in the non-financial sectors*

The Chairman announced that it was now time to move to exit strategies in the real sector, and noted that Japan's contribution includes a discussion not so much about the current crisis but rather the previous one. He invited Japan to share its experience of the industrial revitalisation corporation set up in 2003, which was considered at the time to be a temporary measure under the Industrial Revitalisation Corporation Act. It was wound up in 2007, and the Chairman asked if this was because it was considered to be a temporary measure, and what the assessment of its work was during the 4 years of its existence.

A delegate from Japan explained that the Industrial Revitalisation Corporation of Japan, the IRCJ, was established in 2003 when the country was starting to recover from a deep recession. SMEs occupied a large part of the economy and they were deeply in debt. The government started with a basic policy of revitalising industry using market mechanisms. This meant that the government would not nationalise failing companies or give public money to declining industries for long periods. The IRCJ was mandated to identify companies that had a possibility of revival, purchase their debt and encourage them to restructure within a few years. The IRCJ was also mandated to accomplish its goal within 5 years, and was expected to be dissolved by 2007 and make efforts to liquidate the debt. The IRCJ and the Japanese competition authority (the JFTC) had close contact so that planned divestitures and mergers in the restructuring process would not distort competition. The IRCJ supported just 41 companies, including Japan's second largest cosmetics company and the largest supermarket chain. The remaining companies were of small and medium size, so the impact of the IRCJ was rather limited.

The Chairman asked if the IRCJ had indeed revitalised the real sector in Japan, and another delegate from Japan replied that it was not a very successful programme, in part because the number of companies was limited, so the overall impact was small, and in part because although the IRCJ was created with a sunset clause, a series of other temporary measures were enacted, which was sub-optimal and negative overall for the Japanese economy.

The Chairman remarked that the contribution from Canada started by saying that the government should be warned about the long list of risks attached to direct intervention in the real economy. It then went on to say that some state aid was given via the government of Canada and of Ontario to the automobile sector, that this state aid was given on sound principles, and shows that the general advocacy of the Canadian competition authority was probably useful. The Chairman wondered what those sound principles were, and whether the state aid did not require an exit strategy and did not lead to a negative impact on competition in the Canadian automobile sector.

A delegate from Canada explained that their automobile sector was a good example of one that was too big and too integrated to fail. It accounts for 2% of GDP and 14% of manufacturing, and has been fully integrated across the border with the US since the 1960s. The integration is not just between affiliates but across the whole supply chain. Thus the failure of one part would not have been localised in one part of Canada, but across this whole chain, which is quite widespread geographically across North America. The intervention was designed on the basis of extensive economic analysis with a number of principles in mind that are in the OECD's competition assessment toolkit. They included ensuring that the assistance was available to other competitors and the whole range of market participants, and building in incentives that would automatically wean recipients off government assistance as soon as feasible. In that context they took inspiration from contract terms that are quite standard in so-called data and possession financing on commercial terms. The last goal was to ensure that assistance was as transparent as possible, and the least costly for public finance. To answer the last question, the delegate stated that competition policy is a

shared responsibility in Canada. The “market place frameworks policy branch” of Industry Canada has a competition policy group, and it was this group that was particularly involved in the design of aid to the automobile sector.

2.9 *Monitoring the interbank market*

A delegate from Portugal put forward two concerns regarding the timing of the exit strategy. Mr Kotz had mentioned the volatility of the interbank market, but in fact the interbank market can even effectively shut down, as happened in the aftermath of the Lehmann Brothers disaster. And it was happening again in a limited way in certain European markets. There was a current rumour that Spain was asking for an emergency loan of €250 billion, one third of the total European package. Hence, as delegates from the Netherlands and Belgium had emphasised, this time is different from previous crises. Therefore one should pay close attention to the interbank market, including the bank resolution strategy that needs to be implemented. It is a very sensitive issue, not only for Spain, but also for Portugal, where the interbank market is very tight. And without a functioning interbank market, the entire banking system comes to a halt.

The delegate’s other concern was the consequences of the situation for interest rates to consumers, business and the availability of credit. Spreads are enlarging on account of risk premia and the implications, if they are implemented, of the new capital directives and capital controls. In addition, there was talk of a Franco-German tax on banks, which is clearly a cause for concern. From the competition point of view, the competition authorities may be called upon to say something about a difficult situation for the real economy where official rates remain low but lending rates keep rising.

2.10 *Preventing crises in future*

The Chairman said that it might be possible to address some of these concerns during the general discussion. He wanted to move on to the last part of the round table to discuss suggestions that the competition authorities might have on crisis proofing and learning from past mistakes. Belgium, the Netherlands and Switzerland had offered suggestions in their contributions, and he invited them to elaborate.

A delegate from Belgium said that they could not see that there could be absolute guarantees, but they saw in the market a longing for simple, safe banking products that were on offer in the past, such as by the state-owned savings banks. There is no question of re-establishing those banks, but is there room for simple, safe products that almost everybody can understand, that pass certain safety checks, that are specifically regulated and that receive an appropriate label. Then one would see if people are indeed looking to maximise profits, or whether they would support these simplistic schemes.

A delegate from the Netherlands thought one has to be modest. We do not have clear views on all the different stability-promoting measures suggested by policy-makers, because these are not the primary area of expertise of competition policy experts. However, ideas like living wills and leverage caps seem to reduce moral hazard, or to reduce the risks and consequences of moral hazard. As regards splitting investment banking and commercial banking, it should definitely be investigated but as of now, competition experts did not have a clear idea of whether or not it should be done. The Netherlands contribution stressed the importance of assessing the consequences on competition and innovation when new measures are proposed. Policy initiatives should firstly promote a level playing field between larger and smaller financial institutions. Secondly, they should avoid creating barriers to entry or exit. Third, regulation should leave room for innovation, although not every financial innovation has been successful, but innovation is important to promote growth in the real economy. Finally, financial regulation should promote a level playing field between institutions from different backgrounds and from different countries.

The Chairman invited Switzerland to address the issue of how to avoid excessive risk-taking without impairing efficiency.

A delegate from Switzerland said that four measures had been proposed by a commission working on the “too big to fail” problem. They are

- liquidity standards that will come into force on 30 June 2010 and will enable a bank to stay on its own feet for 30 days;
- general and targeted capital requirements (although the precise percentage is not yet clear);
- risk diversification, which is to be put in place by the central bank and the finance surveillance authority and monitored regularly.
- The fourth measure is more problematic, namely restructuring a bank so as to isolate the relevant parts, letting failure happen to those parts that can go into bankruptcy, and sustaining the others. Of course there is a lot of merit in structuring a bank in a holding structure because this facilitates prudential supervision and regulation. But it is doubtful that this would facilitate the bankruptcy of some parts and not of others. If there is an interest for a bank to be active in all fields, then there is no interest for letting one part go bankrupt and not the others. This was an illusion, especially in an international context. More thought is required on activity restrictions and the regulatory separation of activities. This had been ruled out by the Swiss government as a solution and may well be the general mood, but perhaps not the last word.

There is a problem that needs to be addressed more thoroughly, the delegate continued, but it is not primarily one for the competition authorities to judge. Competition was not the cause of the crisis, and cannot be the solution either. However, it must be restored where it does not exist and upheld in all exit strategies. It is also important for banks that have been helped to make a significant contribution to this help, via balance sheet reductions, restructuring measures, price leadership bans, etc. While it is true that this also restricts competition, it does so in a context where competition is already restricted. The Swiss government should reflect again on this issue. The measures that the European Commission and the new UK commission are looking at are very good from a competition viewpoint because they put a price on helping. This would create a good possibility not to restore things as they were before, but to come close and indirectly prevent a future crisis.

2.11 The importance of international co-operation

The Chairman invited the Netherlands to discuss the strongly-expressed view in their contribution that no solution could come about without a deep level of international co-operation.

A delegate from the Netherlands said that the fact that many markets are interconnected and banks are active in various countries makes international co-operation in crisis management and prevention all the more relevant. The failure of Isave, an Icelandic bank active in the British and Dutch savings market, and the ramifications of this event on the British and Dutch financial markets, highlight the importance of international co-ordination and co-operation. The European Systemic Risk Board is a good step forward, and policy makers should strive for the development of a European regulation scheme. The harmonisation of deposit guarantee schemes is an important factor.

Professor Beck followed up on five points in the most recent interventions. On bank taxation, he emphasised that transaction taxes are being proposed by only a few governments and they have neither an automatic nor a major impact on risk taking, though they automatically hurt customers, who are the ones who have to bear them. They also have a negative effect on access to financial services, crowding out the poor into the informal sector. This is why Colombia excludes from the tax certain transactions up to a

certain level. Independently of where one stands on transaction taxes or bank taxes, or the activity tax proposed by the German government, to avoid distorting competition they should be introduced on at least a Europe-wide scale, as banks can evade them through subsidiary structures or even branch structure across Europe.

Second, high interest rates in Professor Beck's view did not necessarily reflect a lack of competition. If one looks back to the 5 years before the global crisis, interest rates were probably too low, particularly on long-term funding and for riskier projects. So seeing higher interest rates and a steeper yield curve can be explained by macroeconomic conditions rather than competitive pressures. Lack of competition is something that should be looked at, though, and the competition authorities are one of the institutions that should do that.

Third, there was no lack of safe products. He recalled that when he lived in Washington, in one of the banks where he was a customer there was always a big sign next to the customer advisor which said such and such products are insured by the FDIC, but investment products are not insured. Transparency is important, and avoiding the way that Lehmann Brothers bonds were sold as a safe investment to pensioners, is exactly where the role of the competition authorities would come in to ensure that people get the products they should have or want to have.

Fourth, living wills were very important, and banks can be separated in a resolution process. The good bank/bad bank procedure had been applied successfully in many countries, including the US and Argentina. This experience shows that it can be done by separating certain parts that are healthy or more critical for the functioning of the financial system, then selling those parts off to other banks where they can be combined with other units. In the Lehmann Brothers bankruptcy, certain units were successfully sold off shortly afterwards.

Finally, Beck agreed with the Netherlands that international collaboration is important, albeit not sufficient. We had co-operation and co-ordination in the case of Fortis, but the resolution of Fortis was still not sufficient and could have been more effectively handled by a supranational resolution authority.

2.12 Regulation and competition: a view from the capital markets

The Chairman then called on Professor John Coffee of Columbia University to give his views on exit strategies.

Prof. Coffee said that he was not a competition person but a capital markets corporate governance person. He attends conferences like this one about every fortnight, and was fascinated because the group was looking at different issues and with a different vocabulary. A capital markets group of the same size would recognise early on that there would be another failure of a financially significant financial institution in the near to medium term no matter what one did. So the issue would be framed as whether it would be better to deal with it *ex ante* or *ex post*. The IMF is suggesting an *ex ante* way which is a bank levy – not a transaction tax. The *ex post* way is forced shotgun mergers with other banks as has often been done in the United States. There would be a debate about this.

There would also be a debate about Basel III and leverage, and there would be sharp disagreements because the financial institution industry fears higher capital adequacy requirements and Basel III in general. But everybody else would be saying that we need stronger rules on capital adequacy, and reduced leverage. And how does one go about reducing leverage? In the other kind of conferences that he attends the debate would be about the impact of executive compensation on leverage, and at least half the room would say that compensation was the cause.

However, Coffee was slightly surprised that some people today had suggested restricting short selling as a means to restore competition. If you said this at a capital markets conference, people there would throw brickbats at you, because capital market competition is not just between firms but also between the long and the short. If one wants an exit strategy and to reduce capital market distortions, then do not suppress short selling. One can have disclosure and restrict naked short selling, but now that the crisis seems to be largely over, he would recommend an exit strategy that removes restrictions on short selling to let participants restore a natural equilibrium in the market. It would be useful for competition people and capital markets people to get together to have a better understanding of the degree to which leverage, executive compensation, and share holder ability to pressure management are positive or negative, because that is where the intense debate would be in the capital markets group.

3. Chairman' summary

The Chairman observed that the extent to which one can integrate what competition people think and the concerns they have with what the financial market people and Committee think is a topic of great interest to the OECD and the Competition Committee. There were some points made from a competition viewpoint regarding the restoration of competition, but also with respect to making banks pay for some of the damage they had caused. This was slightly more controversial, because there was the issue of whether it was going to weaken the banks. When it came to "What can we do or suggest as competition authorities?" and "Do we have the right timing?" there was a question mark there. "Do we have the right instruments?" There was a second question mark. "Do we have the powers or the ability to intervene?" This was a third question mark. The group was not able to eliminate all those question marks even though some bright lines were suggested at the very end. Part of the OECD's value-added is the ability to use what this group has said and put it in the context of capital market thinking.

The Chairman felt that there was general agreement, as expressed by the Belgian delegate, to protect once and for all against a future crisis. This may be a dream, but some of the suggestions that were made, and which were commented on by Professor Beck, were useful. One of them has been realised in the Netherlands -- the simple instruments that one has looked for. The issues of transparency, the creation of a level playing field, an attempt to prevent exit barriers, and to leave some room for innovation, are common sense, but also useful.

COMPTE RENDU DE LA DISCUSSION

Le Président fait tout d'abord remarquer que la présente Table ronde est la dernière d'une série de cinq qui ont été consacrées aux questions de concurrence suscitées par la crise économique et financière mondiale. L'économie ayant aujourd'hui retrouvé quelques forces, il semble approprié que le thème du jour concerne les stratégies de sortie de crise, thème qui recouvre plusieurs sujets quelque peu différents. Il invite M. Thorsten Beck, Président de *l'European Banking Centre* à l'Université de Tilburg, à ouvrir les débats.

1. Commentaires de M. Beck sur le secteur financier

1.1 *Caractéristiques particulières du secteur bancaire*

M. Beck pose la question de savoir en quoi le secteur bancaire diffère des autres secteurs, et quelle est l'incidence de cette différence non seulement sur les mesures d'urgence prises pendant la crise mais aussi sur les mesures correctives adoptées par la suite et les stratégies de sortie de crise. Un trait particulier du secteur bancaire est le volume considérable des transactions que les établissements effectuent entre eux ainsi qu'avec le grand public. C'est pourquoi les aides publiques, l'aide directe et la recapitalisation en faveur de certaines institutions peuvent également apporter un soutien à leurs concurrentes dans la mesure où ces dispositifs limitent la contagion, les effets de réseaux négatifs, les relations entre banques et l'effet de panique. Et, contrairement à certains secteurs industriels qui ont fait l'objet d'un sauvetage, par exemple la construction automobile, il n'existait pas de surcapacité généralisée dans le secteur bancaire avant la crise. L'intervention était donc justifiée, au plus fort de la crise, pour les banques en difficulté qui avaient beaucoup de poids dans le système financier. Mais les sauvetages sont néanmoins source de distorsion, sinon à court terme du moins, en tout cas, à moyen ou long terme, parce qu'ils réduisent les coûts marginaux des établissements secourus et encouragent une prise de risque excessive à l'avenir, fondée sur la perspective d'un nouveau sauvetage si celui-ci devait s'avérer nécessaire. C'est pour cette raison que les sauvetages doivent être maintenus à un niveau minimal, et que la sortie de ces dispositifs doit être assurée par des clauses explicites de limitation dans le temps. M. Beck estime que les autorités américaines ont mieux réussi que les Européens pour ce qui était d'annoncer à l'avance la date d'expiration des garanties apportées, la date à laquelle l'État céderait ses participations dans les banques, et quels types d'aides supplémentaires pourraient être accordées si nécessaire.

1.2 *Mesures correctives*

M. Beck explique ensuite qu'il convient d'analyser soigneusement les mesures correctives qui ont été imposées comme conditions du sauvetage, parce qu'elles risquent de fausser la concurrence au lieu de la restaurer. Ainsi, imposer des restrictions de tarifs à un établissement aidé revient à créer une rente pour ses concurrents, les restrictions d'embauche peuvent retarder le redressement, et la limitation des fusions et acquisitions peut compromettre la réaffectation des actifs financiers. De même, une cession d'actifs forcée et rapide peut entraîner les prix des actifs dans une spirale de baisse ; et exiger des institutions aidées en Europe qu'elles se dessaisissent d'actifs placés dans un autre pays européen peut sembler contraire à l'idée d'un marché financier unifié à l'échelle européenne. Au lieu de punir les établissements secourus, il vaudrait mieux commencer par se demander pourquoi certaines banques ont eu besoin d'un sauvetage, en examinant notamment les questions de gouvernance et de réglementation. M. Beck est d'avis qu'une partie des nouvelles contraintes réglementaires proposées – comme la séparation des activités de banque

commerciale et de banque d'affaires, la restriction de la taille des banques, le relèvement brutal des exigences de fonds propres et l'attribution aux organes de contrôle bancaire de pouvoirs élargis d'intervention – n'ont pas donné, en pratique, de très bons résultats jusqu'à maintenant. Des mécanismes obligeant les banques à internaliser le coût de leurs activités à risque, par exemple en établissant un lien entre le montant des fonds propres obligatoires et la taille de la banque, dissuaderaient mieux celles-ci d'entreprendre des activités jugées trop risquées.

1.3 Mécanismes de liquidation des banques

De l'avis de M. Beck, la crise a démontré que le cadre de liquidation des banques ne fonctionnait plus. La faillite d'une banque n'est pas une issue qu'il faut éviter à tout prix : c'est un événement qui peut arriver dans le cours du fonctionnement normal du marché. Cependant, solder une défaillance par une liquidation entraîne des coûts de réseau pour les autres banques, tandis que l'injection de fonds publics détruit la discipline de marché. Il faut donc trouver une autre solution, par exemple la fusion ou des banques-relais, comme en Amérique latine. Un autre problème, surtout en Europe, est le fait que les banques opèrent parfois dans plusieurs pays tandis que leur autorité de tutelle est sise dans un seul pays, ce qui peut se traduire par des distorsions et des retards dans la mise en œuvre des décisions. De plus, une banque peut être jugée trop grande pour qu'on la laisse faire faillite dans un petit pays, mais non à l'échelle de l'UE, ce qui pourrait offrir d'autres options encore.

1.4 Le rôle des autorités de la concurrence

M. Beck estime que les autorités nationales de la concurrence ont un rôle important à jouer dans la protection des consommateurs et la transparence, mais aussi pour ce qui est d'examiner la concurrence dans le secteur bancaire sous un angle différent de celui des banques centrales et des instances de réglementation bancaire, plus axées sur la stabilité.

1.5 Décourager les activités à risque

Taxer le secteur bancaire pour l'amener à partager les coûts de la crise est certes un argument valable, mais utiliser les recettes ainsi dégagées pour créer un fonds destiné à couvrir les coûts d'un sauvetage à l'occasion d'une crise future pourrait bien encourager précisément le type d'activités à risque que l'on devrait décourager. Une taxe différenciée en fonction du degré de risque afférent à une activité serait une mesure plus saine mais, là encore, à condition que les recettes ne soient pas accumulées dans un fonds de réserve. L'imposition d'une taxe sur les transactions effectuées par les banques n'est pas une bonne solution, parce qu'elle risque de gripper les rouages du marché et d'exacerber la volatilité, et serait vraisemblablement, en fin de compte, supportée par la clientèle des banques.

2. Débat général : le rôle des autorités de la concurrence

Le Président rappelle les deux raisons qui ont motivé cette Table ronde. La première est de partager des points de vue sur ce que les autorités de la concurrence peuvent et ne peuvent pas faire dans le cadre des stratégies de sortie. La seconde est d'alimenter le débat plus large qui se déroule au niveau de l'OCDE, où de nombreux comités examinent la question des stratégies de sortie. Ainsi, la présentation d'ensemble faite par M. Beck est un bon point de départ, et le reste du débat devrait être centré sur les apports qui peuvent émaner des autorités de la concurrence, et sur les limites de ceux-ci. Il donne la parole à l'orateur invité, M. Hans-Helmut Koch, Président du Comité des marchés financiers de l'OCDE.

2.1 Sortir de la crise, sans pour autant revenir aux pratiques antérieures

M. Koch souligne que, lorsqu'on examine les stratégies de sortie de crise, il faut se demander pourquoi il y a eu entrée dans la crise : parce que les marchés ont cessé de fonctionner correctement. Des

politiques de stabilisation ont été nécessaires à court terme, et des mesures non conventionnelles ont été prises pour s'attaquer à des problèmes qui avaient atteint une échelle sans équivalent depuis de nombreuses années en Europe du Nord et aux États-Unis. Mais à moyen et long terme, les objectifs relatifs à la concurrence ont un rôle à jouer, et les stratégies de sortie doivent être conçues de sorte que les marchés ne redeviennent pas dysfonctionnels. Nous devons déterminer quel type de système financier – pas nécessairement identique à l'ancien – nous voulons voir émerger, et les autorités de la concurrence doivent participer à sa création. À moyen terme, pour concilier les objectifs de stabilisation et de concurrence, les institutions financières doivent disposer de capitaux en plus grande quantité et de meilleure qualité. Les établissements qui sont trop grands pour faire faillite menacent non seulement la stabilité mais aussi la concurrence : ils sont, de fait, subventionnés puisqu'ils peuvent emprunter à des taux plus faibles que leurs concurrents plus petits, et devraient donc être taxés plus lourdement. Les stratégies de sortie doivent être conçues de manière à encourager un apport accru de capitaux de meilleure qualité, à prévoir la fin des mécanismes de garantie, puisque les signaux du marché ne sont pas fiables pour le moment, et à traiter les actifs problématiques. À plus long terme, il se pose aussi la question du service de la dette publique, laquelle a fortement augmenté à cause de la crise, ce qui a permis de temporiser mais a retardé l'ajustement.

Le Président fait remarquer qu'un certain nombre de thèmes reviennent dans les contributions écrites sur les stratégies de sortie, et il invite le BIAC à prendre la parole au sujet du but à poursuivre par les autorités de la concurrence lorsqu'elles mettent en œuvre des stratégies de sortie.

Un délégué du BIAC souligne qu'il est important de restaurer l'efficacité du marché, laquelle a souffert pendant la crise non seulement sur le plan de l'affectation des ressources mais aussi d'un point de vue opérationnel, ce qui résulte indirectement des mesures d'urgence. Le but premier des stratégies de sortie devrait donc être d'éliminer les distorsions. Au fil du temps, certaines mesures d'urgence deviennent des aides publiques si elles restent en place, ce qui peut introduire des distorsions. Dans le secteur non financier en particulier, certaines mesures de soutien exceptionnelles étaient discutables, et les autorités de la concurrence devraient coopérer avec d'autres organes de réglementation à une échelle internationale pour repérer et supprimer ces distorsions le plus rapidement possible.

En ce qui concerne le secteur financier, la plupart des mesures d'urgence étaient destinées à remédier au manque de liquidité : une fois la liquidité revenue, ces mesures ne sont plus justifiées et il convient de les supprimer. Il faut alors les remplacer par des structures de marché qui favorisent un fonctionnement efficace et éliminent le danger que présentent les aides d'État pour la concurrence. On peut s'attendre à des mutations profondes dans l'environnement réglementaire des établissements financiers, et les autorités de la concurrence devront coopérer beaucoup plus étroitement avec les instances de réglementation pour mettre au point ces changements. Par exemple, au plus fort de la crise, la contagion était un risque bien réel, et il fallait soutenir les banques non viables. Dans la mesure où le risque de contagion a disparu, on peut laisser les banques non viables faire faillite sans craindre un effet systémique. De plus, pendant la crise, des fusions ont été opérées, parce qu'il fallait faire vite, sans examen adéquat par les autorités de la concurrence ; désormais, les consultations entre les instances de réglementation et les autorités de la concurrence doivent reprendre normalement. Les marchés des capitaux ayant une échelle et une portée mondiales, un dialogue international entre les organismes compétents est indispensable ; les autorités nationales de la concurrence doivent non seulement dialoguer avec les instances nationales de réglementation, mais elles doivent aussi continuer à dialoguer entre elles.

2.2 *La conception des stratégies de sortie*

Le Président soulève la question de l'enchaînement chronologique des actions entreprises dans le cadre des stratégies de sortie, sujet qui est mentionné par les Pays-Bas et par l'UE.

Un délégué des Pays-Bas met l'accent sur le fait que les stratégies de sortie doivent être transparentes et fondées sur des critères objectifs, mais elles sont de ce fait difficiles à préciser. Dans le cas d'un soutien en capital, ce sont les établissements bénéficiaires qui décident de la date de sortie, mais le soutien devrait s'accompagner d'incitations favorisant une sortie rapide. Pour ce qui est des mécanismes de garantie des dettes, c'est l'État lui-même qui décidera de la date de sortie – idéalement lorsque les marchés interbancaires fonctionneront à nouveau normalement –, mais il pourrait être difficile d'en juger, surtout du fait qu'ils ne fonctionneront peut-être pas de la même manière qu'avant la crise, même à plus long terme. Peut-être les taux interbancaires n'étaient-ils pas actuariellement justes avant la crise et ne reflétaient-ils pas correctement les risques de contrepartie. En ce qui concerne la privatisation, l'État va tenter de maximiser ses rendements mais, là encore, les marchés ne valoriseront peut-être pas les actifs bancaires comme ils le faisaient par le passé, et cette question est encore entourée d'une grande incertitude. L'État devrait donc attendre d'être assuré d'obtenir un rendement correct.

2.2.1 Restructuration et sortie de crise : le point de vue de l'UE

Le délégué de l'UE fait remarquer que, en dépit de la crise et de la nécessité d'assurer la liquidité, les règles de la concurrence sont restées en place et aucune grande banque n'a fait faillite en Europe. Le traité sur l'UE a permis à Bruxelles de prendre des mesures spéciales en matière de garanties et de recapitalisation, en opérant toutefois, sur ce dernier point, une distinction entre banques saines et banques en difficulté. Ces dernières ont dû subir une restructuration, un processus qui peut s'étaler sur cinq ans, soit beaucoup plus longtemps que dans le secteur non financier. La restructuration comporte trois éléments : un plan crédible mis sur pied par l'établissement concerné pour lui permettre de survivre sans aide à long terme ; le partage du fardeau au travers d'une contribution propre de la banque et des actionnaires ; et des mesures telles que des cessions de participations ou l'interdiction de fixer des prix directeurs, de procéder à des acquisitions ou d'ouvrir le marché, mesures destinées à assurer l'équité avec les banques non aidées. En réponse à une question sur les distorsions que peut produire l'interdiction de fixer des prix directeurs, le délégué précise que les banques concernées faisaient déjà l'objet de distorsions : en l'absence d'une telle interdiction, il aurait pu se produire une concurrence déloyale. Une quarantaine de banques sont en cours de restructuration, et le volume global du plan de sauvetage est de 4 000 milliards EUR, dont 3 000 milliards sont des garanties, et dont un tiers seulement a été utilisé. Les garanties ne sont approuvées que jusqu'au 30 juin de cette année, mais elles seront maintenues aux Pays-Bas, quoiqu'à des conditions plus strictes, et elles ont été retirées progressivement au Royaume-Uni, en France et en Italie. Jusqu'à maintenant, la majeure partie des garanties n'a été utilisée que par des banques en cours de restructuration. Quant aux cessions de participations, plusieurs critères entrent en jeu et, en pratique, elles peuvent conduire à une réduction de plus de 50 % du bilan, c'est-à-dire une mesure de grande envergure.

2.2.2 Les secteurs non financiers

Outre le soutien qu'elle fournit au secteur financier, l'UE a également mis en place un cadre temporaire d'aide à l'économie réelle, qui vise exclusivement à restaurer l'accès aux financements et qui sera normalement démantelé à la fin de cette année.

2.3 *Les autorités de la concurrence ont-elles réellement une influence sur les stratégies de sortie ?*

Le Président pose la question de savoir dans quelle mesure les autorités de la concurrence influent effectivement sur la conception des stratégies de sortie, ce qui peut varier considérablement d'un pays à l'autre. Dans certains pays, elles ont des moyens d'intervention limités, voire seulement officieux, tandis que dans d'autres elles jouent un rôle public de promotion de la concurrence en participant à la conception des réponses apportées à la crise et des stratégies de sortie. La contribution de la Belgique indique par exemple que l'autorité de la concurrence exerce dans ce pays une influence indirecte et informelle, au

travers de discussions avec le ministre de l'Économie, la banque centrale et les instances de réglementation financière.

Un délégué de la Belgique confirme que l'autorité de la concurrence n'a pas de pouvoirs en ce qui concerne les aides d'État, mais que toutes les mesures prises par la Commission sont considérées comme des aides d'État par la législation communautaire. Si les responsables de la concurrence avaient eu des commentaires à formuler au sujet de certaines mesures, ils l'auraient fait dans le cadre d'entretiens en privé. Mais ils estiment que, en tout état de cause, ils ne seraient pas allés au-delà de la stratégie de sortie proposée par la Commission. Au début, il y avait réellement un risque que chacun parte dans une direction différente, mais cela a pu être évité. En ce qui concerne les stratégies de sortie, le délégué estime qu'il importe d'user de prudence, parce que les établissements ne sont pas tous prêts à sortir des dispositifs mis en place.

Un délégué de l'Allemagne explique que son pays n'a pas soumis de contribution parce qu'il dispose d'une expérience très limitée. Le gouvernement allemand a créé un fonds chargé d'accorder des aides publiques et, pour la première fois, le *Bundeskartellamt* (Bureau fédéral de la concurrence) a été consulté. Chaque fois qu'il existe des raisons de ne pas verser une aide de l'État, le gouvernement peut faire appel au *Bundeskartellamt* pour qu'il donne un avis d'expert sur les conditions de marché et la place de l'entreprise concernée sur le marché. Il s'agit peut-être simplement là d'une réaction à la crise, mais il se peut qu'il continue à donner son avis à l'avenir, y compris dans le secteur financier.

Le Président constate que l'autorité espagnole de la concurrence a été très active dans la conception des mesures correctives et des aides d'État. Il aimerait savoir si cela est dû à une disposition explicite de la loi, ou si le gouvernement souhaitait simplement connaître son avis. De plus, la CNC (*Comisión Nacional de la Competencia*) a l'intention de publier un rapport sur les aides d'État, comprenant quelques exemples de « mauvaise » aide, et il voulait savoir dans quel contexte cette commission avait préparé et publié ce rapport.

Un délégué de l'Espagne explique que la CNC a conseillé les administrations publiques pendant la crise parce qu'une nouvelle loi l'y avait autorisée, tant au niveau national que régional. Cela a représenté un énorme volume de travail, bien entendu, parce que la CNC a dû étudier la réglementation dans de nombreux domaines différents. Le délégué estime que les avis de la CNC ont été pris en compte, à l'échelon national plus que régional. Sur les conseils de la CNC, une loi a été adoptée pour veiller à ce que le bilan des études d'impact des nouvelles lois couvre aussi les questions de concurrence.

En ce qui concerne les aides d'État, le rapport annuel 2009 de la CNC couvre l'année 2008 mais ne porte pas spécialement sur les aides apportées par l'État pendant la crise. Son deuxième rapport, en cours de rédaction, présentera quelques exemples d'aide publique fournie pendant la crise et que la CNC considère comme de mauvaises pratiques. Il s'agit d'aides accordées aux consommateurs, par exemple pour les encourager à remplacer leur voiture par un véhicule neuf et moins polluant : il s'agissait de subventions à l'achat, complétées par des rabais offerts par les constructeurs. Cette « prime à la casse » était typiquement une aide publique de crise, limitée dans son montant et sa durée, mais incluant des restrictions anticoncurrentielles quant à l'origine des véhicules et au lieu de résidence des acheteurs. De plus, le montant de la subvention n'était pas étroitement lié aux caractéristiques écologiques des véhicules achetés. La CNC a souhaité attirer l'attention sur ces caractéristiques, sans pour autant remettre en cause l'ensemble du programme. Elle a également adopté une position plus ferme à l'égard des aides d'État en général, en conseillant par exemple à l'administration de notifier à la Commission certains aspects de la réglementation en préparation.

Le Président invite le Danemark à expliquer pourquoi l'autorité de la concurrence a participé à la conception du dispositif de garantie. S'agit-il d'une obligation légale, ou le gouvernement danois est-il particulièrement sensibilisé aux questions de concurrence ?

Un délégué du Danemark explique que la participation de l'autorité de la concurrence à la formulation d'une réponse à la crise n'était pas exigée par la loi danoise, mais que le gouvernement était bien conscient de l'importance de la concurrence et du respect des règles de l'UE en matière d'aides de l'État. Au sein de l'autorité de la concurrence, une petite unité est chargée de conseiller tous les organismes publics au sujet des règles européennes concernant les aides d'État et, pendant la crise, elle a mené des consultations avec le gouvernement et l'a conseillé, et s'est également entretenue avec les services de la Commission. Le programme de garanties danois a été mis sur pied en octobre 2008, avant que la Commission ait publié ses orientations, de sorte que l'autorité de la concurrence a dû déployer beaucoup d'efforts. Par la suite, le rôle de l'autorité danoise de la concurrence à l'égard de ce programme de garanties et des banques fiduciaires a consisté à vérifier la conformité avec les orientations de la Commission et à coordonner le dialogue avec celle-ci.

2.4 Stratégies de sortie : l'importance du calendrier

Le Président donne à nouveau la parole au Danemark, et lui demande de fournir des précisions supplémentaires sur l'enchaînement chronologique des mesures et sur la participation de l'autorité de la concurrence. Lorsque le dispositif de garantie a expiré, deux autres programmes ont été lancés, l'une sur la recapitalisation, l'autre sur le traitement des banques en difficulté. Était-ce nécessaire parce le dispositif de garantie s'était terminé trop tôt ? Les autorités danoises ont-elles estimé que la transition vers d'autres mécanismes s'imposait parce que le marché n'était pas encore revenu à la normale ?

Le délégué du Danemark explique que les nouvelles mesures étaient destinées à rassurer les marchés en leur montrant que les banques en difficulté continueraient d'être correctement prises en charge au-delà du 1^{er} octobre 2010, date d'expiration du mandat de l'organisme public créé pour reprendre ces banques. La garantie illimitée sera remplacée par une assurance standard sur les dépôts à hauteur de 100 000 EUR. Toute banque qui ne respecte pas les critères de solvabilité doit choisir entre une déclaration de faillite et une reprise par l'organisme public créé à cet effet et chargé de liquider les banques dans cette situation. L'avantage de la seconde option est que les banques concernées poursuivront leurs activités avec leurs clients existants pendant un certain temps après la reprise, sans toutefois être autorisées à accepter de nouveaux clients. La liquidation sera progressive, alors que si ces banques étaient brutalement mises en faillite, les conséquences économiques et sociales pourraient être graves. Les coûts seront financés par le secteur bancaire au travers de son propre mécanisme d'assurance des dépôts ; il s'agit là d'un retrait du soutien de l'État au secteur financier, mais l'État accordera néanmoins des garanties supplémentaires si le fonds d'assurance des dépôts n'a pas suffisamment de ressources.

Le Président invite la Suisse à présenter sa contribution, qui explique que des clauses d'extinction ou des plafonds ont été adoptés pour garantir que les mesures prises pour remédier aux effets de la crise seraient limitées dans le temps. Mais certains délégués ont souligné l'importance de la flexibilité et les risques d'une sortie prématurée. La Suisse a-t-elle dû retarder l'application des clauses d'extinction ?

Un délégué de la Suisse précise qu'il faut distinguer, d'une part, les mesures de politique budgétaire et monétaire et, d'autre part, les interventions dans le secteur bancaire. En ce qui concerne les premières, il existe effectivement des clauses d'extinction automatique qui vont mettre un terme à ces mesures à la fin de 2011. S'agissant des interventions dans le secteur bancaire, l'État a acquis, directement et indirectement, des participations au capital d'UBS à hauteur de six milliards de francs suisses, et la banque centrale a prêté 54 milliards CHF pour mettre sur pied un fonds destiné à l'acquisition d'actifs toxiques. Ces deux mesures étaient limitées en volume, mais pas dans le temps, du moins pas légalement. On ne peut

pas entrer au capital d'une entreprise, ou acquérir des actifs toxiques, d'une manière limitée. L'intention était bien de se désengager, à terme, et d'ailleurs les actions ont été revendues il y a un an, avec réalisation d'un bénéfice. Le fonds qui a acquis les actifs toxiques en a déjà revendu la moitié, à profit, mais le résultat global pourrait être une perte ou un bénéfice. Toutefois, que le solde soit positif ou négatif pour l'État, l'important est qu'il y a eu une intervention qui a faussé la concurrence. UBS jouit désormais de l'assurance implicite qu'elle est trop grande pour qu'on la laisse faire faillite, de même que la deuxième banque, et le malaise demeure quant à la façon dont fonctionnait le système financier. De tels effets néfastes pour la concurrence peuvent être éliminés par une stratégie de sortie qui tienne compte de ce phénomène, par exemple en faisant participer les banques aux interventions qui les ont aidées.

2.5 Une sortie réussie : le cas de l'Australie

Le Président invite ensuite l'Australie à commenter les interventions qu'elle a effectuées pendant la crise et qui étaient, pour l'essentiel, terminées fin mars 2010, en particulier le mécanisme de garantie. Comment et pourquoi la sortie s'est-elle avérée relativement facile à opérer ?

Un délégué de l'Australie explique que, comme dans d'autres pays, le but du mécanisme de garantie était que les banques de dépôt dûment homologuées aient un accès ininterrompu aux marchés des capitaux, de façon à maintenir la stabilité. Il a atteint cet objectif, et le gouvernement a annoncé en février 2010 qu'il allait mettre fin à ce programme, suivant la recommandation unanime du Conseil de réglementation financière. Les pouvoirs publics avaient clairement manifesté dès le début leur intention de mettre fin à ce dispositif lorsque les conditions se seraient améliorées, et ils ont annoncé son expiration deux mois avant la date de clôture. L'utilisation du mécanisme a beaucoup diminué pendant ce laps de temps. D'aucuns ont affirmé que le dispositif désavantageait les établissements bien notés, parce que le barème des commissions était fonction de la note de crédit, les banques de dépôt les mieux notées payant les commissions les plus élevées pour accéder aux garanties. Mais ce barème a été établi en suivant l'avis unanime du Conseil de réglementation financière et conçu pour refléter les tarifs du marché : il est donc difficile de soutenir sérieusement qu'il était anticoncurrentiel, d'autant plus que les établissements notés au-dessous de AA ont, pendant la durée de ce mécanisme, accru leur recours aux marchés des capitaux pour se financer.

2.6 L'action des pouvoirs publics doit-elle chercher à modifier les structures ou les comportements ?

Le Président soulève la question de l'arbitrage à effectuer entre les différents moyens – changement des structures ou modification des comportements – d'aborder la restructuration des banques aidées par l'État dans le cadre des règles de l'UE. La contribution néerlandaise émet des réserves quant au traitement qui a été réservé au cas d'ING, et le Président invite les Pays-Bas à expliquer les difficultés rencontrées.

Un délégué des Pays-Bas félicite tout d'abord la Commission européenne pour la manière dont elle a traité le grand nombre de dossiers d'aides publiques pendant la crise financière. S'agissant du cas d'ING, les autorités néerlandaises de la concurrence se déclarent satisfaites des corrections structurelles imposées par la Commission, qui a obligé ING à vendre certaines de ses filiales, parce que c'étaient des mesures proconcurrentielles. Les autorités néerlandaises comprennent la volonté d'éviter toute discrimination entre les établissements bancaires, et s'en félicitent. Il ne faut pas oublier que les mesures correctives visant à modifier le comportement des banques qui reçoivent un soutien de l'État ont pour effet de restreindre la marge de manœuvre commerciale des bénéficiaires, ce qui peut aussi limiter la concurrence, le cas le plus évident étant celui de l'interdiction de fixer des prix directeurs. Mais tout dépend du contexte : les marchés financiers aux Pays-Bas sont oligopolistiques à de nombreux égards. Il se peut très bien qu'une interdiction de fixer des prix directeurs entrave ou restreigne la concurrence dans de tels cas.

Un délégué de l'UE répond que l'Union européenne ne peut pas s'exprimer sur des cas particuliers pour lesquels la procédure judiciaire est en cours, mais il convient que, de manière générale, une interdiction de fixer des prix directeurs pourrait avoir un impact différent en fonction des caractéristiques du marché. Mais il ne faut pas oublier non plus que ces interdictions ont été imposées parce que les banques en question recevaient des aides publiques et pouvaient utiliser ce soutien pour offrir des prix plus bas et gagner des parts de marché. Ces interdictions sont toutefois temporaires et ont été imposées sur tous les marchés où l'établissement concerné opérerait.

Le Président note que, d'après l'expérience enregistrée jusqu'à maintenant, les stratégies de sortie sont difficiles à planifier, que les autorités de la concurrence sont impliquées à des degrés divers dans les différents pays, qu'il est utile de fournir des informations *ex ante* sur les limites même s'il faut parfois ménager une certaine souplesse, et que les instruments utilisés pour les restructurations peuvent être mis en doute, ou avoir des effets différents selon le contexte.

2.7 *Stabilité ou concurrence : l'arbitrage est-il nécessaire ?*

Le Président annonce ensuite que deux contributions affirment qu'aucune stratégie de sortie n'avait été nécessaire parce que les mesures adoptées pour assurer la stabilité du secteur financier étaient elles-mêmes proconcurrentielles, ce qui amène à se demander pourquoi elles n'ont pas été mises en œuvre avant la crise. La contribution de l'Australie cite ainsi trois mesures, à savoir le mécanisme de remboursement des déposants, l'extension des opérations d'*open market* de la RBA et l'adoption de la loi sur la vente à découvert (2008). Ces mesures ont été adoptées pour des raisons de stabilité, mais elles se sont aussi avérées favorables à la concurrence.

Un délégué de l'Australie souligne que c'est une question de nuances. Ces mesures ont été adoptées pour des raisons de stabilité, et n'étaient pas nécessairement proconcurrentielles dans l'absolu. Elles ont surtout contribué à freiner le relâchement de la pression concurrentielle. C'était particulièrement vrai du mécanisme de remboursement des dépôts, qui s'applique aux dépôts détenus par les banques réglementées, comme indiqué plus haut, et consiste à verser aux clients des banques insolubles les fonds qu'ils y avaient déposés, à concurrence d'un certain plafond. Ce mécanisme a été mis en chantier dès 2004, et le *Treasurer* a joué un rôle majeur dans sa conception. L'entrée en vigueur de ce dispositif s'est imposée au moment de la crise, parce qu'on a constaté un transfert de ressources des petits établissements vers les grands, qui aurait pu déstabiliser les petites banques. La mise en œuvre de ce mécanisme à ce moment précis était donc non seulement le début d'une mesure à long terme mais aussi un moyen de préserver la position concurrentielle des petits établissements.

Pendant la crise, la RBA n'a pas eu besoin d'élargir ses opérations d'*open market* dans une mesure aussi grande que d'autres banques centrales, parce que les marchés de capitaux australiens étaient relativement souples et que la banque centrale disposait d'une large gamme de contreparties pour ses opérations d'accroissement des liquidités sans qu'il soit besoin de modifier les critères d'admissibilité ou de créer de nouveaux dispositifs. Les conditions financières se sont normalisées et la demande de liquidités supplémentaires a diminué. Ces instruments sont restés en place. Sur la question de la vente à découvert, le gouvernement a pris des mesures parce que les conditions du marché l'inquiétaient à ce moment-là. Depuis, il a fait promulguer une loi qui interdit de façon permanente la vente à découvert « à nu », clarifie les pouvoirs d'accès permettant de réglementer tous les aspects de la vente à découvert et crée un cadre pour la communication des informations. Là encore, ce sont des mesures qui sont destinées à rester en place.

Un délégué de l'Italie souligne que les aides d'État constituent un sujet éminemment politique et que la Commission est soumise à de fortes pressions pour les autoriser, généralement parce que les entreprises concernées sont considérées comme stratégiques et emploient de nombreux salariés. L'issue habituelle est

une autorisation d'accorder ces aides, y compris dans le secteur financier. Pour limiter l'aléa moral, la Commission met en place des mesures correctives influant sur le comportement, telles que le plafonnement des rémunérations. Mais si ces plafonds sont contraignants, les banques concernées perdent leurs meilleurs professionnels et voient leur situation s'aggraver au lieu de s'améliorer. Le même argument s'applique à l'interdiction de fixer des prix directeurs et de procéder à des fusions, ainsi qu'à la vente forcée de filiales. La meilleure manière d'éviter tout aléa moral, c'est tout simplement de ne pas accorder d'aide d'État.

Le Président convient qu'il n'est pas facile de maîtriser le mécanisme des aides d'État. Il cite la contribution britannique : « outre qu'elle offre à la politique de la concurrence un rôle plus important, la situation prévalant sur certains marchés financiers peut aussi créer de nouvelles possibilités d'exercice de la concurrence. » Il demande à la délégation britannique de commenter cette affirmation optimiste.

Un délégué du Royaume-Uni explique que, bien avant la crise financière, un sujet de préoccupation dans ce pays était le manque de concurrence dans la prestation de services bancaires aux particuliers ainsi qu'aux petites et moyennes entreprises. Sous l'effet de la crise, deux des quatre grandes banques britanniques, RBS et le groupe bancaire de la Lloyds, sont tombées dans le giron de l'État, de même qu'un certain nombre de banques plus petites, dont Northern Rock. Parmi les conditions posées pour que cette aide soit autorisée, les deux grandes banques ont dû céder une fraction considérable de leurs participations, ce qui ouvert des possibilités de restructuration du marché. De plus, le marché bancaire du Royaume-Uni a vu s'installer de nouvelles banques européennes importantes comme Santander, et une banque suédoise y a fortement développé ses activités dans le secteur des PME. En raison de la crise et du manque de confiance des consommateurs dans les grandes banques, une implantation sur le marché des services bancaires aux particuliers a commencé à présenter un intérêt pour Tesco (une grande chaîne internationale de vente au détail qui opère au Royaume-Uni) et pour Virgin, sous le nom de Virgin money. Une autre banque, Metro, va ouvrir sa première agence en juillet 2010, et d'autres acteurs se lancent dans de nouvelles formes d'activité telles que la banque par Internet.

Le délégué du Royaume-Uni poursuit en expliquant que, pendant la crise, les autorités britanniques ont créé une exception, au nom de la stabilité, à l'application normale des règles de la concurrence aux fusions. Dans le cas de la fusion de Lloyds TSB avec HBOS, le gouvernement s'est ainsi donné la possibilité de mettre en balance les enjeux de la concurrence et les problèmes de stabilité financière. Maintenant que la situation normale est rétablie, toutes les fusions sont de nouveau régies par les principales règles britanniques et européennes en matière de concurrence. En outre, comme il se pourrait que le marché connaisse de profondes mutations, les autorités britanniques de la concurrence se sont lancées dans une campagne de sensibilisation auprès du gouvernement et ont annoncé la réalisation d'une étude qui va examiner les conditions du marché dans la situation actuelle ainsi que la réaction des établissements déjà en place face à l'arrivée de nouveaux acteurs. Les points abordés incluent l'incidence des obligations réglementaires sur les grandes banques et sur les nouveaux arrivants, les obstacles à l'entrée et à la sortie, ainsi que des données de départ essentielles, telles que les montants à verser aux systèmes de règlement financier. La question intéressante est de savoir quelle est la place du régime et des autorités de la concurrence. Le gouvernement britannique a annoncé, il y a tout juste deux heures, la création d'une commission bancaire indépendante, présidée par l'ancien directeur général de la commission de la concurrence, à savoir M. John Vickers, que connaissent de nombreux participants à cette Table ronde. Cette nouvelle commission va examiner toutes les questions ayant une incidence sur la structure du secteur bancaire britannique, et la nomination de John Vickers témoigne de l'importance que le Royaume-Uni attache à la concurrence dans le secteur bancaire. Enfin, l'expérience acquise au cours des 18 derniers mois met en évidence l'importance d'une exploitation souple des pouvoirs de plaidoyer et l'utilisation d'outils moins formels pour susciter des changements sur le marché.

Un autre délégué du Royaume-Uni fait remarquer qu'il est devenu évident, il y a déjà un certain temps, qu'une révision approfondie du système s'imposerait à l'issue de la crise. Une série d'études

préconisaient une telle révision avant et après les dernières élections, et les différents partis ont abordé cette question selon des optiques différentes. Il est difficile d'imaginer comment les autorités de la concurrence vont s'y prendre, parce que l'écheveau des questions prudentielles et de concurrence est dense et emmêlé. Toutes ces questions doivent être traitées, si nécessaire de façon isolée. Mais la première priorité est d'entreprendre cette étude. Les enquêtes sur le secteur bancaire sont notoirement difficiles à réaliser parce que chaque sujet est compliqué et regorge de données, et qu'il faut parfois plusieurs années pour arriver à faire le tour d'un seul petit segment. Il y a une dizaine d'années, le gouvernement précédent a fait réaliser une étude complète et détaillée sur la concurrence dans le secteur bancaire ; de l'avis général, les auteurs de cette étude ont fait du bon travail, bien qu'ils aient eu du mal à obtenir des données comparables, car ils ne disposaient pas de pouvoirs officiels pour recueillir des informations. De plus, comme ils avaient conclu que les services bancaires aux particuliers étaient compétitifs, ou sur le point de le devenir, leurs conclusions doivent être revues. Dans ce contexte, le mandat de l'étude Vickers est intéressant, puisqu'il inclut un examen de la concurrence dans les services bancaires aux particuliers et aux petites entreprises, et la formulation de recommandations structurelles à ce sujet, mais aussi l'étude des mesures prudentielles, de la loi Glass-Steagall, et autres.

2.8 *Stratégies de sortie dans les secteurs non financiers*

Le Président annonce qu'il est maintenant temps d'aborder les stratégies de sortie dans l'économie réelle et signale que la contribution du Japon se penche à cet égard non pas sur la crise actuelle mais sur la précédente. Il invite le Japon à faire part de l'expérience acquise à l'occasion de la création, en 2003, de l'agence de revitalisation industrielle, alors envisagée comme une mesure temporaire au titre de la loi portant création de cet organisme. Cette agence a été dissoute en 2007, et le Président demande si la raison en est que c'était une mesure temporaire, et quel est le bilan à tirer de ses quatre années d'existence.

Un délégué du Japon explique que l'Agence de revitalisation industrielle du Japon (*Industrial Revitalisation Corporation of Japan – IRCJ*) a été créée en 2003, alors que le pays commençait à émerger d'une profonde récession. Les PME représentaient une large part de l'économie et étaient lourdement endettées. Le gouvernement a commencé par appliquer une politique simple de relance de l'industrie en faisant appel aux mécanismes de marché, c'est-à-dire qu'il a décidé de ne pas nationaliser les entreprises en difficulté et de ne pas subventionner les industries en déclin pendant de longues périodes. L'IRCJ avait pour mission de repérer les entreprises qu'il était possible de revitaliser, de racheter leurs dettes et de les pousser à se restructurer en l'espace de quelques années. L'IRCJ était également mandatée pour atteindre ses objectifs dans les cinq ans : elle devait être dissoute en 2007 au plus tard et s'efforcer de liquider sa dette. L'IRCJ et l'autorité japonaise de la concurrence (la JFTC) étaient en contact étroit afin que les désengagements et les fusions prévus dans le processus de restructuration ne faussent pas la concurrence. L'IRCJ n'a soutenu que 41 sociétés, dont la deuxième marque de cosmétiques japonaise et la plus grande chaîne de supermarchés. Les autres entreprises étaient de petite ou moyenne taille, de sorte que l'action de l'IRCJ a eu une portée relativement limitée.

Le Président demande si l'IRCJ a réussi à revitaliser le secteur réel au Japon, et un autre délégué du Japon répond que ce programme n'a pas obtenu de très bons résultats, en partie parce que le nombre d'entreprises aidées était faible, et donc l'incidence globale aussi, et en partie parce que, même si l'IRCJ lui-même était assorti d'une clause d'extinction automatique, une série d'autres mesures temporaires ont été adoptées, ce qui n'était pas optimal, et même globalement négatif, pour l'économie du Japon.

Le Président constate que la contribution du Canada commence par déclarer que le gouvernement doit être averti de la longue liste de risques que comporte une intervention directe dans l'économie réelle. Elle indique ensuite que des aides publiques ont été accordées au secteur automobile par le gouvernement du Canada et celui de l'Ontario, que ce soutien reposait sur de bons principes et que l'action générale de sensibilisation menée par l'autorité canadienne de la concurrence a probablement été utile. Le Président

s'interroge sur la nature de ces bons principes et se demande si l'octroi de ces aides de l'État n'exigeait pas une stratégie de sortie et n'a pas exercé une influence néfaste sur la concurrence dans le secteur canadien de l'automobile.

Un délégué du Canada explique que le secteur automobile de ce pays est un bon exemple d'industrie trop importante et trop intégrée pour qu'on la laisse faire faillite. Elle représente en effet 2 % du PIB et 14 % de la production manufacturière, et elle fait l'objet d'une complète intégration transfrontalière avec les États-Unis depuis les années 60. Cette intégration n'est pas simplement entre sociétés affiliées mais englobe toute la chaîne d'approvisionnement. La défaillance d'un maillon de cette chaîne n'aurait donc pas été cantonnée à une région du Canada mais se serait propagée à l'ensemble de la chaîne, qui recouvre une vaste aire géographique en Amérique du Nord. L'intervention s'est appuyée sur une analyse économique approfondie et un certain nombre de principes qui figurent dans le Manuel de l'OCDE pour l'évaluation de la concurrence. On a veillé notamment à ce que les concurrents et toute la gamme des acteurs du marché puissent aussi disposer de cette assistance, et à intégrer des incitations visant à sevrer automatiquement les bénéficiaires de l'aide publique dès que possible. Dans ce contexte, on s'est inspiré de clauses contractuelles qui sont très courantes dans le financement du débiteur-exploitant à des conditions commerciales. Le dernier objectif consistait à veiller à ce que l'assistance soit aussi transparente que possible et la moins coûteuse possible pour les finances publiques. Pour répondre à la dernière question, le délégué précise que, au Canada, la politique de la concurrence est une responsabilité partagée. À la Direction générale des politiques-cadres du marché, au sein d'Industrie Canada, il existe un groupe chargé de la politique de la concurrence, qui a été particulièrement actif dans la conception de l'aide apportée au secteur automobile.

2.9 Surveillance du marché interbancaire

Un délégué du Portugal mentionne deux sujets de préoccupation concernant le calendrier d'une stratégie de sortie. M. Kotz a parlé de l'instabilité du marché interbancaire, qui peut d'ailleurs même suspendre complètement ses activités, comme cela a été le cas au lendemain de la chute de Lehmann Brothers. Cela se produit encore, d'une façon limitée, sur certains marchés européens. Une rumeur circule actuellement selon laquelle l'Espagne demanderait un prêt de secours de 250 milliards EUR, soit un tiers du programme total pour l'Europe. Il est clair, comme l'ont souligné les délégués des Pays-Bas et de la Belgique, que la présente crise est différente des précédentes. Il faut donc suivre de près le marché interbancaire, et notamment la stratégie d'assainissement et de liquidation des banques à mettre en œuvre. Il s'agit d'une question hautement sensible, non seulement pour l'Espagne mais aussi pour le Portugal, où le marché interbancaire est très tendu. Or, si le marché interbancaire ne fonctionne pas, c'est l'ensemble du système bancaire qui est paralysé.

L'autre sujet qui inquiète le délégué est celui des conséquences de la situation pour les taux d'intérêt que vont devoir payer les consommateurs et les entreprises, et pour la disponibilité du crédit. Les écarts s'élargissent sous l'effet des primes de risque et des implications des nouvelles directives relatives aux fonds propres et aux dispositifs de contrôle, si elles sont appliquées. De plus, il est question d'une taxe franco-allemande sur les banques, dont on peut craindre les effets. Du point de vue de la concurrence, on peut faire appel aux autorités de la concurrence pour qu'elles rendent compte de la situation difficile dans laquelle se trouve l'économie réelle, où les taux officiels demeurent faibles mais où les taux prêteurs augmentent sans cesse.

2.10 Prévenir les crises futures

Le Président annonce que certains de ces sujets pourront être évoqués pendant le débat général. Il souhaite aborder maintenant la dernière partie de la Table ronde et examiner les suggestions que pourraient faire les autorités de la concurrence sur la protection contre les crises futures et les enseignements à tirer

des erreurs passées. La Belgique, les Pays-Bas et la Suisse ont formulé des suggestions dans leurs contributions, qu'il les invite à commenter.

Un délégué de la Belgique admet qu'il n'existe bien sûr pas de garanties absolues, mais observe sur le marché une certaine nostalgie à l'égard des produits bancaires simples et sûrs qui étaient proposés par le passé, notamment par les caisses d'épargne publiques. Il n'est évidemment pas question de rétablir ces banques, mais il y a certainement de la place sur le marché pour des produits simples et sûrs, qui soient compréhensibles pour la plupart des gens, qui répondent à certains critères de fiabilité, qui fassent l'objet d'une réglementation spécifique et qui soient clairement identifiables. On verrait bien, alors, si les gens cherchent effectivement à maximiser leurs bénéfices ou s'ils soutiendraient ces dispositifs plus simples.

Un délégué des Pays-Bas estime qu'il faut être modeste. On n'a pas une image claire de toutes les mesures favorisant la stabilité proposées par les décideurs politiques, parce que ce n'est pas la spécialité première des experts de la politique de concurrence. Cependant, des dispositifs tels que le *living will* (préparation par les banques de leur démantèlement éventuel) et les plafonds d'endettement semblent limiter l'aléa moral, ou du moins les risques et conséquences découlant de l'aléa moral. Pour ce qui est de séparer les activités de banque d'affaires et de banque commerciale, c'est une possibilité qui devrait assurément être étudiée mais, pour le moment, les spécialistes de la concurrence ne savent pas précisément s'il faut ou non la mettre en œuvre. La contribution des Pays-Bas souligne qu'il est important d'évaluer les conséquences que peuvent avoir de nouvelles mesures sur la concurrence et l'innovation. Les politiques adoptées devraient, premièrement, promouvoir des règles du jeu équitables entre les grandes institutions financières et les petites. Deuxièmement, elles devraient éviter de créer des barrières à l'entrée ou à la sortie. Troisièmement, la réglementation devrait laisser de la place à l'innovation ; les innovations financières n'ont pas toutes été des réussites, mais l'innovation est importante, car elle favorise la croissance de l'économie réelle. Enfin, la réglementation financière devrait promouvoir des conditions de concurrence équitables entre les établissements opérant dans des contextes différents et des pays différents.

Le Président invite la Suisse à s'exprimer sur la question de savoir comment éviter une prise de risque excessive sans nuire à l'efficacité.

Un délégué de la Suisse explique qu'une commission chargée de se pencher sur le problème des établissements trop grands pour faire faillite a proposé quatre mesures :

- des normes de liquidités qui entreront en vigueur le 30 juin 2010 et permettront à une banque de se maintenir à flots pendant 30 jours ;
- des exigences de fonds propres générales et ciblées (bien que le pourcentage précis ne soit pas encore défini) ;
- une diversification des risques, qui doit être mise en place par la banque centrale et l'autorité de surveillance des marchés financiers, et contrôlée régulièrement ;
- la quatrième mesure est plus problématique : il s'agit de restructurer une banque de façon à isoler les segments viables, pour pouvoir laisser disparaître les branches qui peuvent faire faillite et soutenir les autres. Il y a bien sûr de nombreux avantages à structurer une banque sous forme de holding, notamment parce que cela facilite le contrôle et la réglementation prudentiels. Mais il est permis de douter que cela permettrait la faillite de certaines branches et pas d'autres. S'il est intéressant pour une banque d'être active dans tous les domaines, alors elle n'a pas intérêt à laisser une de ses branches faire faillite. C'est illusoire, surtout dans un contexte international. Il faut réfléchir davantage aux restrictions d'activité et à la séparation réglementaire des activités. Ces options ont été exclues par le gouvernement suisse, reflétant peut-être l'avis général sur cette question, mais le dernier mot n'a peut-être pas encore été dit.

Il existe un problème qui doit être abordé plus en profondeur, poursuit le délégué, mais qui ne relève pas principalement du jugement des autorités de la concurrence. La concurrence n'est pas la cause de la crise, et n'en est pas la solution non plus. Elle doit cependant être restaurée lorsqu'elle n'existe plus et préservée dans toutes les stratégies de sortie. Il est important aussi que les banques qui ont été aidées apportent une contribution substantielle à cette aide, sous la forme d'une réduction de bilan, de mesures de restructuration, d'une interdiction de fixer des prix directeurs, etc. S'il est vrai que ces mesures restreignent aussi la concurrence, elles le font dans un contexte où la concurrence est déjà limitée. Les autorités suisses devraient se pencher à nouveau sur cette question. Les dispositifs envisagés par la Commission européenne et par la nouvelle commission britannique sont très bons du point de vue de la concurrence parce qu'ils mettent un prix sur l'aide reçue. Cela permettrait de restaurer non pas la situation antérieure mais une version proche, et de prévenir ainsi indirectement une nouvelle crise.

2.11 *L'importance de la coopération internationale*

Le Président invite les Pays-Bas à commenter la position exprimée avec force dans leur contribution, à savoir qu'aucune solution ne peut voir le jour sans un degré élevé de coopération internationale.

Un délégué des Pays-Bas fait observer que le fait que de nombreux marchés soient interconnectés et que les banques soient actives dans plusieurs pays rend d'autant plus pertinente la coopération internationale sur la gestion et la prévention des crises. La faillite d'Isave, une banque islandaise opérant sur le marché de l'épargne au Royaume-Uni et aux Pays-Bas, et les ramifications de cet événement sur les marchés financiers britanniques et néerlandais ont mis en lumière l'importance de la coordination et de la coopération internationales. La création du Conseil européen du risque systémique est un pas dans la bonne direction, et les décideurs politiques devraient s'atteler à la mise en place d'un mécanisme européen de réglementation. L'harmonisation des mécanismes de garantie des dépôts constitue à cet égard un facteur important.

M. Beck revient sur cinq des points abordés dans les dernières interventions. En ce qui concerne la taxation des banques, il souligne qu'une taxe sur les transactions n'est proposée que par certains États, et elle n'a aucune incidence automatique ni majeure sur la prise de risque ; en revanche, elle pèse automatiquement sur le consommateur, puisque c'est lui qui doit l'acquitter. Elle a aussi un effet négatif sur l'accès aux services financiers, puisqu'elle repousse les pauvres vers le secteur informel. C'est la raison pour laquelle la Colombie exclut du champ d'application de cette taxe certaines transactions jusqu'à un montant donné. Quelle que soit la position que l'on adopte vis-à-vis d'une taxe sur les transactions, de la taxe sur les banques, ou de la taxe sur l'activité proposée par le gouvernement allemand, ces taxes devraient être imposées à une échelle au moins européenne pour éviter de fausser la concurrence, puisque les banques peuvent y échapper au travers de leurs filiales ou même de leurs agences situées ailleurs en Europe.

Deuxièmement, M. Beck estime qu'un niveau élevé de taux d'intérêt ne reflète pas nécessairement un manque de concurrence. Au vu des cinq années qui ont précédé la crise mondiale, les taux d'intérêt étaient probablement trop faibles, en particulier pour les financements à long terme et les projets risqués. Le relèvement des taux d'intérêt et le redressement de la courbe des rendements peuvent s'expliquer par les conditions macroéconomiques plutôt que par les pressions de la concurrence. Le défaut de concurrence devrait toutefois faire l'objet de plus amples études, et les autorités de la concurrence font partie des institutions qui devraient s'en charger.

Troisièmement, les produits sûrs ne manquent pas sur le marché. Il se souvient que, quand il vivait à Washington, il y avait toujours, dans la banque où il était client, une grande affiche près du conseiller de clientèle, annonçant que tels et tels produits étaient assurés par la FDIC ; mais les produits d'investissement ne sont pas assurés. La transparence est importante, et le rôle des autorités de la concurrence est précisément d'empêcher que des obligations de Lehmann Brothers soient vendues comme

des placements sûrs aux retraités, et de faire en sorte que les gens obtiennent les produits qu'ils devraient ou veulent avoir.

Quatrièmement, les *living wills* sont très importants, et les banques peuvent être divisées en différentes parties dans le cadre d'un processus de liquidation. De nombreux pays, dont les États-Unis et l'Argentine, ont appliqué avec succès la procédure de séparation entre banque saine et structure de défaillance. Cela montre qu'on peut séparer certaines branches qui sont saines ou plus critiques pour le fonctionnement du système financier, puis les vendre à d'autres banques où elles seront intégrées avec d'autres unités. Lors de la faillite de Lehmann Brothers, certaines unités ont été bien vendues peu de temps après.

Enfin, M. Beck convient avec les Pays-Bas que la collaboration internationale est importante, quoiqu'insuffisante. On a vu un effort de coopération et de coordination dans le cas de Fortis, mais le démantèlement de Fortis n'était cependant pas suffisant et aurait pu être traité plus efficacement par une autorité de liquidation supranationale.

2.12 Réglementation et concurrence : le point de vue des marchés financiers

Le Président invite ensuite M. John Coffee, de l'Université Columbia, à donner son point de vue sur les stratégies de sortie.

M. Coffee précise qu'il n'est pas spécialiste de la concurrence mais plutôt de la gouvernance d'entreprise et des marchés financiers. Il assiste à des réunions comme celle-ci environ deux fois par mois et il est fasciné de constater que ce groupe examine des questions différentes avec un vocabulaire différent. Un groupe de la même taille mais axé sur les marchés financiers admettrait très vite qu'une nouvelle institution financière importante va faire faillite à court ou moyen terme, quoi que l'on fasse. La question serait alors formulée de la façon suivante : vaut-il mieux régler le problème *ex ante* ou *ex post* ? Le FMI propose une méthode *ex ante* sous la forme d'une taxe sur les banques – et non d'une taxe sur les transactions. La méthode *ex post* consiste à imposer la fusion indiscriminée avec d'autres banques, comme cela a souvent été fait aux États-Unis. Le débat porterait sur cette question.

Il y aurait aussi débat sur Bâle III et le ratio d'endettement, et les désaccords seraient vifs parce que le secteur des établissements financiers redoute l'imposition de ratios d'adéquation du capital plus rigoureux et Bâle III en général. Mais tous les autres secteurs diraient qu'il faut rendre les règles plus strictes en la matière et abaisser les ratios d'endettement. Or, comment fait-on pour abaisser les ratios d'endettement ? Dans les autres types de conférences auxquelles il assiste, le débat porterait sur l'incidence du niveau de rémunération des cadres sur le ratio d'endettement, et au moins la moitié de l'assistance affirmerait que les rémunérations sont la cause du problème.

M. Coffee se déclare toutefois quelque peu surpris par le fait que certains participants aujourd'hui aient proposé de restreindre la vente à découvert afin de restaurer la concurrence. Si l'on avance une telle affirmation dans une conférence sur les marchés financiers, on peut se préparer à recevoir une pluie de critiques, parce que la concurrence, sur les marchés de capitaux, ne s'exerce pas simplement entre les acteurs mais aussi entre le long et le court terme. Si l'on veut une stratégie de sortie et l'atténuation des distorsions sur le marché, il ne faut pas supprimer la vente à découvert. On peut imposer des obligations de divulgation et restreindre la vente à découvert « à nu », mais maintenant que la crise est en grande partie terminée, il recommanderait plutôt une stratégie de sortie qui élimine les restrictions à la vente à découvert, de façon à laisser les participants restaurer un équilibre naturel sur le marché. Il serait utile que les spécialistes de la concurrence et les experts des marchés de capitaux se réunissent pour mieux comprendre les aspects positifs et négatifs des ratios d'endettement, de la rémunération des cadres et des pressions des actionnaires sur la direction des entreprises, parce que c'est sur ces points que les débats seraient les plus intenses dans une réunion consacrée aux marchés financiers.

3. Synthèse du Président

Le Président fait observer qu'il est très intéressant, pour l'OCDE et le Comité de la concurrence, de savoir à quel point on peut intégrer les idées et les préoccupations des spécialistes de la concurrence avec les opinions des experts des marchés financiers et du Comité. Certains arguments ont été avancés du point de vue de la concurrence au sujet de la restauration de la concurrence, mais aussi concernant la possibilité de faire payer les banques pour une partie des préjudices qu'elles ont causés. C'est là un sujet un peu plus controversé, parce qu'on peut se demander si cela ne va pas affaiblir les banques. Quant aux questions « Que pouvons-nous faire ou suggérer, en tant qu'autorités de la concurrence ? » et « L'enchaînement des étapes est-il bon ? », elles n'ont pas trouvé de réponse. « Disposons-nous des bons instruments ? » est une autre question qui est restée sans réponse. « Avons-nous le pouvoir et la capacité d'intervenir ? » : encore un point d'interrogation. Le groupe n'a pas réussi à formuler des réponses à toutes ces questions, même si certaines pistes ont été suggérées en toute dernière partie. La valeur ajoutée de l'OCDE se situe entre autres dans son aptitude à exploiter les idées des participants et à les replacer dans le contexte de la réflexion sur les marchés des capitaux.

Le Président considère qu'un consensus s'est dégagé pour, comme l'a exprimé le délégué de la Belgique, trouver une protection définitive contre de futures crises. C'est peut-être une utopie, mais certaines des suggestions qui ont été faites, et que M. Beck a commentées, sont utiles. L'une d'entre elles a été réalisée aux Pays-Bas, avec les instruments simples que l'on cherchait. Les questions de transparence, l'instauration de règles du jeu équitables, ainsi que les tentatives d'éviter les obstacles à la sortie et de ménager une place pour l'innovation sont autant de questions qui relèvent du bon sens mais auxquelles il est utile de réfléchir.