Global Forum on Competition 2011

Introduction
This publication includes the documentation presented at the tenth anniversary meeting of the Global Forum on Competition held in Paris in February 2011.

Overview
The programme of the Forum included two main sessions on Cross-border Merger Control and on Crisis Cartels.

Related Topics
Cross-Border Merger Control: Challenges for Developing and Emerging Economies (2011)
Crisis Cartels (2011)
Competition, State Aids and Subsidies (2010)
Merger Remedies (2003)
OECD

GLOBAL FORUM ON COMPETITION

Tenth Meeting
17-18 February 2011

BACKGROUND DOCUMENTATION
TABLE OF CONTENTS
OPENING SESSION

Draft Agenda [English/ Français]
Opening remarks by Mr. Angel Gurría
Keynote speech by Mr. Otaviano Canuto
Introductory comments by Mr. Frédéric Jenny

SESSION I ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Call for Contributions [English/ French] DAF/COMP/GF(2010)8
Background note [English/ French] DAF/COMP/GF(2011)1

Contributions:

Australia DAF/COMP/GF/WD(2011)31
Brazil DAF/COMP/GF/WD(2010)83
Bulgaria DAF/COMP/GF/WD(2010)81
Chile DAF/COMP/GF/WD(2011)27
China DAF/COMP/GF/WD(2010)79
Colombia DAF/COMP/GF/WD(2010)78
Croatia DAF/COMP/GF/WD(2011)9
Czech Republic DAF/COMP/GF/WD(2011)32
European Union DAF/COMP/GF/WD(2011)23
Finland DAF/COMP/GF/WD(2010)89
Japan DAF/COMP/GF/WD(2011)26
Korea DAF/COMP/GF/WD(2011)2
Lithuania DAF/COMP/GF/WD(2010)74
Mexico DAF/COMP/GF/WD(2010)90
Mongolia DAF/COMP/GF/WD(2011)16
Morocco (MAEG) [French/ English] DAF/COMP/GF/WD(2011)13
Pakistan DAF/COMP/GF/WD(2011)12
Poland DAF/COMP/GF/WD(2011)19
Russian Federation DAF/COMP/GF/WD(2011)1
Singapore DAF/COMP/GF/WD(2010)71
South Africa DAF/COMP/GF/WD(2011)38
Slovak Republic DAF/COMP/GF/WD(2010)76
Switzerland DAF/COMP/GF/WD(2010)85
Presentations:
Mr. Marcelo Calliari
Mr. Maher Dabbah
Mr. Akira Goto
Mr. John Taladay
Mr. Han Li Toh
Mr. Joseph Wilson

SESSION III  CRISIS CARTELS

Crisis Cartels  DAF/COMP/GF(2011)11
Executive Summary
Synthèse
Background Note
Note de Référence

Contributions:
Bulgaria
Colombia
Croatia
European Union
Germany
Greece
Ireland
Japan
Jordan
Korea
Korea
Mongolia
Norway
Peru Philippines
Russian federation
Senegal
Sénégal Singapore
South Africa
Chinese Taipei
United Kingdom
United States
Zambia

Contribution by Mr. Ian Christmas [English / French]
Contribution by Mr. Steve McCorriston [English / French]
Contribution by Mr. Andrew Sheng [English / French]

Presentations

Colombia
Indonesia
Mr. Frédéric Jenny
Mr. Ian Christmas
Mr. Simon Evenett
Mr. Steve McCorriston
Mr. Andrew Sheng

Summary of Discussion
Compte Rendu de la Discussion
DRAFT AGENDA

(English version)
TENTH MEETING OF THE OECD GLOBAL FORUM ON COMPETITION
17-18 February 2011
OECD Conference Centre, Paris (Room 1)

DRAFT AGENDA
(as at 16 February 2011)

CHAIR: Frédéric JENNY
Chairman of the OECD Competition Committee (France)

Thursday 17 February

OPENING SESSION
(9.00am-9.30am)

OPENING REMARKS
Angel GURRIÁ
Secretary-General
OECD

KEYNOTE SPEAKER
Otaviano CANUTO
Vice-President
The World Bank

INTRODUCTORY COMMENTS
Frédéric JENNY

(9.30am-10.00am) COFFEE BREAK

SESSION I
(10.00am-12.30pm)

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Chair: Felipe IRARRÁZABAL (Fiscal Nacional Económico, FNE, Chile)

Background Note DAF/COMP/GF(2011)1

1. General overview of the challenges in cross-border merger cases for DEEs
   
   Speakers: Maher DABBAH (Director, Interdisciplinary Centre for Competition Law and Policy, University of London); Akira GOTO (Commissioner, Fair Trade Commission, Japan)

2. Challenges with international cooperation on cross-border merger cases
   
   Speaker: Joseph WILSON (Commissioner, Competition Commission of Pakistan)

GENERAL DISCUSSION

(12.30pm-3.00pm) LUNCH BREAK
SESSION I (Cont’d)
(3.00pm-5.00pm)

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

3. Remedies in cross-border merger cases

   Speaker: Han Li TOH (Assistant Chief Executive, Legal and Enforcement
      Division, Competition Commission of Singapore)

4. Addressing challenges from private and agency perspective

   Speakers: John TALADAY (Partner, Howrey LLP, United States);
      Marcelo CALLIARI (Chair, IBRAC; Partner, TozziniFreire Advogados, Brazil)

GENERAL DISCUSSION

For information:
Call for contributions  DAF/COMP/GF(2010)8

Written contributions:
Australia          DAF/COMP/GF/WD(2011)31
Brazil            DAF/COMP/GF/WD(2010)83
Bulgaria          DAF/COMP/GF/WD(2010)81
Chile             DAF/COMP/GF/WD(2011)27
China             DAF/COMP/GF/WD(2010)79
Colombia          DAF/COMP/GF/WD(2010)78
Croatia           DAF/COMP/GF/WD(2011)9
Czech Republic    DAF/COMP/GF/WD(2011)32
European Union    DAF/COMP/GF/WD(2011)23
Finland           DAF/COMP/GF/WD(2010)89
Japan             DAF/COMP/GF/WD(2011)26
Korea             DAF/COMP/GF/WD(2011)2
Lithuania         DAF/COMP/GF/WD(2010)74
Mexico            DAF/COMP/GF/WD(2010)90
Mongolia          DAF/COMP/GF/WD(2011)16
Morocco (CC)      DAF/COMP/GF/WD(2010)80
Morocco (MAEG)    DAF/COMP/GF/WD(2011)13
Pakistan          DAF/COMP/GF/WD(2011)12
Poland            DAF/COMP/GF/WD(2011)19
Russian Federation DAF/COMP/GF/WD(2011)1
Senegal           DAF/COMP/GF/WD(2011)18
Singapore         DAF/COMP/GF/WD(2010)71
South Africa      DAF/COMP/GF/WD(2011)38
Slovak Republic   DAF/COMP/GF/WD(2010)76
Switzerland       DAF/COMP/GF/WD(2010)85
Chinese Taipei    DAF/COMP/GF/WD(2011)4
Tunisia           DAF/COMP/GF/WD(2010)77
United Kingdom    DAF/COMP/GF/WD(2011)22
United States     DAF/COMP/GF/WD(2011)29
Ukraine           DAF/COMP/GF/WD(2010)75
CONSIDERATION OF FUTURE TOPICS
Suggestions by Chairman JENNY

COCKTAIL – GFC 10th MEETING ANNIVERSARY (Château)

Friday 18 February

CRISIS CARTELS

Chair: Prem Narayan PARASHAR (Member, Competition Commission of India)
Moderator: Simon EVENETT (Professor, University of St. Gallen, Switzerland)

Background Note

1. Crisis Cartels: Does one size fit all? Historical lessons
   Lead: Simon EVENETT
   Open discussion

2. Crisis Cartels and reallocation of resources
   The case of steel
   Speaker: Ian CHRISTMAS (Director General, World Steel Association)
   Open discussion

3. Crisis Cartels and price instability in developing countries
   The case of food
   Speaker: Steve MCCORRISTON (Professor, University of Exeter, UK)
   The case of coffee
   Speaker: Frédéric JENNY
   Open discussion

4. Is there a trade-off between development and efficiency justifying crisis cartels?
   The case of financial services
   Speaker: Andrew SHENG (Adviser, Banking Regulatory Commission, China)

Wrap up by Simon EVENETT

GENERAL DISCUSSION
For information:
Call for contributions DAF/COMP/GF(2010)9

Written contributions:
Bulgaria DAF/COMP/GF/WD(2010)82
Colombia DAF/COMP/GF/WD(2011)39
Croatia DAF/COMP/GF/WD(2011)10
European Union DAF/COMP/GF/WD(2011)20
Germany DAF/COMP/GF/WD(2011)28
Greece DAF/COMP/GF/WD(2011)15
Ireland DAF/COMP/GF/WD(2011)21
Japan DAF/COMP/GF/WD(2011)25
Jordan DAF/COMP/GF/WD(2011)14
Korea DAF/COMP/GF/WD(2010)73
Mongolia DAF/COMP/GF/WD(2011)17
Norway DAF/COMP/GF/WD(2010)86
Peru DAF/COMP/GF/WD(2011)24
Philippines DAF/COMP/GF/WD(2011)35
Russian Federation DAF/COMP/GF/WD(2011)7
Senegal DAF/COMP/GF/WD(2011)30
Singapore DAF/COMP/GF/WD(2010)72
South Africa DAF/COMP/GF/WD(2010)91
Chinese Taipei DAF/COMP/GF/WD(2011)6
United Kingdom DAF/COMP/GF/WD(2011)5
United States DAF/COMP/GF/WD(2011)11
Zambia DAF/COMP/GF/WD(2011)37

(1.00pm-2.30pm) LUNCH BREAK

SESSION III (Cont’d) CRISIS CARTELS: BREAKOUT SESSIONS [See Annex for more details]
The discussion will focus on:

Theme 1: The role of evaluation criteria and procedures for dealing with crisis cartels

Theme 2: The role of cartels in restructuring a declining industry versus in industries subject to transitory shocks

Theme 3: The role for cartels in the current economic crisis

Chairs of the three Breakout Sessions:
• Geronimo SY (Department of Justice, Philippines)
• David MILLER (Fair Trading Commission, Jamaica)
• Thula KAIRA (Executive Director, Zambian Competition Commission)

FINAL SESSION EVALUATION AND PROPOSALS FOR FUTURE WORK
Chair: Frédéric JENNY
Reports by Chairs of Breakout Sessions
Sum up by Mr. JENNY
ANNEX

PRACTICAL INFORMATION

Registration

Forum participation is by invitation only. It is restricted to government representatives and selected invitees from the business community and civil society. No financial support is available for participant’s travel to and stay in Paris. Registration is mandatory. For non-members, registration should be done as soon as possible and no later than 3 December 2010 by email to or fax +33 (0) 1 45 24 89 73. Members should register as usual through their permanent delegations in Paris.

When you arrive at the OECD Centre with your registration form, you will need to present an identity card or passport to obtain your Forum badge. Badges will be delivered at the Welcome Desk upon arrival. The desk will open at 8.00am on Thursday 17 February 2011. Given the high number of participants, you should allow a minimum of 30 to 45 minutes for the registration. The GFC will start at 9 am sharp. Late arrivals in the meeting room will not be allowed during the speech of the OECD Secretary General.

Documentation

The Global Forum on Competition website (http://www.oecd.org/competition/globalforum) will be our vehicle for conveying general information and documentation. Unless explicitly requested not to do so, we will reproduce written contributions on the site. GFC participants will find the background documentation and the agenda on their table upon their arrival in Room 1 where the Forum will take place. In a bid to be environmentally friendly, we will not circulate paper copies of the numerous country contributions. Please bring your own copies with you. Participants will also be able to access them on their personal computers through the OECD’s WiFi access in the room.

Seating arrangements

Participants will be seated by country/economy in French alphabetical order, followed by international organisations and representatives from business and civil society. Given the large number of delegations represented at the Forum, access to seats equipped with a microphone is limited. In principle, each delegation will have a minimum of one seat with a microphone. For countries with large delegations, the allocation of more seats equipped with a microphone will be considered. Such allocation will be made according to registrations on a first come, first served basis. A number of seats without a microphone will also be available in the rear of the room.

Breakout Sessions

For the discussion on “Crisis Cartels” on Friday 18 February, three breakout sessions are organised in addition to the Plenary session to allow a more informal and lively dialogue among fewer participants. Allocation to the three meeting rooms will be done according to the French alphabetical order. The aim of the breakout sessions is to allow for discussion of the topics raised in the plenary session on crisis cartels, including the sector specific elements. Participants of each breakout session will be able to benefit from the presence of the sector specific experts as these will rotate between sessions. Participants are kindly invited to observe the timing and return to the Plenary session immediately after the breakout sessions. The chairs of the 3 sessions will briefly report to the Plenary on the discussions in their respective session.
Working Methods

Discussions will be held in the two OECD official languages (English and French), with simultaneous interpretation. The Chairman (and Session Chairs where relevant) will use traffic lights to regulate the timing of interventions. The high number of participants means that participants will need to be disciplined in their interventions in order to allow as many delegates as possible to have the opportunity to speak. Interventions should be as concise as possible, and each intervention will be limited to a maximum of five minutes. For the session on Cross-border Mergers, time constraints may not permit the presentation of the numerous written contributions. Countries who have contributed in writing will be notified in advance if the session’s Chair intends to call upon them to make brief comments on specific points from their written contributions. We will do our best to warn those concerned as soon as feasible, but the late receipt of some country contributions often delays this process. Consequently, countries may not be notified until a few days before or even, on the eve or on the first day of the Forum. Please carefully check your emails on those days since this will be the only way to communicate efficiently with you. For the session on Crisis Cartels, the Secretariat will inform the scheduled speakers of the time allocated to them. They are kindly invited to keep their presentations strictly within the indicated limits. This should allow for periods of general discussion long enough to encourage lively exchanges among participants.

Press

Journalists will be present in the GFC Plenary Room during the Opening Session. They will be allowed to stay for the remaining part of the morning. They will be asked to observe Chatham House rules, i.e. they will not quote the names of the country or speaker.

Accommodation, Visas, About the Conference Centre

The list of hotels is provided on the OECD Conference centre website for convenience (www.oecd.org/conferencecentre). This is neither an OECD recommendation nor a guarantee of quality.

European Union citizens do not require a visa for entry into France. For others, depending on your nationality, the length and purpose of your stay in France, a visa may be required before departure. For further information, please consult the French Foreign Affairs Ministry website.

Please note that the OECD cannot organise a visa on your behalf and that there are long deadlines to get visas in some countries. A personalised invitation letter can be provided by the OECD for the purpose of getting a visa if necessary.

The OECD Conference Centre provides all necessary facilities including phone booths, Wi-Fi access, and computers with Internet connexion with free access, shops, coffee bars, snack bar and Delegates’ restaurant.

General information

<table>
<thead>
<tr>
<th>Currency</th>
<th>Euro (€, EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electricity</td>
<td>220 V, 50 Hz</td>
</tr>
<tr>
<td>Time Zone</td>
<td>GMT/UTC + 1 (Central European Time)</td>
</tr>
<tr>
<td>Telephone Area Code</td>
<td>The international code to call France is “+ 33”. When calling from abroad, the number should be dialled without the first “0”. When calling from France, Paris numbers always start with “01” and French cell phone numbers always start with “06”.</td>
</tr>
</tbody>
</table>
DRAFT AGENDA

(French version)
DIXIÈME RÉUNION DU FORUM MONDIAL SUR LA CONCURRENCE

17-18 février 2011
Centre de Conférences de l’OCDE, Paris (Salle 1)

ORDRE DU JOUR PROVISOIRE

(au 16 février 2011)

PRÉSIDENT: Frédéric JENNY
Président du Comité de la Concurrence de l’OCDE (France)

Jeudi 17 février

SESSION D’OUVERTURE
(9h00-9h30)

ALLOCATION D’OUVERTE
Angel GURRÍA
Secrétaire général
OECD

INTERVENANT PRINCIPAL
Otaviano CANUTO
Vice Président
Banque Mondiale

INTRODUCTION
Frédéric JENNY

(9h30-10h00)
PAUSE CAFÉ

SESSION I
(10h00-12h30)

TABLE-RONDE SUR LE CONTRÔLE DES FUSIONS TRANSNATIONALES : DÉFIS À RELEVER POUR LES PAYS EN DÉVELOPPEMENT ET LES ÉCONOMIES ÉMERGENTES

Président : Felipe IRARRÁZABAL (Fiscal Nacional Económico, FNE, Chili)

Note de référence DAF/COMP/GF(2011)1

1. Vue d’ensemble des défis à relever par les pays en développement et les économies émergentes dans le cas des fusions transnationales

Intervenants: Maher DABBAH (Directeur, Interdisciplinary Centre for Competition Law and Policy, University of London); Akira GOTO (Commissaire, Fair Trade Commission, Japon)

2. Défis posés à la coopération internationale dans le cas des fusions transnationales

Intervenant: Joseph WILSON (Commissaire, Competition Commission of Pakistan)

DISCUSSION GÉNÉRALE

(12h30-15h00)
PAUSE DÉJEUNER
3. **Les mesures correctives dans les cas des fusions transnationales**

   Intervenant: Han Li TOH (Assistant Chief Executive, Legal and Enforcement Division, Competition Commission of Singapore )

4. **Relever les défis: perspective privée et perspective de l'autorité de la concurrence**

   Intervenants: John TALADAY (Associé, Howrey LLP, États-Unis); Marcelo CALLIARI (Président, IBRAC; Associé, TozziniFreire Advogados, Brésil)

**DISCUSSION GÉNÉRALE**

Pour information: Appel à contributions DAF/COMP/GF(2010)8

**Contributions écrites:**

Afrique du Sud DAF/COMP/GF/WD(2011)38  
Australie DAF/COMP/GF/WD(2011)31  
Brésil DAF/COMP/GF/WD(2010)83  
Bulgarie DAF/COMP/GF/WD(2010)81  
Chili DAF/COMP/GF/WD(2011)27  
Chine DAF/COMP/GF/WD(2010)79  
Colombie DAF/COMP/GF/WD(2010)78  
Corée DAF/COMP/GF/WD(2011)2  
Croatie DAF/COMP/GF/WD(2011)9  
États-Unis DAF/COMP/GF/WD(2011)29  
Finlande DAF/COMP/GF/WD(2010)89  
Japon DAF/COMP/GF/WD(2011)26  
Lituanie DAF/COMP/GF/WD(2010)74  
Maroc (CC) DAF/COMP/GF/WD(2010)80  
Maroc (MAEG) DAF/COMP/GF/WD(2011)13  
Mexique DAF/COMP/GF/WD(2010)90  
Mongolie DAF/COMP/GF/WD(2011)16  
Ouzbékistan DAF/COMP/GF/WD(2010)84  
Pakistan DAF/COMP/GF/WD(2011)12  
Pologne DAF/COMP/GF/WD(2011)19  
République Slovaque DAF/COMP/GF/WD(2010)76  
République Tchèque DAF/COMP/GF/WD(2011)32  
Royaume-Uni DAF/COMP/GF/WD(2011)22  
Russie DAF/COMP/GF/WD(2011)1  
Sénégal DAF/COMP/GF/WD(2011)18  
Singapour DAF/COMP/GF/WD(2010)71  
Suisse DAF/COMP/GF/WD(2010)85  
Taipei Chinois DAF/COMP/GF/WD(2011)4  
Tunisie DAF/COMP/GF/WD(2010)77  
Ukraine DAF/COMP/GF/WD(2010)75  
Union Européenne DAF/COMP/GF/WD(2011)23
SESSION II
(17h00-17h30)  PERSPECTIVES DE TRAVAUX FUTURS
Suggestions par le Président JENNY

(17h30-19h30)  COCKTAIL – 10ème ANNIVERSAIRE DU GFC (Château)

Vendredi 18 février

SESSION III
(9h30-13h00)  ENTENTES DE CRISE

Président: Prem Narayan PARASHAR (Membre, Competition Commission, Inde)
Modérateur: Simon EVENETT (Professeur, University of St. Gallen, Suisse)

Note de référence  DAF/COMP/GF(2011)6

1.  Ententes de crise: la même approche convient-elle à tous ? Leçons de l’histoire
    Orateur principal: Simon EVENETT
    Débat

2.  Ententes de crise et redistribution des ressources
    Le cas de l’acier  DAF/COMP/GF(2011)5
    Intervenant: Ian CHRISTMAS (Directeur général, World Steel Association)
    Débat

3.  Ententes de crise et instabilité des prix dans les pays en développement
    Le cas des produits alimentaires  DAF/COMP/GF(2011)4
    Intervenant: Steve MCCORRISTON (Professeur, University of Exeter, Royaume-Uni)
    Le cas du café
    Intervenant: Frédéric JENNY
    Débat

4.  Y a-t-il un compromis entre le développement et l’efficacité qui justifierait les ententes de crise ?
    Le cas des services financiers  DAF/COMP/GF(2011)3
    Intervenant: Andrew SHENG (Conseiller, Banking Regulatory Commission, Chine)

Conclusions par Simon EVENETT

DISCUSSION GÉNÉRALE
Pour information:
Appel à contributions: DAF/COMP/GF(2010)9

Contributions écrites:
Allemagne: DAF/COMP/GF/WD(2011)28
Colombie: DAF/COMP/GF/WD(2011)39
Croatie: DAF/COMP/GF/WD(2011)10
États-Unis: DAF/COMP/GF/WD(2011)11
Grèce: DAF/COMP/GF/WD(2011)15
Irlande: DAF/COMP/GF/WD(2011)21
Jordanie: DAF/COMP/GF/WD(2011)14
Mongolie: DAF/COMP/GF/WD(2011)17
Peru: DAF/COMP/GF/WD(2011)24
Philippines: DAF/COMP/GF/WD(2011)35
Russie: DAF/COMP/GF/WD(2011)7
Sénégal: DAF/COMP/GF/WD(2011)30
Singapour: DAF/COMP/GF/WD(2010)72
Taipei Chinois: DAF/COMP/GF/WD(2011)6
Union Européenne: DAF/COMP/GF/WD(2011)20
Zambie: DAF/COMP/GF/WD(2011)37

(13h00-14h30) PAUSE DÉJEUNER

SESSION III (Suite)
(14h30-17h00)
ENTENTES DE CRISE : SOUS-SESSIONS [Voir l’Annexe pour plus d’informations]
La discussion se concentrera sur :

Thème 1: Le rôle des critères et mécanismes d’évaluation en matière d’ententes de crises

Thème 2: Ententes de crise : leur rôle dans la restructuration des industries en déclin et dans les industries soumises à des chocs transitoires

Thème 3: Le rôle des ententes de crise dans la crise économique actuelle

Présidents des trois sous-sessions:
• Geronimo SY (Ministère de la justice, Philippines)
• David MILLER (Fair Trading Commission, Jamaïque)
• Thula KAIRA (Directrice Exécutive, Zambian Competition Commission)

SESSION FINALE
(17h00-17h30)
ÉVALUATION ET PROPOSITIONS DE TRAVAUX FUTURS
Président: Frédéric JENNY
Rapports des Présidents des sous-sessions
Conclusions par M. JENNY
ANNEXE
INFORMATIONS PRATIQUES

Inscription

La participation au Forum est ouverte aux participants sur invitation uniquement. Elle est réservée aux représentants des gouvernements et à certains invités issus des milieux d’affaires et de la société civile. Veuillez noter qu’aucune aide financière ne sera versée pour votre déplacement et votre séjour à Paris. L’inscription est obligatoire. Pour des participants venant des pays non-membres, l’inscription doit être effectuée le plus tôt possible et avant le 3 décembre 2010 par email ou par fax au +33 (0) 1 45 24 96 95. Les participants de pays membres doivent s’inscrire par le biais de leur délégation permanente comme d’habitude.

Lorsque vous arriverrez au Centre de conférences de l’OCDE, vous devrez présenter votre carte d’identité ou votre passeport afin d’obtenir votre badge pour la réunion du Forum. Les badges seront remis au bureau d’accueil à l’arrivée des participants. Le bureau d’accueil ouvrira à 8 heures le jeudi 17 février 2011. Compte tenu du grand nombre de participants, il vous faut prévoir entre 30 et 45 minutes pour accomplir cette formalité. Le Forum débutera à 9 heures précises. Les retardataires ne pourront pas accéder à la salle de réunion pendant le discours du Secrétaire général de l’OCDE.

Documentation

Vous pourrez trouver sur le site Web du Forum (http://www.oecd.org/competition/globalforum) des informations d’ordre général ainsi que la documentation relative au Forum. Sauf refus exprès, nous reproduisons les contributions écrites sur le site. Les participants au Forum mondial sur la concurrence viseront à approfondir la discussion sur des questions déjà soulevées pendant la séance plénière, y compris sur des éléments plus spécifiques à chaque secteur. Les participants bénéficieront de la présence d’experts des différents secteurs qui participeront aux trois sous-sessions à tour de rôle. Les participants sont priés de respecter le temps imparti et de retourner en séance plénière dès la fin des sous-sessions.
Méthodes de travail

Les débats se dérouleront dans les deux langues officielles de l'OCDE (l'anglais et le français) et feront l'objet d'une interprétation simultanée. Le Président (et les présidents de session, le cas échéant) utiliseront des voyants lumineux de couleurs semblables à celles des feux de signalisation pour réguler les temps de parole. En raison de leur grand nombre, les participants devront faire preuve de discipline lors de leurs interventions afin qu'un maximum de délégués aient la possibilité de s'exprimer. Les interventions devront être aussi concises que possible et en tout état de cause ne pas dépasser cinq minutes. Pour des raisons de temps, lors de la session sur le contrôle des fusions transnationales, il ne sera peut-être pas possible de présenter les nombreuses contributions écrites. Les représentants de pays ayant envoyé de telles contributions seront informés à l'avance si le président de la session compte les inviter à formuler de brefs commentaires sur certains points. Nous ferons de notre mieux pour avertir les personnes concernées dès que possible, mais la réception tardive de certaines contributions de pays retarderait souvent ce processus, aussi les pays risquent-ils de n'être informés que quelques jours à l'avance, voire la veille ou même le premier jour de la réunion du Forum. Veuillez consulter attentivement votre messagerie électronique durant les jours précédant le Forum dans la mesure où l'envoi de courriers électroniques sera l'unique moyen de communiquer efficacement avec vous. Pour la session sur les ententes de crise, le Secrétariat informera les orateurs prévus à l'ordre du jour du temps de parole leur étant alloué. Cette organisation devrait permettre de dégager des temps de discussion générale suffisants pour des échanges interactifs.

Presse

Les journalistes pourront assister à la séance d'ouverture du Forum en salle plénière. Ils seront autorisés à rester jusqu'à la fin de la matinée. Il leur sera demandé de respecter la règle dite de Chatham House, en vertu de laquelle il est interdit de citer les noms des pays ou des orateurs.

Logement, visas et renseignements sur le Centre de conférences

Une liste d'hôtels figure sur le site Internet de l'OCDE à toutes fins utiles (www.oecd.org/conferencecentre). Il ne s'agit en aucun cas d'une recommandation de l'OCDE, qui ne garantit pas la qualité des prestations offertes par les établissements répertoriés.

Les citoyens de l'Union européenne n'ont pas besoin de visa pour entrer en France. Pour les autres, en fonction de leur nationalité, de la durée et de l'objet de leur séjour en France, il pourra être nécessaire qu'ils demandent un visa avant leur départ. Pour plus d’informations, veuillez consulter le site Internet du ministère français des Affaires étrangères.

Veuillez noter que l'OCDE ne peut faire une demande de visa en votre nom et que les délais d’obtention peuvent être longs dans certains pays. Si nécessaire, une lettre d’invitation nominative pourra vous être délivrée aux fins de l’obtention d’un visa.

Le Centre de conférences de l'OCDE offre toutes les commodités : cabines téléphoniques, connexion WiFi, ordinateurs en accès libre connectés à Internet, boutiques, café, snack bar et restaurant pour les délégués.

Renseignements pratiques

<table>
<thead>
<tr>
<th>Monnaie</th>
<th>Euro (€, EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Électricité</td>
<td>220 V, 50 Hz</td>
</tr>
<tr>
<td>Fuseau horaire</td>
<td>GMT/UTC + 1 (heure de Paris)</td>
</tr>
<tr>
<td>Indicatifs téléphoniques</td>
<td>Pour appeler la France depuis l’étranger, composer le préfixe international « + 33 » suivi du numéro sans le premier « 0 ». Lorsqu’on appelle de France, les numéros de postes fixes à Paris commencent toujours par « 01 » et ceux des téléphones portables français par « 06 ».</td>
</tr>
</tbody>
</table>
OPENING SESSION
OPENING REMARKS
BY MR. ANGEL GURRÍA
**10th Meeting of the Global Forum on Competition**

Opening Remarks by Angel Gurría, OECD Secretary-General

Paris, 17 February 2011

Ladies and Gentlemen, good morning to you all:

Welcome to the 10th meeting of the OECD’s Global Forum on Competition. Let me introduce and welcome Mr Otaviano Canuto, Vice-President of the World Bank, who will be our keynote speaker today, and Mr Frédéric Jenny, Chairman of the OECD Competition Committee. Otaviano, Frédéric, your support and commitment have been instrumental to the success of this Forum. Thanks for being here.

**Ten Years After: A New (Challenging) Economic Scenario**

The world economy today is in better shape than it was the last time the Forum met in February 2010. The recovery has firmed up, but we have not yet recovered most of the ground lost during the crisis. Unemployment is still unacceptably high, at 8.3% on average in the OECD area. Youth unemployment is almost twice as high. The output gap is close to 3%.

The crisis left other permanent scars. The financial sector in many of our countries is still not functioning properly. And public accounts are in bad shape, to put it mildly. With an average deficit of 7.6% of GDP and average debt of 100% of GDP, there is a dire need for fiscal consolidation in most of the OECD.

But how to consolidate the public finances without killing the recovery? It’s a difficult balance to achieve. In order to square this circle, we need to push for structural reforms, to increase the efficiency of government spending, to promote more competition. It’s the only way. And that’s where you come in. That’s why your work is so fundamental in the current context.

Falling prey to protectionism to stimulate local growth and employment would be a big mistake. Competition is a fundamental ingredient for a strong and job-rich recovery.

**The Heightened Importance of Competition**

Vigorous competition stimulates productivity and the innovation that is vital for fostering new sources of growth and competitiveness. It prevents market capture by incumbents or large firms. Competitive markets create new employment opportunities, and increase the access of consumers to cheaper and better quality products.

Fair competition is one of the oldest pillars of economic progress. This has been an issue since Roman times, when heavy fines were imposed to those who were deliberately obstructing competition. Many centuries later, we are still struggling to ensure a level playing field. But that playing field is much more complex today.

As economic globalisation has intensified, the scope of competition policy has grown as well. We now face the daunting task of creating level playing fields both domestically and internationally. The crisis was a tough reminder: a global economy needs global rules, and these global rules have to be adhered to by all parties.

Falling prey to protectionism to stimulate local growth and employment would be a big mistake. Competition is a fundamental ingredient for a strong and job-rich recovery.

**The Role of the Global Forum: Cooperation for Competition**

The Global Forum on Competition is the place where we can make this happen. After 10 years of existence, it is now one of the most plural and effective incubators of innovative competition policies. This year we brought together policymakers, experts and officials from close to 90 economies, inter-governmental and non-governmental organisations.

The Forum provides support to competition authorities. It addresses some of the most complex challenges in this area, like fair competition in public procurement or the communication challenges between regulators and competition enforcers; two crucial topics that we have addressed in previous sessions.

This is done through an increasingly open and inclusive approach. Today, there is a growing convergence of interest with our developing and emerging economy partners. We can learn a lot from each other. For instance, our discussions today will also focus on the particular challenges many countries face in dealing with cross-border merger control.

As developing and emerging economies have become more integrated into the global economy, they have been exposed to increasing international merger activity. In reaction to this surge, more countries have introduced merger control rules. But reviewing cross-border transactions is demanding. This may be more so for new and younger competition regimes dealing with institutional and enforcement challenges.

Today’s discussion is an opportunity to consider how international cooperation in cross-border merger control can help countries overcome these challenges.

We will also discuss the issue of crisis cartels, in a session chaired by Mr. Parashar, a member of the Competition Commission of India. Effective cartel deterrence remains a top international priority. The 1998 OECD Recommendation on Hard Core Cartels was the basis for very
important achievements. However, in these difficult times, government reactions to adverse economic conditions or transitory shocks may lean towards restricting competition.

This leads us into new dilemmas. For example, should governments allow or promote cartels as a means to restore stability during a food crisis? What are the alternatives? This is an important issue today, with food prices reaching new heights and several countries, including at the G20, considering policy options.

Ladies and Gentlemen:

We are living indeed a most interesting and challenging moment. The financial and economic crisis has changed our playing field, and some of our ideas about the logics that govern economics. "Principles and practices that were once accepted wisdom are now in doubt or discredited", as Mr. Otaviano Canuto put it in an excellent book that he recently edited, entitled "The Day After Tomorrow".

The essential importance of competition certainly remains, but will our vision of this subject change after witnessing the massive corporate governance and risk management failures in the financial system? Can we go back to business as usual in competition policy advice?

I say this is time for new thinking. And I am confident that a lot of that new thinking will happen here, amongst you.

Have a most productive and interesting Forum.
KEYNOTE SPEECH
BY MR. OTAVIANO CANUTO
KEYNOTE SPEECH BY OTAVIANO CANUTO
World Bank Vice President
For Poverty Reduction and Economic Management (PREM)

OECD Global Forum on Competition (10th anniversary meeting)
OECD Conference Centre, Paris, February 17, 2011
(as prepared for delivery)

Introductory Remarks:

1. **What we know but is not well enough acted upon: the benefits of competition**, in particular its positive impact on entrepreneurship, innovation, economic growth, and poverty reduction.

2. **What often gets in the way of effective implementation: political economy challenges** of those adversely affected by competition seeking to preserve their status quo rents, combined with insufficient understanding and implementation of effective competition policies within government.

3. **What are key directions for moving forward: a need to scale up competition work especially in developing countries**, in cooperation with OECD, other international organizations and regional, national and local stakeholders.

1. **Benefits of Competition: Innovation and Growth**

- Competition is the key driving incentive for innovation: an empirical result that we have found in several countries is that firms facing more competition pressure are more likely to have introduced new products and upgraded existing product lines.

- The global innovation and productivity increases from applying new knowledge have caused far more than 50% of economic growth, and we have over the years better understood the importance of product market competition in spurring such innovation, driven by a dynamic interaction between incumbent firms and entrepreneurial start-ups. Examples:

- In a recent empirical study of the effect of Chinese import competition on firms in 12 European countries, Nick Bloom and colleagues highlight the 2 key competition mechanisms driving innovation:

  - First, selection across firms, with competition moving employment and market share toward the more innovative and technologically advanced firms as firms using low-tech production methods shrink and exit.

  - The second effect, competition leads to within-firm efficiency increases, raising R&D, patenting, IT and Total Factor Productivity. These selection and within-firm effects of competition were about equal in magnitude, and accounted for around 15% of European technology upgrading in those 12 countries between 2000 and 2007.
A related joint work between researchers at the Bank and OECD on Chile finds a positive and robust effect of import competition on product quality upgrading.

A complementary line of work in developing countries has examined the impact of lack of competition in upstream sectors with spillover effects throughout the economy. In road freight services, a recent Bank study found that poor quality feeder roads in Malawi segmented international and domestic markets, leading only a few providers to enter the local market. Another Bank study demonstrated that on the Chad main corridors, public cartelization through freight bureau intervention doubled transport prices so that the margin for transporters exceeded 100%. Conversely, breaking the Laos cartel and opening transit to all Thai truckers in 2004 reduced logistics costs from Bangkok to Vientiane by 30%. Mexico’s opening up of road freight to competition in 1989 allowed downstream user companies to offer new, previously unavailable products and to reach new areas, with cheaper, more customer-responsive trucking services allowing logistics innovations in downstream user firms.

In the retail sector, the selection effect of competition in the US has been well documented by Haltiwanger and colleagues: they found that aggregate productivity growth is almost exclusively through the exit of less efficient single-store firms and by their replacement with more efficient national chain store affiliates.

Mobile telecoms is another area where the impact of competition has been significant: based on data from 41 African countries, Bank research has found that an additional operator entering the market increases mobile subscribers by 57 percent.

2. Political economy challenges: Predatory vested interests but also insufficiently informed and supported citizens unsure how to face the short-term threats posed by increased competition.

Insufficient competition is a key source of corruption, and increasing competition, limiting the bargaining power of the briber and bribe, is often a more acceptable path to reducing corruption that the direct identification and prosecution of corrupt individuals.

Weak business environments and dysfunctional legal & regulatory frameworks also matter. Together they imply substantial opportunities for rent seeking, fostering symbiotic relationships between public sector officials and established favored companies – that create both a demand and supply for government restrictions to competition. Such restrictions generate rents for both sides and create severe entry and expansion problems for new grass roots entrepreneurs. As a result: both too few new entrepreneurs and a missing middle of dynamic & growing mid-sized firms.

These challenges, in less mature markets, are compounded by:

1. More substantial information asymmetries in credit and product markets; insufficiently dense markets; and concentrated ownership through family owned and managed firms and often large financial-industrial conglomerates – leading infrastructure services and other local essential business inputs to be subject to more persistent monopolization & foreclosure;

2. Industrial and end-use consumers lacking sufficient understanding of the longer-term benefits of competition, with key short-term beneficiaries of competition lacking voice;
3. Government policies not sufficiently taking into account the longer term negative impact of restricting competition by short-term protection of national markets or limiting price increases. For instance, as a response to recent food crises and other price shocks, many governments regulated the prices of strategic goods and gave subsidies that risk crowding out private investment in the long run, rather than intervening through more competition-friendly approaches.

3. Directions for moving forward: scale up competition work especially in developing countries

- Within the last couple of years, the demand by developing countries for competition-related technical advisory services from the Bank Group and other support providers has increased steadily. Over the past year, the WBG has been providing technical assistance on competition through projects among others in ECA (Russia, Romania, Armenia and recently in Kazakhstan), South Asia (Bangladesh, and recently involved in India and Pakistan), and also in Brazil.

- These projects have been focused on improving the effectiveness of the competition framework, assessing the status of competition in key markets, and proposing specific solutions to foster more efficient markets.

- The WBG is also supporting the establishment of a regional center on competition for the LAC region in Mexico, which could become a platform for capacity building within the region.

- On the analytical front, recent research has been conducted in MENA countries regarding distortions to a more level playing field, including an assessment of competition in selected sectors. Competition in the banking sector in MENA, for example, has been found to be lower than in other regions, explained by the region’s worse credit information environment and lower market contestability.

- Going forward, there is a huge payoff from scaling up competition work especially in developing countries, in cooperation with OECD, other international organizations and regional/national/local stakeholders. Competition work should focus on:

  1. **Fostering entry and entrepreneurship by removing competition constraints in key sectors and facilitating access to essential business services.** Inefficiencies in upstream markets, especially of non-tradable inputs to starting and expanding a business, undermine the competitiveness of many industries in developing economies, and these inefficiencies are often due to their inappropriate regulatory and competition frameworks.

     A key competition policy focus should be to promote entrepreneurship, with an emphasis on eliminating barriers to entry and expansion, in particular by fostering market efficiency and facilitating access to essential business services that are local in character such as: transport & communications, distribution warehouses, construction, professional business services and other essential local non-tradable inputs.

  2. **Ensuring pro-competition policies and practices, particular in areas where the government itself can act decisively such as procurement.** Government procurement of goods and services accounts for 15% of GDP for developed economies but is much higher in developing countries, with governments spending as much as 70% of total government expenditures.
Recent work in the area of product market regulation and bid rigging reveals that many developing economies could benefit significantly from more competition in public procurement. For instance, in India the procurement policies of central and state governments typically include a price or quantity preference for public sector enterprises, biasing purchases against the private sector.

More generally, state-owned enterprises and government participation still play a dominant role in many important markets and sectors in many economies. In Romania, state-owned enterprises control at least one firm in 14 key sectors of the economy and exhibit a market share above 50% in at least one segment of the critical network industries. Most African power utilities remain state owned and operated. On average, Africa’s state-owned power utilities embody only 40% of good governance practices for such enterprises.

Joint work between the Bank and OECD on reducing possibilities for bid rigging and favoritism in public procurement could complement other advisory services given to developing country governments and help competition and procurement officials achieve common objectives.

3. **Strengthening regional and international partnerships to help catalyze pro-competition reforms, joining forces between pro-competition reformers across government and private sector stakeholders to create platforms for more effective competition advocacy.** A key challenge moving forward is how to give individuals and institutions promoting competition the status and ability to get more pro-competition policies adopted and effectively implemented.

Importantly, there is a need for more focused programs to promote a “culture of competition” by helping convert “natural allies” into active “champions” of competition both within the private sector (especially existing and new exporters and start-up entrepreneurs that have recently benefited from competition and access to essential business services) as well as within the public sector (high-level policy makers and government officials, as well as interested legislators and judges). Just like business role models are helpful in inspiring young entrepreneurs, a larger number of concrete, easy-to-understand case studies illustrating the benefits of competition are needed to turn natural allies of competition into effective champions and “change agents”.
INTRODUCTORY COMMENTS
BY MR. FRÉDÉRIC JENNY
Introductory Comments by Mr. Frédéric Jenny, Chairman of the Competition Committee

It is indeed very heartening to have just heard both the Vice-President of the World Bank, Mr. Canuto, and the OECD Secretary General, Mr. Gurría, explain how central competition, competition policy and competition law enforcement are to development throughout the world. If this meeting had taken place 20 years ago, I am not sure that we would have had the same enthusiasm for what we, competition people, are doing and what we are trying to improve. This is the 10th Anniversary of the Global Forum. Taking this opportunity, I will say a few words about my recollection of my youth in Lutèce -- as Paris was known at the time... -- when I was a student on economics.

At the time, the competition world was flat. In some sense, it is the opposite of what we have heard from a very famous writer in the US. The world was flat in the sense that in my economic theory text book, there was supply, there was demand and the market was there. The potential entrants were on the margins ready to jump in if there was any monopoly profit to compete either way. The prices were stable. Everybody was happy because the firms were maximising profits and the consumer was maximising his welfare. The world was simple: it was flat. Competition was easy. And then, the world of competition became less and less flat as we started thinking about it, in particular in the context of the OECD, but also in the wider context.

Mr. Canuto has referred to the importance of infrastructures. I remember the 1980's when there were terrible droughts and millions of people died in Ethiopia and when international aid poured into Ethiopia to try to help the Ethiopians avoid such humanitarian disasters. One of the solutions was to deregulate the grain business to get the government not to interfere with the market. This was also to promote some agricultural techniques to avoid dramatic decreases in crops and better predict what the crops would be: that way there could be an international alert system. It actually worked very well for 15 years.

Then came the late 1990s. There were no droughts, but there was a terrible famine in Ethiopia. And the reason was that the market had worked so well that people had come into the field. They planted more and more, the prices had gone down and farmers lose all their money. They therefore decided to stop planting grain because that was the best way to lose all their money. The reason behind this was the absence of infrastructures to take the grain from one place to another place. Nobody had thought that, in order to have competition, infrastructures are necessary. This was not emphasised in my economic theory text book, because it was assumed that there were adequate infrastructures, both in distance and in time. In Ethiopia, there was no silo where to keep the grain for next year. There were smaller crops. There was no way to move crops from one area to another. Weather conditions were very different. The result was market failure even though there was much more competition.
So the first dimension is that competition suddenly became a bit more complicated than we thought. For competition to work, we need various infrastructures, including the ability to hedge risks in the future, including the ability to build these infrastructures to make the market work.

In the early 1990's a lot of countries then moved from a planned economy to a market economy. We all expected that within three or four years, their rate of growth would increase considerably and that they would be quickly part of the international community. Exactly the opposite happened, at least, for the first few years. Russia is a good example of this, but other examples also exist. In a sense, why is that? They moved from a planned economy to a market economy and promoted good principles of competition as we know them from economic theory text books. And it did not work. Why? The reason is the absence of legal background to support a market economy. Ownership rights, contract law were largely undeveloped. There were no bankruptcy laws, so that it was very difficult to organise a reallocation of resources, etc. So herein lays a second level of complexity: if one wants to talk about competition, there is a need also to talk about the legal system. The later will support the economic development in addition to the existence of infrastructures and governments involvement in infrastructures building.

Then, globalisation came. It was negotiated at a world level, still based on the idea that more competition was going to bring more benefits. This is an absolute necessity, and on this I completely agree with what was just said by previous speakers. But globalisation brought a bunch of new issues. The cotton farmers, if I take only one example in Africa, made a very strong point: a more competitive market with very unequal players (and you may have in some countries some local politics that will increase supply) will create world disequilibrium. Such disequilibrium will have serious consequences in their home countries: these farmers only have one crop and it is not so easy for them to reallocate their resources elsewhere. So, all of a sudden, globalisation brought another dimension: policies have to be taken together. Policies need to be co-ordinated. Otherwise, they might end-up with market failures at the world level.

Last step, to make it short, the financial crisis and the economic crisis are such that we may have gone too far in deregulation, at least in some areas. Maybe we should have been more subtle about the relationship between systemic risk and promoting competition and should take this into account. But there is another lesson: competitive markets can fail. Consumers can be irrational; firms can be irrational as well in some cases. Therefore it may be that we should take on board those lessons. I do not mean to eliminate competition, but to think about it in a more complex way by integrating dimensions previously described in order to see how competition could work at best. Over the last fifteen or twenty years, we have really seen an increasing complexity of competition issues and of the relationship of competition to growth, development, welfare and other areas, taking on board more and more dimensions. What revealed those dimensions? They were revealed by the exchanges between developed countries and countries not so developed, coming from a different angle and with a different history or culture. There was a conflict and this had for effect to suddenly show problems which were not obvious when in a certain setting because we were not directly confronted to them.

All this leads me to the Global Forum on Competition. The very nature of the Global Forum is to bring together people from different countries, with different legal structures, different histories, and different sizes of economies, etc. Participants can talk to each other about competition issues and explore their country differences. Why are there differences? What means being more sophisticated with competition tools in the field of cross-border mergers or crisis cartels (as on this 10th GFC’s agenda)? The two topics are excellent examples, as was the informal economy issues discussed in a past Forum, etc.

I will now present my final point. First of all, discussions among countries at various development levels are an extremely useful process for everybody. I was very naive about competition. I think that we are a bit less naive about competition now. Re-thinking about competition in a global context made our life a bit more difficult, but it has enriched the power of this Forum and it has enriched the accuracy of our
analysis. If I had a final word to say, I would say first that I am extremely grateful to the OECD for the creation of the OECD Global Forums, in general, and the Global Forum on Competition, in particular. For now ten years, we have benefitted from global exchanges and the ability to go deeper into understanding of the inter-relation between many challenging issues.

The OECD created the Global Forum on Competition. For the future, I am wondering whether the Global Forum is not going to create the new OECD. And I think the Forum will. This is one of the ways to solve both institutional and intellectual challenges faced by the OECD. The Global Forum on Competition is a very adequate forum to that end. It worked very well over the last ten years. I trust that it will continue to work very well. So, Mr. Gurria, thank you very much for having been with us and allowing us to continue. The World Bank has been a strong supporter of the GFC for almost ten years. I want to really thank its Vice-President, Mr. Canuto, for being with us today. I also want to thank The Bank for the financial support provided to the GFC. This support made the GFC possible. It proved to be very useful and, as said, has helped us become a bit more intelligent than we were when we started in 2001.
SESSION I

CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES
CALL FOR CONTRIBUTIONS

(English version)
TO ALL GLOBAL FORUM PARTICIPANTS

RE: Cross-Border Merger Control: Challenges for Developing and Emerging Economies

Global Forum on Competition (17-18 February 2011)

Session I

Dear GFC Participant,

The OECD Global Forum on Competition will hold a roundtable on challenges faced by developing and emerging economies in the area of cross-border merger control on 17 February 2011. You are invited to make a written contribution to this session by 10 December 2010 at the latest.

Developing and emerging economies face considerable challenges in establishing effective competition law regimes, particularly in the field of merger control. The past two decades have witnessed a surge in the number of cross-border mergers, in both value and volume, alongside an increase in the number of merger control regimes around the world. Developing and emerging economies are becoming more integrated into the global economy, as evidenced by the increase in international merger activity affecting these economies.

However, developing and emerging economies may face challenges when dealing with cross-border merger control, due to their particular political, social and in some cases geographical circumstances. This makes for a highly complex framework, in which all of the following are interwoven in a deep and at times paradoxical interplay: competition policy and other public policies and considerations; jurisdictional, procedural and substantive issues relating to merger control; foreign and domestic interests; legal regimes and business interests; and global and domestic interests and considerations. Such issues are not unique to developing or emerging economies, but individually or collectively they may be more pronounced in economies with younger competition and merger control regimes.

The quality and utility of this roundtable will be greatly strengthened by written contributions from participants. It is of interest to understand the measures, if any, in place or planned by GFC economies to deal with cross-border mergers. Although this session is focused on the challenges faced by developing and emerging economies, the discussion will be further enriched with the experiences of both developed and developing economies. Please include summaries of any recent cases you have dealt with, in addition to any particular issues that have arisen as a result of cross-border mergers in your jurisdiction, and responses to such issues. This will help to inform the Secretariat’s background note.

To assist with the preparation of your contribution, a number of issues and questions are attached to guide your submissions. This is not an exhaustive list and participants are encouraged to raise and address other issues as well, based on their experiences. A suggested bibliography is also attached.
Please advise the Secretariat by 15 October 2010 if you will be making a written contribution. As noted above, written contributions are due by 10 December 2010. This deadline applies to both members and non-members. Failure to meet this deadline may result in the contribution not being taken into account in the preparation of the scenario for the roundtable discussion. In addition, late contributions may not be distributed via the Forum website www.oecd.org/competition/globalforum in advance of the meeting.

All communications regarding documentation for this roundtable should be sent to Ms. Erica Agostinho (Email: Erica.AGOSTINHO@oecd.org; Tel: +33 1 45 24 89 73; Fax: +33 1 45 24 96 95), with a copy to Ms. Helene Chadzynska (Email: Helene.CHADZYNSKA@oecd.org). All substantive queries relating to this roundtable should be sent to Ms. Sarah Long (Email: Sarah.long@oecd.org; Tel: +33 1 45 24 92 35). The GFC Programme Manager, Ms. Helene Chadzynska, will be happy to answer any questions you may have about the GFC more generally. She can be reached via telephone on +33 1 45 24 91 05.
Questions and points for consideration

A. General points

1. Please provide a brief overview (one page) of your merger control regime, with particular reference to the following issues:
   - Whether a fully-functioning merger control regime exists in your jurisdiction; if not, whether one has been considered, or whether other types of instruments (primarily those aimed at fighting collusion between firms and abuse of dominance) are used to control mergers;
   - The criteria (turnover, market shares etc.) used for establishing jurisdiction over merger operations;
   - If a notification system is in place, whether this is voluntary or mandatory; whether notification fees are payable; whether there are special requirements for merger notification;
   - The substantive test used to assess mergers;
   - Any forms of exemptions or special provisions for cross-border mergers.

2. If you do not have a merger regime in your jurisdiction, please describe if any other statutes or legal provisions apply to the review of mergers.

B. Specific questions

I. Co-operation among competition authorities (international, regional and bilateral)

1. Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

2. Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

3. If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?

4. Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?

5. Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?
II. Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

1. If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

2. Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

3. To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

4. Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

5. Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

6. Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

III. Remedies (types, consultation, monitoring and enforcement)

1. Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

2. If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.

3. Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

4. What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

5. To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?
SELECTED REFERENCES


Correa, Paulo, and Aguiar, Frederic, “Merger control in developing countries: lessons from the Brazilian experience” (UNCTAD, 2002).


CALL FOR CONTRIBUTIONS

(French version)
A L’INTENTION DE TOUS LES PARTICIPANTS AU FORUM MONDIAL

Objet : Contrôle des fusions transnationales :
défis à relever pour les pays en développement et les économies émergentes

Forum mondial sur la concurrence (17 et 18 février 2011)

Session I

Cher Participant au Forum mondial,

Dans le cadre du Forum mondial sur la concurrence organisé par l'OCDE, une table ronde sera consacrée le 17 février 2011 aux difficultés rencontrées par les pays en développement et les économies émergentes dans le domaine du contrôle des fusions transnationales. Vous êtes invités à soumettre, en vue de cette session, une contribution qui devra nous parvenir le 10 décembre 2010 au plus tard.

Les pays en développement et les économies émergentes sont confrontés à des difficultés considérables lorsqu’ils doivent mettre en place un droit de la concurrence efficace, en particulier dans le domaine du contrôle des fusions. Au cours des deux dernières décennies, les fusions transnationales ont connu un véritable essor, en valeur comme en volume, et parallèlement, les régimes de contrôle des fusions se sont multipliés dans le monde. Les pays en développement et les économies émergentes sont de plus en plus intégrés dans l’économie mondialisée, comme le montre le développement des activités de fusions internationales qui les concernent.

Cependant, en matière de contrôle des fusions transnationales, les pays en développement et les économies émergentes se heurtent quelquefois à des difficultés qui tiennent à leurs spécificités politiques, sociales et, dans certains cas, géographiques. Il en résulte un cadre très complexe, qui voit s’entremêler dans un jeu d’interactions étroites et quelquefois paradoxales tout un ensemble de facteurs tels que politique de la concurrence et autres stratégies et considérations relevant des pouvoirs publics, questions de compétence, de procédure ou de fonds liées au contrôle des fusions ; intérêts étrangers et nationaux ; régimes juridiques et intérêts commerciaux ou encore intérêts et considérations à l’échelle internationale ou intérieure. Ces problèmes ne sont pas propres aux pays en développement ou aux économies émergentes, mais individuellement ou collectivement, ils peuvent être plus prononcés dans les pays où les régimes de la concurrence et du contrôle des fusions sont plus récents.

Cette table ronde gagnera en qualité et en utilité grâce aux contributions écrites des participants. Il est en effet intéressant de comprendre les mesures prises ou le cas échéant prévues par les économies représentées au Forum mondial sur la concurrence pour aborder les fusions transnationales. Bien que cette session mette l’accent sur les difficultés rencontrées par les pays en développement et les économies émergentes, les débats seront enrichis par des expériences variées, qu’elles émanent d’économies développées aussi bien que d’économies en développement. Nous vous remercions de bien vouloir dresser une synthèse des récentes affaires que vous avez eu à traiter, et d’indiquer en outre quels sont les problèmes particuliers éventuellement soulevés par des fusions transnationales dans votre pays ainsi que...
les solutions que votre pays y a apportées. Ces informations aideront le Secrétariat à rédiger sa note de référence.

Afin de vous aider à préparer votre contribution, vous trouverez ci-joint une liste de points et de questions proposés à titre d’orientation. Cette liste n’est pas exhaustive et nous encourageons les participants à soulever et à traiter d’autres questions, en s’inspirant de leur expérience. Une bibliographie est également suggérée en annexe.

Nous vous remercions de bien vouloir indiquer au Secrétariat d’ici le 15 octobre 2010 si vous comptez soumettre une contribution écrite. Comme indiqué plus haut, les contributions écrites devront nous parvenir le 10 décembre 2010 au plus tard. Cette échéance vaut pour les pays membres comme pour les pays non membres. En cas de non-respect de ce délai, votre contribution risque de ne pas pouvoir être prise en compte lors de la préparation des scénarios en vue de la table ronde. En outre, les contributions tardives risquent de ne pas être diffusées sur le site Internet du Forum (www.oecd.org/competition/globalforum) avant la réunion.

Toutes les communications relatives à la documentation en vue de la table ronde doivent être adressées à : Mme Erica Agostinho (adresse électronique : erica.agostinho@oecd.org ; tél. : +33 1 45 24 89 73 ; télécopie : +33 1 45 24 96 95), avec copie à Mme Hélène Chadzynska (adresse électronique : helene.chadzynska@oecd.org). Toutes les questions de fond relatives à la table ronde devront être adressées à Mme Sarah Long (adresse électronique : sarah.long@oecd.org ; tél. : +33 1 45 24 92 35). La Responsable du programme du Forum mondial sur la concurrence, Mme Hélène Chadzynska, répondra volontiers à toutes vos questions sur le Forum plus généralement. Vous pouvez la joindre par téléphone au +33 1 45 24 91 05.
Questions et points à examiner

A. Généralités

1. Merci de décrire brièvement (sur une page) le régime de contrôle des fusions en place dans votre pays, en donnant en particulier des informations sur les points suivants :

   • Existe-t-il dans votre pays un système de contrôle des fusions pleinement opérationnel ? Si non, a-t-on envisagé d’en mettre un en place, ou d’autres types d’instruments (principalement ceux destinés à lutter contre la collusion entre entreprises et les abus de position dominante) sont-ils utilisés pour procéder au contrôle des fusions ?

   • Quels sont les critères (chiffre d’affaires, parts de marché, etc.) utilisés pour définir la compétence en matière de fusions ?

   • Existe-t-il un système de notification, volontaire ou obligatoire ? Y a-t-il des frais de notification ? Existe-t-il des obligations spéciales pour la notification des fusions ?

   • Quel est le critère de fond utilisé pour évaluer les fusions ?

   • Existe-t-il des formes de dérogation ou des dispositions spéciales applicables aux fusions transnationales ?

2. S’il n’existe pas de régime relatif aux fusions dans votre pays, merci de décrire le cas échéant les textes législatifs ou dispositions légales s’appliquant au contrôle des fusions.

B. Questions spécifiques

I. Coopération entre les autorités de la concurrence (internationales, régionales et bilatérales)

1. Est-il arrivé qu’un conflit naîsse entre votre pays et un pays étranger à propos du traitement applicable à une fusion transnationale ? Comment le conflit a-t-il été résolu ?

2. Existe-t-il des accords bilatéraux entre votre pays et des pays étrangers dans le domaine du droit de la concurrence ? Ces accords ont-ils été utilisés dans la pratique dans des affaires de fusions transnationales ? Prévoyaient-ils des limitations particulières du cadre de la coopération qui ont entravé les efforts de votre pays pour réglementer efficacement la ou les fusions transnationales concernées ?

3. Si la législation le permet, dans quelle mesure les autorités compétentes de votre pays sont-elles prêtes ou disposées à prendre en compte les intérêts étrangers lorsqu’elles s’occupent d’une opération de fusion transnationale ? Le cas s’est-il présenté dans la pratique ?

4. L’instance en place dans votre pays prévoit-il une participation active aux travaux et aux délibérations des organisations internationales (OCDE ou ICN par exemple) dans le domaine du contrôle des fusions ? Des efforts ont-ils été faits pour faire appliquer au plan national les principes ou les recommandations édictés par de telles organisations ?

5. L’instance en place dans votre pays appartient-elle à une organisation régionale active dans le domaine du droit de la concurrence ? Cette organisation a-t-elle adopté des règles ou autres instruments consacrés à la réglementation des activités de fusions transnationales, au niveau national ou régional ? Y a-t-il eu dans votre pays des affaires relevant de ces règles régionales ?
II. Questions de compétence (par exemple notification, échange de renseignements, mise en œuvre ou extraterritorialité)

1. Si votre pays impose une notification des fusions, les seuils de notification actuellement en vigueur permettent-ils de repérer correctement les fusions ayant un impact sur votre pays ?


3. Dans quelle mesure votre pays examine-t-il ou prend-il en compte les mesures et les décisions prises par des autorités de la concurrence étrangère à propos de fusions transnationales lorsqu’il procède à des investigations ou qu’il prend des décisions finales ? Y a-t-il eu des cas dans lesquels cela l’a amené à décider de ne pas réglementer une fusion trans nationale particulière ?

4. Dans votre pays, une intervention du pouvoir politique dans le domaine du contrôle des fusions transnationales est-elle possible et sur quoi se fonde-t-elle ? Merci de fournir le cas échéant des exemples.

5. La législation en vigueur dans votre pays prévoit-elle la prise en compte de considérations ne relevant pas de la concurrence, par exemple la politique industrielle ou la politique en matière d’investissement, lors de l’examen d’une opération de fusion trans nationale ? De quel type de considérations s’agit-il ? Merci de fournir le cas échéant des exemples.

6. Les fusions transnationales soulèvent-elles, en matière de mise en œuvre, des difficultés spécifiques à votre pays ? Si oui, quelles sont ces difficultés ?

III. Mesures correctives (types, consultations, suivi et mise en œuvre)

1. Votre pays a-t-il imposé des mesures correctives aux parties à une fusion trans nationale ? Merci de fournir des exemples de types de mesures correctives déjà imposées ou qui pourraient l’être.

2. Si, dans votre pays, il n’est pas possible à l’autorité de la concurrence d’adopter des mesures structurelles, lui est-il possible d’appliquer par exemple des mesures comportementales ? Merci de fournir le cas échéant des exemples.

3. Des problèmes ou difficultés spécifiques ont-ils été rencontrés au cours des négociations menées avec des parties à une fusion à propos de ces mesures correctives ou de leur mise en œuvre ?

4. Quelles sont les dispositions prises par votre pays pour assurer le suivi et l’application des mesures correctives éventuellement imposées ? Des accords ont-ils été conclus avec d’autres pays pour aider au suivi et à la mise en œuvre de ces mesures correctives ?

5. Dans quelle mesure votre pays agit-il en coordination avec d’autres autorités nationales de la concurrence pour déterminer quelles sont les mesures correctives appropriées, à la lumière des mesures de mise en œuvre prises dans d’autres pays ?
RÉFÉRENCES


OCDE, Table ronde sur les mesures correctives en matière de fusions (2003).

OCDE, Table ronde sur la coopération internationale en matière de fusions transnationales (2001).


BACKGROUND NOTE

(English version)
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES (DEES)

-- Background Note --

1. Introduction

1. The purpose of this paper is to identify some of the main challenges related to cross-border merger control in developing and emerging economies (DEEs). The paper offers an analytical and critical account of the topic by focusing on a number of underlying themes. The paper is intended to offer a framework within which these themes can be examined from both theoretical and practical perspectives, as well as from the perspectives of law and policy. The paper highlights the importance of cross-border merger control in DEEs, notably in the context of their increasing integration into the global economy. In doing so, the paper focuses on the challenges faced by these economies when seeking to regulate cross-border mergers.

2. Merger control has become increasingly important over the last decade. A significant number of countries, including many DEEs have introduced some form of control of merger operations. However, not every competition law regime in the world has merger control provisions, and competition law in general has not been introduced in all countries around the world. This background paper will therefore not consider the challenges faced by countries without a merger regime, though certain aspects of it may be relevant to those countries in which competition law regimes exist but which do not include a specific mechanism for merger control.

3. The paper is structured as follows. Part 2 provides an overview of the topic. Part 3 will consider the particular challenges faced by DEEs in the area of merger control. Part 4 will discuss three important themes underpinning the topic: co-operation, jurisdiction and remedies. The conclusions of the paper appear in Part 5.

2. Cross-border merger control

2.1 The concept of ‘cross-border merger’

4. There are a number of ways in which the term cross-border merger can be defined¹, either on the basis of the ‘structure’ or the ‘effect’ of the merger.

---

* Prepared for the Secretariat by Maher Dabbah, Interdisciplinary Centre for Competition Law and Policy, University of London. The views expressed in this paper are the personal responsibility of the author. They should neither be attributed to the OECD Secretariat nor to OECD member countries. The author welcomes comments and corrections of factual errors, which can be sent to him at the following email address: m.dabbah@qmul.ac.uk.

¹ See further below, at paragraph 21 which sets out different ‘classifications’ of cross-border mergers in the case of DEEs.
5. In relation to the structure, a merger can be considered to have a cross-border dimension if it involves firms established in more than one jurisdiction. In relation to the effect, such dimension can be said to exist where – regardless of the place of establishment of the merging firms – the merger affects the markets in more than one jurisdiction. Moreover, a cross-border dimension may be found, regardless of whether the classification is done on the basis of structure or effect. For example, in its Recommendation on Merger Review (2005), the OECD defines the concept of ‘transnational merger’ as one that is subject to review under the merger laws of more than one jurisdiction.

6. Regardless of the basis on which a cross-border dimension to a merger may arise, a number of views may be advanced in relation to how many jurisdictions this dimension should cover. On the one hand, a cross border merger may exist where the merger concerns two or more jurisdictions. On the other hand, the view may be taken that a cross-border dimension should be wider and will therefore only be found where the merger concerns more than two jurisdictions. Arguably, the former (narrow) view would be more sensible to adopt given that the difference between the two views is one of quantity and not quality. This means that when it comes to regulating such mergers, the same issues (or problems) are likely to arise in both situations. These issues include: the fact that notification of the merger needs to occur in more than one jurisdiction and the possibility of inconsistent decisions between the relevant competition authorities.

2.2 The special nature and characteristics of merger control

7. Merger control is a unique aspect of competition law. Merger operations are a business phenomenon, and are therefore distinct in fundamental respects from other key antitrust conduct, such as cartels and abuse of dominance. Mergers involve structural, as opposed to transient behavioural issues. They have the potential to fundamentally effect future development in a sector of the economy as they alter the very structure of an industry. Moreover, from a public interest perspective, mergers cannot be classified with negative antitrust conduct such as cartels and abusive dominance given that mergers will often produce positive effects.

8. Mergers typically involve significant commercial and financial risks, and often have an impact on financial markets and stock exchanges. This enhances their value from a business perspective and necessitates a special regulatory approach within the overarching competition law regime. It is important in this context to emphasise the role that merger control should have in practice. Whilst merger control prevents the occurrence of anticompetitive outcomes, it also assists businesses in making sound decisions in the design of long-term business and commercial strategies. This point is of crucial importance for DEEs: merger control in such economies can have positive impact in terms of structuring different sectors of the economy and enhancing the prospects of stronger economic performance, in addition to protecting competition and consumers.

---

2 See generally the special report produced by the IBA’s Global Forum for Competition and Trade Policy, *Policy Directions for Global Merger Review*.

3 It is worth noting, however, the overlap which may exist between mergers and these other antitrust phenomena. For example, a merger may be considered to be an abuse of a dominant position where it leads to a strengthening of such position. See Case C-6/72 *Europemballange Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215.


9. Cross-border merger control is a multi-faceted topic. An interesting interaction exists between all of the following: competition policy and other public policy considerations; jurisdictional, procedural and substantive issues relating to merger control; legal regimes and business interests; and global, regional and domestic interests and considerations. This unique interaction enhances the importance of, and difficulties associated with, merger control, especially when dealing with merger operations involving cross-border elements.

10. Merger control is designed to achieve public policy objectives concerned with the structure of industry within a particular jurisdiction.\(^6\) It focuses on the commercial and economic consequences of a merger for the relevant jurisdiction rather than on the processes by which mergers are brought about. Through controlling merger operations, particular market structures can be maintained and effective competition guaranteed. The specific objectives behind merger control, however, may differ between jurisdictions.\(^7\) Nonetheless, the consensus around the world is that the objective of merger control is maintaining competitive market structures to safeguard consumer welfare.

11. A number of developments in recent years have pushed merger control up the agenda of many countries as well as various international bodies and organisations. The following are worth mentioning.

12. First, as noted above, merger control is motivated by competition policy or industrial policy considerations. Therefore, the social and political conditions in a country must be sufficiently developed before merger control can be introduced.\(^8\) An increasing number of countries – many of them DEEs – have now reached this point in recent years, which has pushed merger control to the fore. Mergers should therefore be considered from two opposing perspectives. On the one hand, they are essential operations for fostering the development of local economies and, on the other hand, they are operations likely to trigger changes and introduce new competitive structures, change employment patterns, and impact on consumer, environmental and other important economic and social aspects.\(^9\)

13. Second, since the 1980’s there has been global recognition that the uniqueness of mergers necessitates specifically tailored rules and tools for the purposes of regulating them.\(^10\) In a number of key jurisdictions, experience has revealed the inadequacy of other competition law provisions, e.g. those dealing with abuse of dominance and horizontal agreements as merger control tools.\(^11\)

---


\(^7\) For example, protecting local or small and medium size competitors, achieving various socio-economic and socio-political objectives, protecting employment, encouraging enterprise, and achieving various industrial policy objectives including promoting the international competitiveness of the local economy and building strong national firms.


\(^10\) See Ibid.

\(^11\) See, as an example, the EU experience prior to the adoption of the first merger Regulation, Regulation 4064/89. Until 1989, the European Commission relied on Article 101 (which prohibits anti-competitive agreements) and 102 (which prohibits abuses of a dominant position) of the Treaty on the Functioning of the European Union for the purposes of regulating merger operations. See the case of Continental Can, mentioned in note 3 above, for the use of Article 102 for this purpose. Whilst these two provisions were considered to be possible to use in dealing with merger operations, it became clear that they were not adequate. A specific tool for merger control was therefore deemed necessary.
14. Third, globalisation since the mid-1990s means that cross-border elements are now a typical feature of a significant number of merger operations, including those between local firms. In practice, such operations may easily affect local markets of different countries throughout the world. Many of these countries include DEEs located in different regions.

15. Fourth, a number of bodies and international organisations have promoted the significance of cross-border merger control. The International Competition Network (ICN) devoted almost exclusive focus to the topic in the early years of its existence and the Organisation for Economic Co-operation and Development (OECD) has held a number of important roundtable discussions on the subject over the past two decades. One notable result of this extensive policy discussion is in the 2005 Recommendation on Merger Review (see Box 1). The United Nations Conference on Trade and Development (UNCTAD) has also been active in the area of merger control. The work of these bodies has not only created an important ‘bank of information’, it has also given DEEs an extremely useful insight into the area of merger control as well as providing them with a platform in order to build their national rules and design their policies in the area.

---

**Box 1. The OECD 2005 Merger Review Recommendation**

The Recommendation on Merger Review 2005 offers a number of suggestions for making merger control effective, efficient and timely. These include: ensuring that competition authorities have access to the necessary information to conduct their merger appraisal; reducing the burden on merging parties; allowing for greater flexibility in merger review; and using objective criteria for determining the issue of notification and for fixing the parameters of asserting jurisdiction over merger operations.

The Recommendation also emphasises the importance of countries upholding fundamental principles, such as transparency in the merger review process and procedural fairness, as well as the right to be heard during proceedings (which should be extended to third parties with a legitimate interest). Another principle that is given particular mention is that of non-discrimination between domestic and foreign firms.

---


13 The output of these roundtables has been phenomenal. See the roundtables on: *Competition, concentration and stability in the banking sector* (2010); *The failing firm defence* (2009); *Standard for merger review* (2009); *Minority shareholdings and interlocking directorates* (2008); *Dynamic efficiencies in merger analysis* (2007); *Mergers and dynamic efficiencies* (2007); *Managing complex mergers* (2007); *Vertical mergers* (2007); *Media mergers* (2003); *Merger remedies* (2003); *Merger review in emerging high innovation markets* (2002); *Substantive criteria used for merger assessments* (2002); *Portfolio effects in conglomerate mergers* (2001); *Competition issues in joint ventures* (2000); *Mergers in financial services* (2000); *Airline mergers and alliances* (1999); *Notification of transnational mergers* (1999); and *Failing firm defence* (1995).

14 See also the useful OECD Report on *International cooperation in transnational mergers* (2001).

15 A number of publications have been produced within UNCTAD which deal with merger control; some of which with particular focus on developing countries. See for example: Correa, Paulo and Aguiar, Frederico, ‘Merger control in developing countries: lessons from the Brazilian experience’ (UNCTAD, 2002); and the note by the UNCTAD Secretariat, ‘The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble’ (UNCTAD, 2010).

16 This particular point will be discussed in more detail in paragraph 54 below in the context of multilateral co-operation.
The Recommendation highlights the need and importance of co-operation and co-ordination between competition authorities in the area of merger control, in both bilateral and multilateral forms. It addresses a number of issues related to co-operation and co-ordination, most prominently that of confidential information. The Recommendation encourages merging parties to consider a waiver of confidentiality where possible. At the same time, however, it stresses the need for competition authorities to have the necessary safeguards for handling the exchange of confidential information.

The Recommendation encourages countries to conduct a periodic review of their merger regimes in order to achieve improvements in these regimes as well convergence towards best practices in the area.

16. A further reason for the increased attention given to merger control is that complicated large-scale merger operations attract significant media coverage.17

17. The international attention focused on merger control has been a catalyst for discussions not only of the socio-economic impact of merger operations on the industry in question but also of the legal-political nature of the merger control process itself. A number of issues fall under the latter, notably: the powers and mandate of the competition authority, including its independence from the government of the time; whether it is called upon to assess mergers purely on a competition basis or whether there is a consideration of broader socio-economic goals; how closely it can or will collaborate with other competition authorities (discussed further below in the context of international co-operation); and, fundamentally, the extent to which a merger control regime achieves the objectives of national economic policy.

18. The importance of these issues is magnified when multiple national competition authorities are involved in the same merger operation. The multiple reviews provide the opportunity for a comparison of different approaches, including the compatibility of the objectives pursued, the limitations of implementing procedures and the protection of local consumers. These approaches can easily diverge in some cases. The views taken by different countries on the policy regarding merger control reflect national economic and political preferences. Therefore, the scope of official intervention beyond certain market imperfections will often differ significantly.

19. Issues related to cross-border merger operations are important to all types of economies around the world, whether small or large, advanced or emerging. However, the topic is of particular relevance for DEEs, and its importance is expected to increase in the next decade. Nonetheless, these economies face serious hurdles in establishing fully effective merger control regimes that can deal with the challenges of cross-border merger operations.

20. DEEs have unique economic, political and social circumstances.18 Merger control in these countries should therefore be approached with particular care. Crucially, one should make no assumptions regarding the topic based on knowledge or experience found in the developed world. There are substantial differences between experiences with merger control in DEEs and in developed and advanced economies. However, the experiences of these more advanced economies can be drawn upon by DEEs to gain insight into best practices in the area, in addition to improving international co-operation.

17 The prestige which some merger operations enjoy arises out of the hopeful nature of these operations, which are often devised as a solution to major industrial problems or a daring attempt to achieve additional commercial benefits (such as new synergies) and tap into and release additional revenue streams.

21. A number of scenarios may be envisaged in which the unique circumstances of DEEs affect cross-border mergers.

- First, a cross-border merger may involve two or more foreign firms located in the same foreign jurisdiction but one or more of them may operate in the relevant DEE.
- Second, the same cross-border merger may involve two or more firms located in different foreign jurisdictions.
- Third, the foreign firms in question may have no presence in the relevant DEE but their merger operation (most notably the creation of a full-function joint venture)\(^{19}\) may give them, or the merged entity, such presence.
- Fourthly, at least one of the firms in the merger may be located in the relevant DEE.

22. The unique circumstances of DEEs mean that the question of merger control in these economies acquires an added complexity, enhancing the challenges they face.

3. **Particular challenges faced by DEEs**

23. Developing and emerging economies face enormous challenges when seeking to establish merger control regimes and effective competition law regimes more generally.\(^{20}\) During the past decade in particular, an abundance of academic literature, studies and reports by various international organisations have emerged in which challenges were identified and discussed at length in relation to establishing effective competition law regimes in DEEs. There has been, however, insufficient attention given to the challenges in the area of **merger control** specifically.

24. This is at odds with the expansion of merger activity – in particular cross-border mergers – in both value and volume over the past two decades, in parallel with the proliferation of merger control regimes around the world. And, as noted, it is of direct relevance to DEEs.

25. This part of the paper will consider the different challenges faced by DEEs in the area of merger control and their efforts to address cross-border merger operations. This is not intended to be an exhaustive discussion of all possible challenges. Rather, the purpose is to focus on the key challenges. Most of these challenges, however, are not unique to the area of merger control and are equally relevant to the field of competition law and policy more generally.

3.1 **The absence of a proper competition culture**

26. Most, if not all, DEEs lack an established competition culture. This is due to a number of factors. At a basic level, many DEEs have for a long time suffered from heavy state control and planning. As a result, private forces have not been allowed to play a serious role in the marketplace. Furthermore, due to the prevailing culture in these economies, there is a lack of sufficient awareness of competition as an

---

\(^{19}\) Also referred to, in some cases, as a concentrative joint-venture. This operation involves the creation of a new entity, which is independent from its parents and to which assets and personnel will be transferred so that it is capable of carrying out its activities as an autonomous entity. The concept of full-function joint venture features in Article 3(4) of EU Regulation 139/2004.

economic process.\textsuperscript{21} This culture often resembles unfair competition more than competition law because of the fairly widespread ideology that competition is something that must be overcome by defeating competitors through illegitimate means.\textsuperscript{22}

27. The lack of a proper competition culture directly impacts on the role and significance that competition law assumes in practice. It narrows down considerably the scope for effective enforcement to emerge. It may even call into question the actual need for a strong competition law regime, with an independent and powerful competition authority. Obviously, the lower the significance or relevance attached to competition law, the more likely it is that merger control will not receive adequate attention in DEEs.

28. International and peer pressure – along with internal awareness – have lead to a noticeable increase in concrete actions taken by DEEs to engage in competition advocacy and build domestic competition cultures. However, additional work remains necessary to further the privatisation process and enable private firms to play a greater role in the marketplace.

3.2 The difficult transition towards a market-based economy

29. Competition can only be a meaningful process if a market-based economy is established in the relevant country. China’s transition to a market-based economy is illustrative in this regard. As the market system has progressively been introduced in greater parts of the economy, various laws have been enacted to combat anti-competitive practices and to regulate mergers.\textsuperscript{23} This process has culminated in the adoption in 2007 of the Anti-monopoly Law (AML), which is the first specific competition law in China applying generally to public, private, domestic and foreign owned firms. The provisions of the AML are substantially similar to those found in competition laws of developed economies. Already in the two years since the AML has been in force, China’s Ministry of Commerce (MOFCOM), the authority responsible for merger control, has adopted guidelines\textsuperscript{24} and regulations\textsuperscript{25} and reached a number of significant merger decisions, including those of conditional clearance or prohibition of some notable mergers.\textsuperscript{26}


\textsuperscript{22} These cultural trends are possible to observe throughout entire regions around the world, including in Latin America, Africa and the Middle East. See Dabbah, Maher, Competition Law and Policy in the Middle East (Cambridge, 2007); Fox, Eleanor and Sokol, Daniel, Competition Law and Policy in Latin America (Hart Publishing, 2009).

\textsuperscript{23} Including, for example, the Anti-Unfair Competition Law (1993).

\textsuperscript{24} See the guidelines produced in 2009: Guidelines for merger review of concentrations; Guidelines on notification of concentrations; and Guidelines on merger filing documentations for the notification of concentration.

\textsuperscript{25} See the Provisions on the Notification Thresholds for Concentration of Undertakings, issued by the State Council of the People’s Republic of China (2008); Measures for Calculating the Turnover of Financial Sector Undertakings in Notification of Concentration jointly issued by MOFCOM and other financial industry regulators (2009); Measures on Notification of Concentrations issued by MOFCOM (2010); and Measures on Review of Concentrations issued by MOFCOM (2010).

\textsuperscript{26} One of the notable merger cases worth noting here is the Panasonic/Sanyo merger of 2010; another example is the prohibition decision adopted by MOFCOM in 2008 in the Coca-Cola/ Huiyuan Juice Group Ltd proposed merger.
3.3 The dominance of industrial policy

30. DEEs place heavy reliance on industrial policy considerations, and they dominate the economic decision-making and policy-formulation processes. As a consequence, competition and competition-related considerations may be overshadowed. These are economies in which issues such as employment, economic development and various other industrial policy considerations, such as promoting international competitiveness of the economy occupy a key position on government agendas. These are politically sensitive issues in any economy, but perhaps more so in DEEs.

31. Many countries have placed particular emphasis on industrial policy over the years. The Korean approach up to the 1980’s is one example. It has been argued that this policy approach resulted in competition considerations being marginalised, and led to distortion of competition in local markets. This was evidenced from the subsidies offered to national firms and the protection offered to these firms from foreign competition. It is important to note, however, that not everyone has looked at such favourable treatment to national champions in negative terms. Some have argued that important benefits have resulted from this policy approach.

32. Where heavy emphasis is placed on non-competition considerations, merger activities involving local firms may be seen as particularly important for the purposes of giving expression to these considerations in practice. This is notwithstanding the possible negative effect such mergers may cause to competition locally. As a result, merger control – from a competition perspective – may not be looked at favourably, especially by politicians who may favour non-competition considerations over controlling these mergers on competition grounds.

3.4 The lack of resources

33. Merger control is a particularly resource-intensive process in both human and financial terms. Without the necessary capabilities, the relevant competition authority will simply be unable to carry out its tasks in this area. This is especially so where a mechanism of mandatory notification is used. Almost all competition authorities of DEEs face a major challenge due to the lack of adequate human and financial resources. The local skills markets of these economies do not always have the necessary expertise in the field of competition law. The picture has been changing, gradually, in a number of DEEs in recent years.

28 Indeed, this is the position also in developed economies. See in particular the experience of countries such as Japan and Germany. In the latter, a decision of the Federal Cartel Office blocking a merger on competition grounds may be reversed by the relevant minister – using a statutory-based ministerial authorisation mechanism – if the merger is considered to be beneficial to the international competitiveness of the German economy.
29 See the OECD Roundtable on *Competition policy, industrial policy and national champions* (2009).
30 See *Ibid*.
31 A notable example of a national firm benefiting from such favourable treatment is Hyundai.
32 See Rodrik, Dani, ‘Getting interventions right: how South Korea and Taiwan grew rich’ (1995) *Economic Policy* 20. The author argues that the favourable treatment offered to the Hyundai group was beneficial for the purposes of enabling the group to internalise labour market externalities and encouraging it to become more efficient *vis-à-vis* its international rivals.
33 See also below on the relationship between merger control and foreign direct investment.
34 See below on the issue of notification.
however. An increasing number of students and young professionals from these economies are seeking to
specialise in competition law. This is a positive development which will, in the long-term, lead to a
dramatic improvement of the current position.

34. Many competition authorities in DEEs invest significant efforts in recruiting, in maintaining their
work force and in reducing the incentives for their young officials to leave for other career opportunities in
the private or academic sectors. On the other hand, in financial terms these authorities often suffer from
serious budgetary constraints with the result that they are forced to prioritise in their work. Merger control
is not considered to be a top priority and greater importance is usually attached to other areas, such as anti-
cartel enforcement, competition advocacy and abuse of dominance.

35. Handling merger enforcement work requires competition officials with the necessary expertise in
law and economics. This expertise should include suitable knowledge in the operation of different sectors
of the economy and the competition officials will need to adopt an international outlook in their approach
to merger control. This is important in order to effectively assess the cross-border merger in question and
to interact with foreign competition officials involved in assessing this merger, possibly through bilateral
links. All of these points should be considered in the light of the special nature of merger assessment,
which involves strict time limits and considerable time pressures. It also demands intensive
communications between the reviewing officials and the merging firms, as well as third parties, and
possibly other public authorities (such as sector regulators) in the same country.

36. The lack of adequate resources – especially when looked at in the light of the special nature of
merger control – goes some way to explain the little attention given to the area in many DEEs. This is in
addition to the fact, as noted above, that mergers have often been seen as important for achieving economic
development and international competitiveness.

37. Many competition authorities in the developing world may also feel that it is unnecessary for
them to be concerned with cross-border mergers. When mergers are regulated by more experienced foreign
competition authorities, the competition problems can be identified and remedied quickly and effectively
without the need for DEEs to intervene. Some competition authorities (and even courts) have particular
confidence in the credibility of foreign actions and decisions as an effective means of enforcement. Some
of these DEE authorities may prefer reliance on foreign actions in order to avoid possible conflicts with more
experienced competition authorities. Other authorities from DEEs may prefer to limit their role to that of
assisting foreign authorities. However, in the area of merger control this may not be particularly likely.

38. Furthermore, reliance by competition authorities in DEEs on foreign actions may not offer the
required solution to the potential problems likely to be triggered by a given cross-border merger. These
authorities are concerned with protecting competition and safeguarding the necessary competitive market
structures in the local economy. A foreign action may not address effectively all of the potential

35 See note 20 above.
36 This has been the experience of Singapore, and is also true for many other countries around the world.
37 See further section 4.2.2 in relation to extraterritorial assertion of jurisdiction with regard to obtaining
information.
38 See for example the view of the Israel Antitrust Authority (IAA) in a case which was brought before the
Israel Supreme Court (sitting as a High Court of Justice) which concerned abusive dominance: Case
6623/03 Oded Lavie vs. Director of Antitrust Authority (2003). According to the IAA it made no sense to
bring an action against the abusive conduct of a firm when this conduct was brought to an end globally as a
result of the action by a foreign competition authority.
competition problems from the merger at hand, some of which may be unique to the particular local jurisdiction. This means there is no substitute for local action in the relevant situation.

39. A final comment to be made is that there are situations in which a cross-border merger may occur without the competition authority in a DEE becoming aware of this fact.\(^{39}\) This has been the position in a number of African countries, including Kenya and Zimbabwe. In the latter, it is thought that a number of harmful mergers with a cross-border element occurred without the knowledge of the Competition Commission in the country. The situation has improved significantly since 2002 with the strengthening of the merger control mechanism in the country and with the introduction of a requirement for mandatory notification.

3.5 \textbf{Inadequate legal framework}

40. Where the relevant competition law of a DEE does not provide an adequate framework for merger control or provides only basic provisions (i.e. that mergers are within the scope of the law), competition authorities face a challenge in controlling mergers. An interesting example is found in the Egyptian competition law regime (see Box 2).

41. An effective merger control regime requires more than a provision in the law stating that harmful mergers are prohibited or merely demanding merger notification. In practice, it requires a comprehensive mechanism for merger regulation, including: established avenues for notification; interaction between the competition authority and merging and third parties; and rules and principles which clearly lay down the powers of the competition authority and the obligations of all (the authority, the merging parties and third parties).

\begin{box}
\textbf{Box 2. Merger Control in Egypt}

Article 11(2) of the Egyptian Law on the Protection of Competition and the Prohibition of Monopolistic Practices 2005 merely provides that one of the functions of the Egyptian Competition Authority (ECA) is to receive merger notifications. This is repeated in Article 44 of the Executive Regulations, albeit with more details. The latter Article provides that the ‘Authority shall receive notifications from Persons within 30 days from the acquisition of assets, proprietary rights, usufruct, shares, the setting up of unions, mergers or amalgamations or joint management of two or more Persons.’ Article 45 of the Regulations gives only a brief list of the kind of information that should be submitted as part of the notification. No proper mechanism in practice has been established, although a very basic, but under-developed, notification form has been devised. In practice, limited action is taken concerning the notifications received. The information submitted by merging parties is stored by the ECA, but not used to conduct a formal merger appraisal.
\end{box}

3.6 \textbf{Problems with implementation}

42. The implementation of a competition law regime in a DEE can be a challenge. It is often accompanied by various difficulties, ranging from institutional design, to equipping the competition authority with the necessary expertise or managing the relationship between the authority and the

government or other public bodies. The process can be extremely slow and time consuming, especially when merger control is not ranked highly on the agenda of governments and competition authorities in DEEs. Thus, a slow implementation process in the competition law regime as a whole can translate into a significant delay in implementing and achieving merger control in practice.

3.7 The role of foreign direct investment

43. In DEEs, foreign direct investment (FDI) is of key economic and political importance. This has been recognised not only by many of these economies themselves, but also by several international organisations. Some of these organisations – most notably the World Bank – have been strong advocates of facilitating FDI in DEEs as a means of achieving international openness on the part of these economies and securing their integration into the global economy.

44. It is open to debate, however, whether FDI is perceived positively by all DEEs around the world. The attitudes of such economies seem to differ on this front. At one end of the spectrum, there are those economies in which FDI is embraced fully and foreign firms (and their governments) are given a wide opportunity to venture into the economic (and possibly also the political) landscape of DEEs. These economies tend to consider FDI a key engine for advancing themselves technologically and enhancing their international competitiveness. Some DEEs, at the other end of the spectrum, do not appear to share the same enthusiasm and they tend to exert strict control over foreign participation in different sectors and markets of the local economy.

45. DEEs in favour of attracting FDI usually adopt carefully tailored measures for the purposes of attracting FDI which may include offering important tax incentives or concessions in the form of custom levies or monetary terms. However, a positive attitude towards FDI may be linked to a more hands-off approach to regulation more generally. The more emphasis placed on encouraging FDI, the less open a government may be to embracing a mechanism such as merger control fully, and opting for an effective mechanism for regulating cross-border mergers.

46. A cross-border merger is one form which FDI can take: a foreign firm without any presence in the relevant DEE acquiring a local firm established (or another foreign firm operating) in this economy. However, the foreign firm(s) involved in a cross-border merger may already have a presence in the DEE concerned. In either case, although the merger may raise competition issues, the government concerned may still not opt for regulating such merger for concerns over the possibility of the relevant foreign firms

---

40 One of the most notable examples of delayed enactment of a competition law is found in China where the process took two decades to complete. See, more recently, the position in Hong Kong in which a competition bill has been prepared and is expected to be enacted into law in 2011. Other examples may be found throughout the Middle East and Africa.


42 See Dabbah, note 22 above.

43 In some DEEs, the competition law itself may be utilised for the purposes of attracting FDI. There is indeed a growing recognition in many such economies that competition law should be adopted and used for this purpose.

44 Among the different conditions which may be imposed are those that FDI should lead to economic growth, technological development, improvement in the quality of goods or services, increase in employment opportunities, or boosting the country’s entry into world markets. In some cases, the relevant law may have additional strict conditions aimed at ensuring that the firm engaged in FDI would not come to enjoy a monopolistic position in local markets.
deciding either not to ‘invest’ or to quit the domestic market in response. A decision or a threat by foreign firm(s) involved in a merger operation to desert the local market of a DEE may arise where the relevant local competition authority opts to impose conditions on the merger.

47. The government and/or competition authority in a DEE may consider they do not have the upper hand in any possible dealing with foreign firm(s) involved in a cross-border merger. This perception may be more pronounced where particular emphasis is placed on FDI and the need to attract it.

48. The existence of effective merger control regimes in DEEs cannot be considered to be a hurdle impeding or excluding FDI in all circumstances. The existence of effective merger control and effective competition enforcement more generally may be seen as complementary to FDI, by providing a mechanism of addressing restraints impeding the latter and also creating a business and regulatory environment with enhanced legal certainty. It ought to be remembered that there are many situations in which foreign firms (and their governments) need DEEs and markets in these economies as much as the latter need such firms and their home governments. Nonetheless, there is a prevailing view that the lack of such control or enforcement can prove to be particularly attractive to such firms as a good environment to invest in.

4. Co-operation, jurisdiction and remedies

49. Having considered the challenges and unique circumstances faced by DEEs in the area of merger control, it is important to turn to issues of high practical significance in the area. This part of the paper will examine three key themes residing at the heart of the regulation of cross-border mergers, namely: the issue of co-operation between competition authorities; the question of jurisdiction (including merger notification); and the issue of merger remedies. These issues play a key role in the whole operation of a merger control mechanism. They also offer concrete illustrations of many of the challenges facing DEEs.

4.1 Co-operation between competition authorities

50. Co-operation between competition authorities around the world has received close attention over the years, particularly since the 1980s. This co-operation may take a number of forms. A distinction is usually made between three main types of co-operation: multilateral co-operation; regional co-operation; and bilateral co-operation. All of these are of direct relevance to DEEs, although some are slightly more relevant than others.

4.1.1 Multilateral co-operation

51. Multilateral co-operation in the field of competition law is the oldest of the three types of co-operation identified above. Its roots date back to the efforts made in the first half of the twentieth century to create an international trade organisation, which was intended to have competence in regulating restrictive business practices at an international level. This particular effort put in place a form of

45 See as a good example the action taken by Coca-Cola to modernise the bottling plan of Schweppes Zimbabwe Limited and later to transfer it to an indigenous company in the country, Fidelity Life Asset Management Company (Pvt) Limited. This was done as part of the conditional merger clearance given by the Competition Commission of Zimbabwe in the Coca-Cola Company/Cadbury-Schweppes Merger in 1998.


47 See the draft Havana Charter for an International Trade Organisation, UN Doc. E/Conf. 2/78 1948.
multilateral co-operation widely referred to as hard law-based co-operation. This was based on binding obligations on countries under a multilateral agreement with the aim of creating an international body with competence in the field of competition law. The (unsuccessful) effort started in the 1990s to introduce competition law within the World Trade Organisation represents one variant of this idea.

52. Binding multilateral co-operation, however, is not the only type to be mentioned. Multilateral co-operation also takes a ‘soft law’ form, meaning co-operation without binding commitments by countries. The origins of this type of multilateral co-operation date back to the 1980s when UNCTAD adopted its Set on Multilaterally Agreed Rules and Principles.\(^{48}\)

53. With the OECD’s increased input in the field of competition law since the 1990s and with the creation of the International Competition Network in 2001, the soft law model has become the dominant form of multilateral co-operation. Particular importance has been attached to it as an effective international strategy especially in the area of merger control. This can be seen from the impressive output of the OECD and the ICN since the mid-1990s.\(^{49}\)

54. Multilateral co-operation of a soft law nature has direct relevance to DEEs in the area of merger control. This type of co-operation has the advantage of catering for the different interests and unique circumstances of DEEs. The experience of the ICN shows how this form of co-operation creates strong incentives for competition authorities from these economies to implement principles or recommendations produced at an international level.\(^{50}\) This experience also shows how these authorities can be given an opportunity to participate in the deliberation process and to play an important role within it. The flexibility underpinning soft law multilateral co-operation is a major selling point as far as DEEs are concerned.

55. Soft law multilateral co-operation helps promote a level playing field notwithstanding the differences between developed and less developed economies. This is particularly important in the area of cross-border merger control where competition authorities located in the latter may easily become involved in regulating cross-border mergers alongside more experienced and established competition authorities.\(^{51}\) This particular type of co-operation has some clear advantages especially when compared with other forms, notably bilateral co-operation. It has the potential to achieve important convergence and harmonisation but without imposing rules, principles or standards on DEEs or their competition authorities. It also paves the way for good policy design within DEEs through facilitating the creation of an important bank of principles and ideas from which DEEs and their competition authorities can draw when building their domestic experience in the area of merger control.

---

\(^{48}\) It is worth noting that the Set was produced following substantial efforts made by developing countries. However, only a passing reference is made to merger control.

\(^{49}\) In addition to the OECD output mentioned in note 13 above, see the Recommendation on Cooperation between Member Countries on Anticompetitive Practices affecting International Trade (1995), and ICN Guiding Principles for Merger Review (2002), among other ICN output.

\(^{50}\) See, for example, the changes introduced by Brazil in relation to its notification thresholds on the basis of OECD and ICN principles, explained in Box 4 below.

\(^{51}\) See OECD Whish and Wood study on Merger Control Procedures (1994) which includes a number of case studies where DEEs were involved in the regulation of cross-border mergers; see in particular the case studies dealing with two mergers which occurred in 1989: the Gillette/Wilkinson merger and the Coats Viyella/Tootal merger.
4.1.2 Regional co-operation

4.1.2.1 General

56. Regional co-operation in the field of competition law has been a widespread phenomenon in the developing world. A number of regional efforts have been launched, although this type of co-operation has not proved itself to be fully effective. Among the high profile examples of these efforts are: the Association of South East Asian Nations (ASEAN); the Southern Common Market (MERCOSUR); the Common Market for Eastern and Southern Africa (COMESA); and the West Africa Economic and Monetary Union (WAEMU). However, these are not the only regional communities in existence.52

57. Regional co-operation in the field of competition law generally and the area of merger control particularly, may be designed using different models, three of which are worth mentioning.

- First, the regional co-operation may take the form of a forum for consultation and experience sharing between the relevant countries as well as for offering technical assistance or helping with capacity building in these countries. This forum may be used specifically for the purposes of establishing domestic competition law or merger control regimes in the countries concerned.

- Second, there is the European Union (EU) model of establishing a regional institution(s) with competence to handle enforcement at the regional level and with a regional network bringing together the relevant regional and domestic competition authorities (as is the case with the European Competition Network (ECN)).

- Third, regional co-operation may rest on approaches seeking to achieve procedural and/or substantive law convergence and harmonisation among the competition law regimes of the countries concerned.

58. There are mixed views about the value of regional co-operation as a practical way to develop merger control (as part of competition law) in DEEs. On the one hand, this co-operation has been considered particularly relevant to these economies for a number of reasons. First, there are the unique circumstances of DEE economies. Second, competition policy is seen as a good fit within the wider economic co-operation between countries and as complement to trade policy. Both of these areas – economic co-operation and trade policy – form the cornerstone of regional co-operation. Third, there is the strong belief that creating a ‘centre of gravity’ at a regional level helps to enhance the status and importance of competition law domestically within the countries concerned. This can assist with facilitating the provision of technical assistance between the participating competition authorities to build domestic competition capacity. A further benefit of this centre of gravity would be the harmonisation of the various national rules and standards. This would be advantageous from the perspective of business, which is interested in reducing costs, having greater legal certainty and operating in similar regulatory environments.53 Fourth, regional co-operation is considered to be an effective means of addressing serious

52 See Dabbah, Maher, International and Comparative Competition Law (Cambridge, 2010), pp. 366-7 for a comprehensive list of all relevant regional organisations and communities.

53 One of the ways this is achieved is through using a one-stop shop principle, under which when a transaction is regulated at the higher regional level it will be excluded from the jurisdiction of the competition authorities at the lower national level. See the existence and the operation of this principle under Regulation 139/2004 in the EU.
59. The advantages identified in the previous paragraph are well-illustrated by the EU’s experience, which has been very successful in the area of merger control. It demonstrates how a regional approach can help achieve effective and efficient enforcement in relation to cross-border mergers.

60. Many regional co-operation initiatives around the world have been inspired by the EU model especially in an era of intensive globalisation and with an increasing number of competition problems taking on a cross-border dimension as a result. Indeed, it should be acknowledged that regional co-operation may, in some cases, offer a suitable tool to address (and where relevant regulate) competition issues of a cross-border nature more effectively than domestic enforcement.

61. Nonetheless, building effective regional co-operation in the area of merger control in the case of DEEs is an extremely challenging and ambitious goal. This is highlighted by the fact that to date no single regional effort has proved effective or fully workable. Building regional co-operation in the regulation of cross-border mergers is also dependent upon sufficient progress being achieved in the field of competition law more generally. The effectiveness of a regional merger control mechanism requires the presence of merger control in at least some (if not all) of the countries concerned in the first place. This may not feature highly on regional agendas where other more pressing economic and political issues take precedence, such as regional conflicts and poverty. Furthermore, it is uncertain – given the absence of effective merger control regimes in many DEEs – whether a top-down approach would prove effective for the purposes of establishing merger control mechanisms within the countries comprising the regional grouping.

62. A top-down approach is based on the notion that a strong and advanced regional competition law framework could enable the relevant countries to strengthen their own domestic regimes and ensure harmonised standards in those regimes. It is questionable whether this is a sound approach, however, given that achieving such a desired outcome would – at any rate – be undermined by the fact that competition law is simply lacking or not enforced in some of the countries concerned.

63. Moreover, it would be vital for the regional regime and the domestic regimes to operate in harmony, ensuring full and effective co-operation. In practice, this requires a properly defined relationship between the regional and domestic actors, as well as between the different domestic regimes of the relevant countries.

64. Finally, one comment should be added on the benefit of harmonisation of the domestic merger laws of the relevant DEEs within a regional setting, which was referred to above. Even with a comprehensive regional approach to harmonisation, success can never be guaranteed when major divergences exist in the legal, political and economic regimes and circumstances among the different countries concerned. There are clearly significant differences between the countries which are members of regional communities or organisations in the developing world. Any harmonisation initiative will be harder to achieve in these circumstances. Moreover, the countries within one and the same community may be at different stages of economic development with varying degrees of economic and trade strengths. Any attempt to achieve harmonisation – regardless of the mechanism used in this case – is likely to result in one or a small group of countries ‘dominating’ the process and this is likely to trigger objections on the part of weaker countries. Alternatively, this may result in a lowest-common denominator approach resulting in a mechanism of little practical value.

4.1.2.2 Assessing existing regional efforts

65. It may be helpful at this stage to offer an assessment of existing regional efforts, notably the four examples mentioned above: the Association of South East Asian Nations (ASEAN); the Southern Common Market (MERCOSUR); the Common Market for Eastern and Southern Africa (COMESA); and the West Africa Economic and Monetary Union (WAEMU).

- **Association of South East Asian Nations (ASEAN)**

66. A number of references to competition law and policy feature within various ASEAN documents. More concretely, some steps have been taken towards establishing a form of regional co-operation. This includes adopting the ASEAN Regional Guidelines on Competition Policy and publishing the Handbook on Competition Policy and Law in ASEAN for Businesses in 2010. However, no proper framework for this purpose has been created.

67. At present, only five of ASEAN’s members have enacted competition law, with provisions dealing with merger control. However, competition law and policy are high on the ASEAN agenda and there is potential for development in the future.

- **Southern Common Market (MERCOSUR)**

---

55 The Association of South East Asian Nations (ASEAN) was established in 1967 in Bangkok. Currently, it has ten member states. The goals behind ASEAN range from political to socio-cultural to economic integration. The emphasis however has been put in practice on the third of these. See the proposal to establish the ASEAN Economic Community (AEC).

56 See paragraph 41 of the ASEAN Economic Community Blueprint 2007 which provides that all member countries ‘endeavour to introduce competition policy… by 2015’. This paragraph also provides for the establishment of ‘a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and co-ordinating competition policies’ and encouraging ‘capacity building programmes/activities for ASEAN Member Countries in developing national competition policy’. The Blueprint is available at: http://www.aseansec.org/21083.pdf

57 The adoption of the Guidelines is based on the idea expressed in the Blueprint which was to develop a ‘regional guideline on competition policy based on country experiences and international best practices with a view to creating a fair competition environment’. See paragraph 41, ibid. The Guidelines deal with a number of issues, ranging from, among others, the aims of competition policy to those of enforcement, competition advocacy and international co-operation. The Guidelines are available at: http://www.aseansec.org/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf.

The Handbook is addressed to businesses operating in the ASEAN region. It provides basic information and an explanation of the key principles and concepts of competition law and policy. It also gives an account of the substantive and procedural competition rules of ASEAN member countries.

58 It is worth noting that to date no official ASEAN competition authority has been established. Nonetheless, in 2007, an agreement was reached by all ASEAN leaders to establish a network of local competition authorities which could serve as a forum for holding discussions and facilitating co-ordination on competition matters and also developing a regional policy framework. To this end, a group of experts was set up – the ASEAN Experts Group on Competition (AEGC) – which was given the task of studying and making recommendations on competition law and policy including enforcement on a regional level. The group has focused on issues such as capacity building within domestic competition authorities, competition advocacy, establishing new competition authorities, and determining the priorities of such authorities.

59 These are Indonesia, Singapore, Thailand, Viet Nam and Malaysia.

60 See Dabbah, ch. 7, note 52 above.
68. A specific effort has been made within MERCOSUR to seek harmonisation between the domestic competition law regimes of its different member countries. This particular attempt was seen as a necessary step towards regional integration. However little progress was made in practice until 1996, when Argentina, Brazil, Paraguay and Uruguay adopted the Fortaleza Protocol within the MERCOSUR framework under which they agreed to form a common institutional framework to address competition issues. For this purpose, the Protocol created a number of tools for co-operation between domestic competition authorities. It also advocates greater harmonisation between the domestic competition law regimes of MERCOSUR countries in the area of merger control. However, despite the Protocol having been formally in force since 2000, it has yet to be actually implemented in practice (See Box 3).

Box 3. The MERCOSUR Protocol

The Protocol has only been ratified by Brazil and Paraguay, with Argentina and Uruguay yet to agree. Furthermore, only Brazil and Argentina have a merger regime under their competition law and fully dedicated competition authorities. Although full ratification has not occurred, it is worth noting that an informal ‘network’ exists between the domestic competition authorities of MERCOSUR member states. Practical examples include in 2007 the Brazilian Administrative Council for Economic Defence (CADE) deciding to block the merger between Saint Gobain and Owens Corning because of likely adverse effect on competition in the relevant markets due to risks of concentrations in these markets (especially the glass manufacture market) in Brazil. The CADE took the step of informing competition authorities of relevant MERCOSUR member states.

69. Responsibility for adjudication and enforcement of the Protocol was placed in the hands of the MERCOSUR Trade Commission (TC) and the Committee for the Defence of Competition (CDC).

70. However, the framework of the Protocol has yet to reach its full potential. To ‘compensate’ for this, a memorandum of understanding was approved in 2003 which was intended to enhance co-operation

---

61 The Southern Common Market (MERCOSUR) was founded in 1991. MERCOSUR stands on a regional free trade agreement between four South American nations (Argentina, Brazil, Paraguay and Uruguay). Venezuela signed a membership agreement and currently is awaiting ratification before being formally admitted as a full member state. Bolivia, Chile, Colombia, Ecuador and Peru are associate member states.

62 Some pre-1996 developments, however, had promising competition relevance. This includes the Ouro Preto Protocol signed in 1994 which provided for a dispute settlement mechanism.


65 The CDC is intended to be composed of national competition authorities. The TC and the CDC are not supranational bodies. The CDC was intended to take charge of intra-regional investigations, which are handled in three stages. First proceedings begin before the competition authority of each member state at the request of an ‘interested’ party which, after a preliminary determination considering whether there are MERCOSUR implications, decides whether to submit the case to the CDC for a second determination. At the second stage the CDC must decide whether there is an infringement of the Protocol and recommend that sanctions and/or other measures be imposed. Finally, through a directive, the CDC ruling is submitted to the TC for a final decision to be adopted.

66 In 2004, the TC requested a revision of the Protocol which was intended to finally create the CDC. The revision was also intended to enhance co-operation between domestic competition authorities and provide technical assistance by Argentina and Brazil for Uruguay and Paraguay. See Rosenberg, Barbara and Tavares de Araújo, Marianna, ‘Implementation costs and burden of international competition law and
within the MERCOSUR framework. The memorandum addresses: notification procedures; exchange of information; and technical assistance. The memorandum has been implemented within the legal systems of MERCOSUR member states.\textsuperscript{67}

- **Common Market for Eastern and Southern Africa (COMESA)\textsuperscript{68}**

71. COMESA has, in many respects, been inspired by the EU model. Competition law is a foundation stone within the COMESA framework\textsuperscript{69} as the economic transition experienced by the majority of COMESA member states indicated the need for competition law. Such transition appears to have highlighted and helped articulate the need for a regional framework to confront possible anticompetitive situations.\textsuperscript{70}

72. A number of COMESA member states have domestic merger control regimes, but these were considered to be inadequate to deal with complex cross-border and multi-jurisdictional issues.\textsuperscript{71} It was acknowledged that co-operation at bilateral level could resolve and redress some of these issues, but a regional framework was perceived to be a more consistent and sustainable way of doing so.

73. COMESA’s competition law and policy incorporates a mechanism for achieving harmonisation among the competition rules and policies of its member states in order to minimise and avoid conflicts. Under Article 55(3) of the COMESA Treaty, regional competition law was adopted in the form of the COMESA Competition Regulations. A designated body, the COMESA Competition Commission – which has responsibility in the field of competition law –\textsuperscript{72} is given the function of applying the Regulations.\textsuperscript{73}

74. As far as merger control is concerned, the Regulations have a wide scope and provide for, among other things, the notification and control of mergers and acquisitions. Merger control is covered under Part

---

\textsuperscript{67} See Jenny, Frederic and Horna, Pierre, ‘Modernization of the European legal system of competition law enforcement: lessons from other regional groupings’ in Brusick, Alvarez and Cernat, ibid.

\textsuperscript{68} The Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) was signed on 5 November 1993. It brings together 18 African nations. COMESA resembles more an overarching community given that it covers other regional organisations, including the East African Community (EAC) and the Southern African Development Community (SADC). The impact of COMESA on these regional organisations is clear. For example, a Memorandum of Understanding was signed with the EAC under which the EAC has agreed to adopt and implement the COMESA trade liberalisation and facilitation programme. A Joint Task Force has also been established with SADC in order to harmonise its programmes with those of COMESA.

\textsuperscript{69} See Aide Memoire: Trade Capacity Building: Strengthening the COMESA trade region through a culture of competition (COMESA, 2008).

\textsuperscript{70} See Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, 2005).

\textsuperscript{71} See, for example, the views of Kenya, Zambia and Zimbabwe who openly acknowledged prior to the creation of COMESA that national competition rules were insufficient to combat restrictive practices manifested at a regional level.

\textsuperscript{72} The Commission is a corporate body with an international legal personality.

\textsuperscript{73} The Regulations are considered to have supremacy over national laws: in the case of conflict the Regulations must prevail over the conflicting national law (Article 5(2) of the Regulations). This idea of supremacy has been borrowed from the EU.
4 of the Regulations which contains fairly detailed provisions. These provisions, however, are not comprehensive and in many places are incomplete. The COMESA Competition Commission has jurisdiction in relation to ‘notifiable mergers’.

75. A notifiable merger is a merger with ‘regional dimension’, a concept defined in Article 23(2) as requiring two conditions: (i) one or both of the firms involved operate in two or more COMESA member states, and (ii) the thresholds of combined annual turnover or assets – provided for in Article 23(3) of the Regulations – are exceeded. There is an obligation to notify these mergers to the Commission. The Commission, however, may require notification of a merger, which does not meet the two conditions for notification, if the merger appears to the Commission likely to lead to substantial lessening of competition (SLC) or likely to operate against the public interest. The Commission will use the SLC test to conduct its substantive appraisal of mergers within a timeframe of 120 days, which may be extended if the Commission feels this is necessary to be able to complete its investigation. Article 26 of the Regulations deals with the Commission’s procedures when conducting its review, the factors taken into account as part of its merger assessment and the likely outcomes of a merger investigation. The Article also sets out the powers of the Commission when conducting its merger appraisal.

- **West African Economic and Monetary Union (UEMOA** or WAEMU)**

76. A regional competition law regime has been established within WAEMU. The WAEMU Commission has competence to apply the competition rules, subject to the control of the Court of Justice, which has jurisdiction to rule on all decisions issued and fines imposed by the Commission.

77. In 2002, the WAEMU Council of Ministers adopted the Community Competition Law, which came into force in January 2003. The law has five elements: (i) control of anticompetitive behaviour within WAEMU; (ii) rules and procedures relating to the control of cartels and abuse of dominant position within WAEMU; (iii) the control of state aids within WAEMU; (iv) transparency of the financial relationship between members states and public enterprises on the one hand, and between public enterprises and international or foreign organisations on the other; and (v) co-operation between the WAEMU Commission and national authorities in the enforcement of the Law.

---

74 See, for example, below regarding the timeframe for merger review (under Article 25 of the Regulations) within which the Commission operates.

75 Details of these thresholds have yet to be published.

76 See Article 23(5) of the Regulations.

77 See Article 25 of the Regulations. The Article is silent, however, on how long such an extension is likely to be.

78 Acronym for the French name **Union Économique et Monétaire Ouest Africaine.**

79 The West African Economic and Monetary Union was established in 1994 as a union between 8 African countries. Its objectives are mainly of general economic nature.

80 The Commission acts through the Department of Fiscal Customs and Trade Policies, via the Trade and Competition Authority. It monitors compliance with WAEMU competition rules at the national level and; (i) receives complaints directly through national structures; (ii) initiates and investigates legal actions; and (iii) takes provisional measures, deciding on restrictions and fines. Before the Commission acts, it seeks advice from the Competition Advisory Committee.

81 The Court of Justice enjoys the power to hear legal actions launched by WAEMU bodies and appeals against Commission decisions, which can be amended or annulled as the Court of Justice sees fit.
There is thus no specific reference to merger control in the WAEMU Treaty. However, WAEMU’s position has been that this does not rule out the control of merger operations. Such operations are thought to be possible to control under the provisions dealing with abuse of dominance.82

4.1.2.3 Comments on existing regional efforts

Comprehensive regional co-operation in the area of merger control in the developing world is an ambitious goal. A fully-fledged regional merger control framework does not seem realistic without at least undertaking some preliminary steps. The first of these steps is the removal of serious political obstacles facing DEEs. Raising the profile of competition law on the regional agenda will depend on domestic successes by the countries concerned both in terms of competition law enforcement and progress towards economic integration more broadly. Due to the highly complex nature of the economic integration process, political disagreements will very likely emerge and will likely impact on the field of competition law and ultimately on merger control.

Beyond the potential political disagreements, ‘functional’ constraints also present serious problems. Huge differences exist between the countries concerned in terms of their experience in the area of merger control. It is therefore premature to embrace the idea of regional co-operation as a means of introducing effective merger control regionally to overcome domestic constraints. The initial focus should be on reaching a stage where merger control rules are introduced domestically in the countries concerned and enforced effectively. It is an essential premise that countries have the same level of development for regional co-operation to work effectively in this area. One solution would be for merger control rules in different regions of the developing world to be developed from the bottom up, i.e. with each country designing its own merger control regime and making some progress in enforcing it. Advancing in this way is more conducive to achieving meaningful co-operation at a regional level.

Regional communities around the developing world often lack the necessary tools to deal with the issues and problems that arise following the exercise of jurisdiction by regional authorities.83 Most notably, it is important to have suitable tools for the following: (i) the allocation of jurisdiction between the ‘community’ level and ‘national’ levels; (ii) the enforcement role and powers of the regional authorities (for example whether they will have the ability (and, if yes, how) to access and gather information in actual cases from firms operating in the different countries); and (iii) the necessary safeguards in place for an expansion in workload beyond the capabilities of the regional authorities (for example, the ability to involve national competition authorities to lessen the burden on the regional authorities).

The issue is aggravated by the fact that some DEEs are parties to more than one regional community.84 This leads to difficulties related to whether an individual country will give priority to the merger control framework of one community over another. The existence of overlaps in membership has the potential to undermine the real prospects for creating a fully effective merger control regime at regional level.

It is clear that regional communities which exist in DEEs have been inspired by the EU model. While drawing from the EU experience is beneficial, it is important to appreciate the limitations of attempting to transpose the EU model. It took the EU over five decades (including two long decades of

82  Article 88 (b) prohibits practices ‘comparable’ to situations of abusive dominance and it has been thought to serve as a legal basis for a certain degree of merger control.

83  See The Attribution of Competence to Community and National Competition Authorities in the Application of Competition Rules (UNCTAD, 2008).

84  This is particularly notable on the African continent.
intensive work in the area of merger control) to reach its current position in the field of competition law and the area of merger control. Many DEEs are still in the nascent phase of developing their competition law and their circumstances and history also differ significantly from those of the EU.

84. A large part of the work and discussion on regional co-operation has been merely academic. Considerable efforts need to be made to promote the regional co-operation agenda. In particular, ‘implementation’ at the domestic level of regional rules or principles in many cases is crucial for this purpose. This necessitates instituting domestic merger control regimes in the countries concerned, as noted above. Overly burdensome bureaucracy is also a major constraint facing all regional organisations among DEEs making the task of setting a clear future for regional co-operation and achieving effective implementation much harder.

85. The problems facing regional co-operation are exacerbated by uncertainty faced over whether the emphasis of these regional communities should be placed on economic or political goals. Merger control is not seen through a pure competition law lens, and it cannot be detached from the wider political and economic issues that affect it. Co-operation cannot, therefore, stand in isolation and in almost all cases will depend on the wider political and economic circumstances prevailing in the region and on the individual countries concerned.

86. A final comment concerns capacity constraints, which is an issue for many of the regional communities in the developing world suffer. As noted in the previous part of the paper, the members of these communities are generally small economies which lack the necessary resources to be able to establish effective domestic merger control regimes, let alone devote resources to a regional merger control regime. The latter have the potential to be extremely high. Many of these countries do not consider allocating resources for merger control at regional level to be a national priority.

4.1.3 Bilateral Co-operation

87. Bilateral co-operation has developed into an important tool by which competition authorities engage, among themselves, in a variety of enforcement and enforcement-related activities. Bilateral co-operation may occur in both a formal (on the basis of an agreement) and informal (without the conclusion of an agreement, including on a de facto basis) manner. In the discussion below, the reference is made to competition-specific bilateral co-operation agreements, which should be distinguished from general bilateral links between countries including those of free trade agreements and memoranda of understanding. The latter do usually contain provisions dealing with competition law and policy but they are not suitable as a vehicle for proper bilateral co-operation in the field of competition law.

88. The number of bilateral co-operation agreements has grown quite considerably since the 1990s. However, compared to the number of competition authorities in existence, the number of agreements is relatively small. The vast majority of bilateral agreements and links have been entered into between experienced competition law agencies in the developed world. Thus, there is a noticeable absence from the competition law scene in most DEEs of specific bilateral co-operation agreements. This is interesting given the strong regional ties, as seen in the previous part of the paper, which exist between many of the

85 For example, in relation to the MERCOSUR Protocol, implementation here would require the introduction of competition law regimes and the setting up of domestic competition authorities in Uruguay and Paraguay, two of the member states.

86 Establishing a proper institutional structure at domestic level with sufficient financial resources and expertise is important to ensure successful implementation.

countries in these regions. One explanation for this absence may be that competition law was introduced only recently in the different countries and therefore competition enforcement (let alone merger control) has not matured to an extent to make the conclusion of such agreements possible or deemed necessary. However, given the extent of ‘cross-border’ or ‘inter-regional’ trade within regions and the existence of many firms operating in the different countries of these regions, the likelihood of merger transactions with cross-border elements is a realistic prospect.

89. The absence of bilateral links with competition authorities in DEEs is also understandable as far as their relationships with more experienced competition authorities in the developed world are concerned. The lack of a level playing field between the two groups is a major reason for this. There is also the fact that experienced authorities are usually time constrained in their merger investigations. Engaging in bilateral co-operation with authorities in DEEs (who may be reviewing the same merger) may not be seen as compatible with their goal of ensuring efficiency in these investigations.

90. Bilateral free trade agreements have been concluded between different countries within the same region. Some of these agreements have competition provisions, although these agreements are arguably not the most suitable medium for bilateral co-operation in the area of merger control to be established. The lack of formal or competition-specific bilateral co-operation agreements between the different countries does not mean, however, that co-operation is non-existent. Different forms of bilateral co-operation can be found, such as those involving joint meetings between competition officials and training seminars and workshops that may occur on an informal basis.

91. Bilateral co-operation offers a number of important benefits to countries and their competition authorities specifically. These were identified and advocated by the OECD in its 1995 Recommendation. The Recommendation lists the following specific benefits: (i) improved efficiency in enforcement and investigations; (ii) avoidance of jurisdictional conflicts; (iii) protecting the legitimate interests of countries; (iv) reducing the need for exchange of confidential information; (v) enhancing the interests of merging parties and legal certainty; and (vi) creating a closer nexus between the relevant competition authority and the relevant merger.

92. These benefits are relevant to DEEs. Thus, introducing bilateral co-operation should be a positive development for these economies. In reality, however, serious obstacles exist in the face of any effort to convert bilateral co-operation in the case of DEEs into an effective tool in the area of merger control. In particular, as noted above, the chances that experienced competition authorities will enter into such agreements with competition authorities in DEEs are quite slim. Arguably, only where the merger control regime of a DEE is modelled on that of a developed economy, and where the necessary wider political and economic circumstances exist which may facilitate such co-operation, will a competition authority in the latter consider entering into a bilateral co-operation agreement with the former.

93. Bilateral co-operation can only work if both parties to the agreement will benefit or at least consider it beneficial to enter into such co-operation. This is well demonstrated by the experience with the EU-US bilateral co-operation and that of Australia-New Zealand. These are the two most successful examples of bilateral co-operation in the field of competition law. The success achieved in these two

---

88 See OECD Recommendation on Cooperation between member countries on anticompetitive practices affecting international trade (1995).

89 The idea in relation to the latter point is that a given merger will be assessed by the relevant competition authority.

90 The EU/US co-operation is based on two co-operation agreements: the 1991 and 1998 agreements.

91 The co-operation between Australia and New Zealand is founded in the Closer Relations Agreement 1983 and a co-operation agreement from 2007.
instances is due in a large part to the similarities between the parties. In the case of the EU and the USA, this is seen in light of the fact that these are the world’s most advanced competition law regimes and there is a significant jurisdictional overlap between them in many cases, especially in merger operations. In the case of Australia and New Zealand, this is seen in light of the similar levels of economic development existing in both countries as well as the close political ties and mutual trust and confidence between them.

94. Notwithstanding the limitations from which bilateral co-operation suffers as an international option for DEEs, it may nevertheless be advantageous for these economies to attempt to establish bilateral links in the field of competition law either among themselves or with more developed economies. These links do not have to be exclusively for the purposes of co-operation in individual enforcement actions, but may facilitate technical training and capacity building. These would be particularly important in the area of merger control given the specific demands, as we saw above, of this area, especially in terms of adequate resources, most notably relevant expertise. This could also enhance the prospects for convergence and harmonisation which are likely to emerge from such bilateral links.

4.2 Jurisdictional issues

95. Jurisdictional issues sit at the very heart of the merger control mechanism. As a process, merger control begins with the question of jurisdiction: i.e. whether a particular transaction falls within the scope of the relevant regime and whether the relevant jurisdictional requirements are satisfied. This is what triggers the entire process of substantive merger appraisal. Where the jurisdictional thresholds are not met, no notification of the merger will be necessary and as a consequence the relevant competition authority will not carry out an assessment of the merger.

96. The jurisdictional question assumes particular importance in relation to cross-border merger operations given the high probability of these operations having to be notified \textit{ex ante} in many jurisdictions. One issue concerns whether these mergers, where they involve foreign firms, should be caught – under all circumstances – by the relevant local merger rules of a given jurisdiction or whether this should only happen under certain circumstances. In relation to DEEs, this question is particularly relevant in the context of cross-border merger control.

4.2.1 Notification

97. In the vast majority of merger control regimes in the world, a mechanism of mandatory notification exists. Only a few jurisdictions in the world (including the United Kingdom, Chile, Australia and New Zealand) have a mechanism of voluntary notification. When designing or operating a merger control regime, a DEE will need to consider whether to rely on mandatory or voluntary notification and, more importantly, the jurisdictional thresholds which trigger notification to the relevant competition authority.

---

92 It is important to note that the prospects of this cannot be ruled out completely even in the absence of a formal co-operation agreement. See for example the consultations conducted between the Competition Commission of Zimbabwe and the Australian Competition and Consumer Commission in the \textit{Coca-Cola Company/Cadbury-Schweppes} merger, mentioned in note 45 above.

93 See above.

94 It should be borne in mind however that jurisdiction may nonetheless be exercised by the relevant competition authority in such cases. See for example the provision in the COMESA \textit{Regulations} to that effect, note 73 above and accompanying text; or where a voluntary notification mechanism exists and the relevant competition authority chooses to examine a merger \textit{ex post}.

95 In some jurisdictions, an exemption exists for certain types of ‘foreign’ mergers. See, for example, the exemption in existence in the US merger control regime.
authority. This is a complex issue that requires careful consideration. Such thresholds should, on the one hand, reflect the size of the economy in question and relevant national sensitivities and, on the other hand, have proper regard to the interests of firms engaged in merger operations.

98. There is a particular difficulty in setting the jurisdictional thresholds at an appropriate level. In relation to this task, a risk exists that these thresholds may be set too high or too low. There are implications in both of these situations. Where the thresholds are set at a high level, there is a risk that some problematic mergers (which normally should require appraisal on substantive grounds) would escape scrutiny. Where the thresholds are set at a low level, this will increase dramatically the number of merger operations caught under the notification rules. Some of these mergers may not have a sufficiently material link to the relevant jurisdiction (See Box 4). Such an outcome will have serious repercussions for the scarce resources available to competition authorities in DEEs. This is in addition to the unnecessary regulation to which merging parties in cross-border situations will be subjected to. This point deserves particular emphasis given that most mergers do not give rise to competition problems.

### Box 4. Reform of Merger Notification Thresholds in Brazil

It is worth mentioning the change which occurred in Brazil.

Under section 54 of the Competition Act 1994, notification is mandatory for all mergers, acquisitions, joint ventures, or any other type of corporate grouping where: the transaction generates effects in Brazil; and the transaction results in a market share equal to or higher than 20% of a given relevant market; or any of the parties to the transaction achieved a turnover above R $400 million in the preceding financial year.

For a long time, the Brazilian competition authorities gave an expansive interpretation to the concept of ‘effects in Brazil’. This was encouraged by the wording of section 54 which omits a geographic reference to Brazil in relation to the market share and turnover thresholds. With such low thresholds, many merger operations which produced no impact at all on competition in local markets had to be notified to the Brazilian Administrative Council for Economic Defence (CADE).

A new interpretation was given to the concept of effects and the turnover criterion in a key decision delivered by the CADE on 19 January 2005. The CADE stated that notification should occur in the case of transactions, which involved economic groups with a turnover exceeding R $400 million – in Brazil – in the preceding financial year. This significant change has been facilitated by the adoption of the principle of appropriate nexus of jurisdiction as advocated by the OECD and the ICN. The change in position led to a significant decrease in the number of merger operations, which would have had to be notified in Brazil in the absence of this change. Therefore at present only those merger operations in which the turnover generated in Brazil exceeds the stated threshold should be notified.

It is worth noting that there is a proposed change currently under discussion in Brazil (Bill of Law 06/2009) which is seeking to place exclusive reliance on turnover thresholds and not market share thresholds for establishing jurisdiction. This proposed change also follows OECD and ICN best practices (see note 97 below and accompanying text).

99. The work of the OECD and the ICN demonstrates the difficulty involved in determining the appropriate jurisdictional nexus and the appropriate level at which to set the notification thresholds. The ICN principles produced on this issue\(^\text{97}\) show that it is difficult to determining the criteria for such thresholds. This is in part due to the general nature of the criteria proposed under these principles for

---


\(^{97}\) See ICN Recommended Practices for Merger notification and review procedures.
determining the notification thresholds i.e. that they should be clear and understandable and based on objective and quantitative and not subjective factors.\footnote{Criteria such as turnover figures and assets are considered to be objective; market shares, on the other hand, are considered to be subjective criteria.}

100. The OECD Recommendation on Merger Review (2005) offers further clarification on this issue. According to the Recommendation, OECD member countries should assert jurisdiction only where a merger operation has an appropriate nexus with their jurisdiction. It also states that the criteria for determining notification must be clear and objective. Clearly, such recommendations are motivated by an interest to reduce the cost and burden on merging firms and third parties. They are therefore welcome.

\subsection*{4.2.2 Obtaining information and information exchange with other competition authorities}

101. Another jurisdictional issue, which has great practical significance, concerns the tools and powers for seeking and gathering information in merger cases and for exchanging information between competition authorities. In merger cases, the information will usually come from the merging parties themselves as part of the merger notification exercise. However competition authorities in DEEs encounter a number of difficulties in obtaining information from, and exchanging information with, firms involved in cross-border mergers. To understand this issue, the discussion should be placed in the wider context of extraterritorial assertion of jurisdiction by competition authorities (especially those of DEEs) over these operations.

102. The doctrine of extraterritoriality has been a source of controversy in the field of competition law.\footnote{See Dabbah, ch. 8, note 52 above. Extraterritoriality refers to a situation where a competition authority or court asserts jurisdiction over a situation involving foreign elements (such as behaviour, conduct or transactions of foreign firms). This may be done on the basis of ‘effects’ produced on competition in local markets, or on the basis of ‘implementation’ of the behaviour, conduct or transaction in the relevant jurisdiction, or (in some cases) on the basis of the ‘single economic group’ doctrine (where although the firm(s) concerned may be foreign, nonetheless they may own a local subsidiary). The ‘effects’ and ‘implementation’ doctrines are the main scenarios for asserting jurisdiction extraterritorially. The former is used in the USA (and many other) regimes whereas the latter is used in the EU.} The aggressive use of the doctrine in some parts of the world has triggered disputes and conflicts between countries and has led to some countries and their authorities taking measures to block extraterritorial efforts by other countries.\footnote{See, for example, the blocking efforts – through both case law and statute – by the United Kingdom in relation to extraterritorial assertions of jurisdiction by the USA. Other countries which have adopted blocking legislation against US extraterritorial actions include Australia and South Africa.}

103. However, the doctrine of extraterritoriality has an important role to play in the field of competition law and in merger control particularly. Without it at least some potentially harmful transactions might escape scrutiny. Extraterritoriality has a particularly important role in the absence of an effective multilateral strategy in the relevant country and given the limitations from which bilateral co-operation suffers.\footnote{See discussion above in paragraphs 93 and 94.}

104. Extraterritoriality is an inherent feature of merger control. This can be seen in light of the wording and nature of the jurisdictional thresholds triggering merger notification (whether mandatory or voluntarily), which feature in different merger control regimes. The judicial confirmation given in the US
and Europe strengthens this point.\textsuperscript{102} However, the ability of competition authorities of DEEs to assert jurisdiction extraterritorially in cross-border merger cases remains a challenge.\textsuperscript{103}

105. As a starting point competition authorities in DEEs may struggle to obtain all the necessary information required to conduct the merger analysis.\textsuperscript{104} When the relevant information is located outside the territory of the DEE in question, it can be very difficult for the relevant competition authority to obtain it. The firm(s) concerned may refuse to comply with the orders of the authority to supply the relevant information and the only way to obtain it would be to rely on the possible assistance of the relevant foreign competition authority. However, unless a bilateral co-operation agreement to assist and exchange information exists between the relevant jurisdictions, ad hoc co-operation of this type is unlikely.\textsuperscript{105} This highlights the need for bilateral co-operation, although as stated above considerable constraints may prevent it from materialising.

106. Even if the competition authority is able to obtain the necessary information and reach a conclusion that the relevant merger should be blocked or cleared subject to conditions, it can still face serious problems in enforcing its decision where there are no assets belonging to the firm(s) concerned in local markets.\textsuperscript{106} The likelihood of an authority succeeding to enforce its decision in the courts of the relevant foreign jurisdiction is slim. The situation is exacerbated where fundamental differences exist between the two jurisdictions, for example in civil and common law jurisdictions, or because one jurisdiction allows for criminal penalties whereas the other allows only for civil penalties.\textsuperscript{107}

4.3 Remedies

107. Remedies play a decisive role in merger control.\textsuperscript{108} Without the ability to impose remedies, agencies would have no other choice than to reject problematic mergers. Remedies allow problematic mergers, which nonetheless have obvious and important benefits, to be cleared where these benefits outweigh possible competition problems which the relevant merger is likely to give rise to. Merger remedies create a third category – next to unconditional clearance or prohibition decisions – of outcome in merger cases, namely that of conditional clearance.

\textsuperscript{102} Judgments of the US Supreme Court and the European Court of Justice have been crucial in recognising the doctrine of extraterritoriality. See, for example, the judgement of the General Court of the EU (then the CFI) in Case T-102/96 \textit{Gencor v. Commission} (1999) ECR II-753.

\textsuperscript{103} This does not mean that such assertion is impossible however. A number of examples are possible to identify of successful assertion of extraterritorial jurisdiction, including the \textit{Coca-Cola Company/Cadbury-Schweppes} merger, mentioned in note 45 above.

\textsuperscript{104} This arguably highlights the importance of having mandatory notification as opposed to voluntary notification.

\textsuperscript{105} For illustrations, see Dabbah, ch. 4, note 22 above.

\textsuperscript{106} See for example the \textit{Rabies-Vaccines} merger which was investigated by the US Federal Trade Commission (Case No. 891 0098, 55 Fed. Reg. 1614 (1990)). This case concerned the acquisition of the French firm, Connaught by Institute Merieux of Canada. Despite identifying competition concerns in the case, the firms had no assets in the USA and so the FTC needed the co-operation of the Canadian Competition Bureau in the circumstances.

\textsuperscript{107} Some important illustrations can be found from practice, most notably: the decisions of the UK House of Lords (now the Supreme Court) in \textit{Huntington v. Attrill} [1893] A.C. 150 and in \textit{Government of India v. Taylor} [1955] AC 491; and the judgement of the UK Court of Appeal in \textit{United States of America v Inkley} [1988] 3 All ER 144.

\textsuperscript{108} For a useful discussion of merger remedies, see the OECD Roundtable on \textit{Merger Remedies} (2003) and the ICN principles on remedies.
4.3.1 Types of remedies available

108. There are several types of merger remedies. Broadly speaking, these remedies are divided along the lines of structural and behavioural remedies. In some merger control regimes, however, the categorising of remedies is more sophisticated than this.\(^1\) In these regimes, a distinction is made between: structural remedies;\(^1\) ‘other’ structural remedies;\(^1\) behavioural remedies;\(^1\) and other types of remedies.\(^1\)

109. Competition authorities overwhelmingly prefer structural remedies over behavioural ones. Structural remedies are considered to have greater effectiveness than behavioural remedies in addressing the competition problem(s) identified during merger appraisal. Moreover, unlike behavioural remedies, they do not require ongoing monitoring. Nonetheless, when it comes to designing merger remedies and determining its policy on this topic (including what type of remedies to accept), a competition authority faces a difficult task. This is particularly the case in DEEs.

110. A competition authority in a DEE may choose – as part of its policy – to express preference towards structural remedies. In practice, however, authorities may struggle to implement this type of remedy where the merging parties maintain no relevant assets in the jurisdiction in question and (more generally) where the merging firm(s) have the upper hand in their dealings with the authority.\(^1\)

111. The merger may also require the divestiture of a number of assets and the relevant competition authority in a DEE may lack the experience to deal with such complex cases.\(^1\) It may also be the case that the competition concerns identified in the investigation are related to issues which are behavioural in nature such as exclusivity clauses in contracts between one or more of the merging firms and customers of these firms.\(^1\)

112. In practice, competition authorities in DEEs may therefore have to opt for behavioural remedies in more instances than they would like to be the case. This has been the situation adopted in Korea. (See Box 5). However, despite their drawbacks one should not dismiss the importance and relevance of behavioural remedies and the need to opt for a behavioural remedy in a given case as a first choice or as one part of a sophisticated remedies package.

\(^1\) See for example the classification made by the UK Office of Fair Trading and UK Competition Commission.

\(^1\) Structural remedies include most commonly divestiture.

\(^1\) Other structural remedies may include granting access to facilities of infrastructure or intellectual property rights.

\(^1\) Behaviour remedies may include things like licensing of intellectual property rights, removal of exclusivity clauses in contracts with customers or price regulation measures.

\(^1\) Other types of remedies may include recommendations by the competition authority to the government or parliament to change a law or regulation deemed to be an obstacle to competition in the relevant market.

\(^1\) One such example is whether the firms may be able to threaten to withdraw from the relevant jurisdiction and/or to lobby the government in order to exert heavy pressure on competition officials, as discussed previously.

\(^1\) See for example the views submitted by Mexico within the OECD Policy Roundtable on Merger remedies (2003).

\(^1\) Exclusivity clauses in particular constitute a problem in several DEEs; see most notably the position in different sectors of the Mexican economy, including that of soft drinks.
Box 5. The Use of Behavioural Remedies in Korea

In recent years, the Korean Fair Trade Commission (KFTC) has heavily relied on behavioural remedies as part of merger clearance in a number of cases. Two examples offer interesting case studies.

The first concerns the acquisition in 2007 by CJ Cable Net of a stake in Chungnam Broadcasting System and Modu Broadcasting System\(^{117}\) which led to the integration of the provision of cable-TV by these firms in six cities in Korea. The KFTC cleared the transaction subject to a rigorous and sophisticated remedies package. This included a prohibition on: direct or indirect price increases; reduction in the number of channels offered per subscription class of customers; refusal to make information available on cheapest products or refusal to supply such products; and refusal of applications to convert subscriptions to cheaper services.

In the second case, the 2005 acquisition by Hite Brewery Co. of Jinro Ltd\(^{118}\), the KFTC made use of extensive behavioural remedies. These remedies included: a prohibition on raising the prices of alcoholic beverages by the merged entity by more than the average inflation rate during a five year period; an agreement that any price increase must be approved by the KFTC in advance; a prohibition on unfair coercion or inducement by the merged entity of wholesalers to deal with it on unfair terms by taking advantage of its position; and an obligation on the merged entity to submit to the KFTC information concerning transactions entered into with liquor wholesalers.

113. A number of characteristics which make behavioural remedies appealing and particularly relevant for DEEs can be identified. Among these characteristics, the flexibility of behavioural remedies is noteworthy. In the absence of a jurisdiction-specific structural remedy, a behavioural remedy enables competition authorities in DEEs to adopt a solution which suits the circumstances and needs of the jurisdiction in question. This should also enhance the willingness of merging parties in cross-border operations to comply with the conditions and obligations imposed on them as part of the merger clearance.

114. The types of behavioural remedies which should feature in the toolbox of remedies available to competition authorities in DEEs depends on the characteristics of local markets and the enforcement experience and regulatory perspectives of the authorities. Nonetheless, a number of behavioural remedies will be particularly relevant to DEEs. These include: (i) behavioural remedies designed to address issues of vertical restraints (including those related to exclusivity clauses); (ii) non-structural access remedies in the form of licensing of intellectual property rights; and (iii) granting access to facilities\(^{119}\). It should be noted, however, that these issues present a more difficult remedy for competition authorities in general, including those of DEEs.

115. DEEs should not rely excessively on behavioural remedies as there is a cost attached. The demands of monitoring compliance can be very high especially given these authorities suffer from limited resources. However, on balance, the benefits resulting from using behavioural remedies in some cases to address a competition issue may outweigh or justify the inevitable cost. This should be a consideration for these authorities to take into account when designing their policy on merger remedies.

117 KFTC Decision no. 2007-274, 7.5.2007.


119 In some cases, competition authorities may ‘condition’ the relevant merger using other behavioural tools. See for example the conditional clearance given by the Competition Commission of Zimbabwe in the Coca-Cola Company/Cadbury-Schweppes merger (mentioned in note 45 above). The relevant conditions included an undertaking by Coca-Cola to maintain the local Mazoe and Calypso brands on the Zimbabwean market and develop them into regional brands with wider circulation; and to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials necessary to produce the finished product brands.
4.3.2 Consultation and co-operation

116. Recent developments in the area of merger control have established the value of consultation and co-operation between competition authorities on the question of remedies in merger cases. This is especially important in light of the serious potential for conflicts between competition authorities which can arise in a number of contexts. These contexts include:

- first, the relevant competition authorities might reach conflicting conclusions concerning the need for remedies in the same cross-border merger case;
- second, the jurisdiction in which the merger has its ‘centre of gravity’ might decide not to regulate the merger and allow it on non-competition grounds, whereas one or more other jurisdictions may seek to impose remedies under their merger control laws; and
- third, two competition authorities could identify competitive concerns with respect to different aspects of the same merger operation in which case the remedies deemed necessary by one authority might not match the remedies sought by the other authority.

117. Bilateral co-operation in this context brings a number of important benefits to both the competition authorities and the merging parties. The benefits to competition authorities are not limited exclusively to benefits in administrative terms, but in practice, translate into benefits also for consumers and for local markets. This is the case where co-operation enhances the prospects for effective design and implementation of a remedy in a particular case.

118. The prospects of consultation and co-operation between competition authorities of DEEs and experienced competition authorities cannot be taken for granted. However, at the same time, they cannot be completely ruled out. Co-operation between competition authorities in the remedies phase can be of critical importance. This is especially so for the purposes of enhancing consistency between these authorities. International discussion at the OECD and in other fora explored different options for co-operation, most notably the idea of ‘work sharing arrangements’ between competition authorities. This idea might deserve further examination though so far there has been a lack of consensus over the best way forward in this case. This can be seen in light of the difference in views over the viability and practicability of the ‘lead jurisdiction’ idea.

4.3.3 Monitoring and Enforcement

119. Where behavioural remedies are used as a condition to clear a merger, it is important that the relevant competition authority puts in place a means for the effective monitoring of the remedies implementation. This is vital for ensuring full compliance by merging firms and guaranteeing the effectiveness of the relevant behavioural remedy. Monitoring is also important, though to a lesser extent, in

---

121 See note 92 above.
122 It should be noted that this was not the first time when this idea has been discussed. The idea was examined in the 2000 report of the International Competition Policy Advisory Committee (ICPAC). The report expressed strong support in favour of co-operation here. It put forward two different possibilities for having such arrangements: first, through joint negotiation (here every relevant competition authority would express its concerns over the transaction and a remedies package would be agreed through joint negotiation); and secondly, by designating one jurisdiction as ‘lead jurisdiction’ which negotiates remedies with the merging parties.
the case of structural remedies.\textsuperscript{123} The same holds true for enforcement: competition authorities must have the necessary powers and tools to be able to take enforcement actions where merging parties fail to comply with conditions or obligations featuring in remedies agreed with the parties.

120. Monitoring and enforcement are not an easy task and the requirements for these functions are not unique to the area of merger control. Competition authorities require adequate financial and human resources, which is a constraint relating to the field of competition law in general and not only the area of merger control.

121. Competition authorities face a serious hurdle in their monitoring efforts of remedies in cross-border mergers on two fronts. The first is limited access to the necessary information, and the second is the limited recourse to enforcement actions if the merging firms fail to comply with the conditions and obligations set out under the remedies. There are two possible avenues for enhancing the effectiveness of the function of monitoring. These include (i) taking actions against a local subsidiary of the merging parties (which may not always exist) and (ii) relying on co-operation. The latter avenue might be more promising although co-operation may have to be particularly extensive for it to work.

122. In some cases, achieving success in enforcement actions by one competition authority in cross-border merger cases requires the assistance of foreign competition authorities also involved in the transaction.\textsuperscript{124} This assistance is more likely to be given where the two competition authorities in question operate within a framework of close co-operation. As noted above, such frameworks are lacking in the case of competition authorities in DEEs. As a consequence, engaging in effective enforcement actions in cross-border merger cases becomes much harder to achieve.

123. One final issue to be discussed in the present context concerns non-competition factors. In the relevant DEE, industrial policy and other types of considerations – such as those related to foreign direct investment – may be paramount.\textsuperscript{125} The relevant competition authority may feel that such considerations should guide its work in the area of merger control. As a consequence, the authority may be concerned that the prospects of effective monitoring and enforcement of remedies may prove unattractive to foreign firms. Alternatively, government concerns may exist and pressure may be put on the authority to prioritise attracting foreign participation in local markets. The authority may therefore choose to develop or implement a policy-approach based on these consideration(s).

5. Conclusions

124. Among all of the branches of competition law and policy, merger control is the area that has had the most impact on the globalised economy. Yet, it is the area which, in geographical terms, has expanded the least. There is a significant scope for further developments to occur in the area: whether in terms of building effective merger control mechanisms in all existing competition law regimes around the world or in terms of developing merger control at the regional and international levels.

125. Impressive progress has been made in pushing for and achieving convergence and harmonisation in the area, most notably using soft law instruments. There has also been an increase in the number of bilateral co-operation links established between different competition authorities which have direct relevance to the regulation of cross-border mergers. This is in addition to the expansion in regional efforts to address competition law and policy in many parts of the developing world.

\textsuperscript{123} In the case of structural remedies, monitoring will be important to ensure that divestiture occurs according to the terms and conditions agreed between the competition authority and the merging parties. Once it has been completed, no on-going monitoring will be necessary.

\textsuperscript{124} See note 106 above.

\textsuperscript{125} See the discussion above in relation to these two issues.
126. DEEs occupy a unique position in the area of merger control. Most of these economies do not have effective merger control regimes; although some have established competition law regimes. They are also not active participants in bilateral co-operation.

127. In relation to multilateral co-operation, some competition authorities in DEEs have taken part in important proceedings, within the OECD, the ICN and UNCTAD.

128. Only in relation to regional co-operation have some of these economies achieved notable success in building some form of regional framework for regulating cross-border mergers (and for addressing competition issues more generally). However, none of these regional efforts have proved to be fully effective and they are still some way from reaching maturity.

129. This state of affairs raises the question of how DEEs should go about designing their strategies in the area of merger control. A number of points should be made in this regard. Cross-border mergers clearly impact many DEEs around the world. Provisions should therefore be made for dealing with cross-border mergers within current competition rules in DEEs. Competition authorities in DEEs should develop strategies which incorporate elements of multilateral, regional and bilateral co-operation and which reflect the unique positions and circumstances of these economies.

130. Competition authorities would benefit from becoming more actively involved in international proceedings in the area of merger control within bodies such as the OECD and ICN. This will widen their learning curve and offer them important insights into this highly complex area. This approach will bring about important benefits for these authorities: of achieving convergence and harmonisation and interacting with many other competition authorities, including those more experienced.

131. In relation to regional co-operation, this type of co-operation can be helpful for the purposes of building a mechanism for dealing with cross-border mergers affecting a number of countries in the relevant region. Such a mechanism will enable the countries to become a more significant force, individually and collectively, in regulating cross-border mergers and to enjoy more weight vis-à-vis powerful firms involved in these mergers.

132. In relation to bilateral co-operation, the chances for competition authorities in DEEs to engage in this kind of co-operation in enforcement actions in individual cases – especially with experienced competition authorities – are not particularly high. Nonetheless, bilateral links may be possible and useful to establish for the purposes of sharing experience, technical assistance and capacity building and for undertaking policy dialogues more generally. All of these activities should yield considerable benefits for competition authorities in DEEs.

133. At the most fundamental level, however, action should be taken by DEEs to ensure the existence of a fully effective framework for regulating mergers domestically. This includes ensuring that: the law contains adequate provisions dealing with the key aspects of merger control (including those dealing with jurisdiction); proper practicable and transparent procedures are in place (particularly in relation to the issues of merger notification and merger remedies); appropriate guidance is provided from which merging firms and their advisors can benefit; and an independent competition authority with the relevant expertise in handling merger control is established.

134. Moreover, it must be recognised that building effective merger control in a DEE requires the existence of an effective competition law regime in the first place, unless of course the relevant country establishes a merger control regime on sectoral basis as has been the case in countries such as Hong Kong.

135. These are crucial pre-conditions for enabling DEEs to address cross-border mergers. Only once the domestic frameworks are in place will engaging in any of the different types of co-operation, whether multilateral, regional or bilateral, be meaningful.
REFERENCES

Andrade, Maria, ‘Competition law in Mercosur: Recent developments’ (2003) Global Competition Review 1


Correa, Paulo, and Aguiar, Frederic, ‘Merger control in developing countries: lessons from the Brazilian experience’ (UNCTAD, 2002)

Cowling, Keith, Stoneman, Paul, Cubbin, John, Cable, John, Hall, Graham, Domberger, Simon, and Dutton, Patricia, Mergers and Economic Performance (Cambridge, 1980)


Dabbah, Maher, Competition Law and Policy in the Middle East (Cambridge, 2007)

Dabbah, Maher, International and Comparative Competition Law (Cambridge, 2010)


Fox, Eleanor and Sokol, Daniel, Competition Law and Policy in Latin America (Hart Publishing, 2009)


Gal, Michal, Competition Policy for Small Market Economies (Harvard, 2003)


Mussati, Giuliano, Mergers, Markets and Public Policy (Kluwer, 1995)


Smith, Stephen, Industrial Policy in Developing Countries (Economic Policy Institute, 1991)


UNCTAD report ‘The attribution of competence to community and national competition authorities in the application of competition rules’ (2008)

UNCTAD Secretariat, ‘The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble’ (2010)

REFERENCES TO OECD MATERIAL

(All available at www.oecd.org/competition)


OECD Roundtable, ‘Competition, concentration and stability in the banking sector’ (2010)


OECD Roundtable, ‘Competition issues in joint ventures’ (2000)

OECD Roundtable, ‘Competition policy, industrial policy and national champions’ (2009)


OECD Roundtable, ‘Merger review in emerging high innovation markets’ (2002)

OECD Roundtable, ‘Mergers in financial services’ (2000)


OECD Roundtable, ‘Portfolio effects in conglomerate mergers’ (2001)

OECD Roundtable, ‘Standard for merger review’ (2009)

OECD Roundtable, ‘Substantive criteria used for merger assessments’ (2002)

OECD Roundtable, ‘The failing firm defence’ (2009)


OECD Whish and Wood study on Merger Control Procedures (1994)
BACKGROUND NOTE

(French version)
CONTRÔLE DES FUSIONS TRANSMATIONALES : DÉFIS À RELEVER PAR LES PAYS EN DÉVELOPPEMENT ET LES ÉCONOMIES EMERGENTES

-- Note de référence --

1. Introduction

1. Le présent document vise à identifier certains des principaux défis liés au contrôle des fusions transnationales dans les pays en développement et les économies émergentes. Il développe une approche analytique et critique du sujet axée sur un certain nombre de thèmes sous-jacents. Ce document se propose d’établir un cadre pour l’examen de ces thèmes non seulement sous un angle théorique et pratique et mais aussi du point de vue de la loi et de l’action des pouvoirs publics. Il souligne l’importance du contrôle des fusions transnationales dans les pays en développement et les économies émergentes, en particulier dans le contexte de leur intégration croissante dans l’économie mondiale. Ce faisant, il se focalise sur les défis à relever par ces économies pour réglementer les fusions transnationales.

2. Ces dix dernières années, le contrôle des fusions a revêtu une importance sans cesse croissante. Beaucoup de pays, y compris de nombreux pays en développement et économies émergentes, ont, d’une façon ou d’une autre, mis en place un régime de contrôle des opérations de fusion. Cependant, les différents régimes de droit de la concurrence existant de par le monde ne prévoient pas tous un contrôle des fusions, et de manière plus générale, tous les pays ne sont pas dotés d’un droit de la concurrence. La présente note de référence ne portera donc pas sur les défis à relever par les pays dépourvus de régime de fusion, même si certains des aspects qu’elle aborde pourront néanmoins intéresser les pays dotés d’un droit de la concurrence, mais où il n’existe aucun mécanisme spécifique en matière de contrôle des fusions.

3. Le rapport s’articule de la façon suivante. La Partie 2 propose une présentation générale du sujet. La Partie 3 est consacrée aux défis spécifiques aux pays en développement et aux économies émergentes dans le domaine du contrôle des fusions. La Partie 4 traite trois aspects fondamentaux de la question à l’étude, à savoir la coopération, la compétence et les mesures correctives. Enfin, les conclusions de cette note de référence sont présentées en Partie 5.
2. **Contrôle des fusions transnationales**

2.1 **Définition du concept de « fusion transnationale »**

4. Le concept de fusion transnationale\(^1\) peut être défini de plusieurs façons en se fondant soit sur la « structure » de la fusion, soit sur son « effet ».

5. En termes de structure, on peut considérer qu’une fusion présente une dimension transnationale si elle implique des entreprises établies dans plusieurs juridictions. En termes d’effets, la dimension transnationale peut être retenue si, quel que soit le lieu d’implantation des entreprises à la fusion, l’opération affecte les marchés de plusieurs juridictions. Par ailleurs, on peut déterminer qu’une fusion présente une dimension transnationale sans tenir compte de sa structure ou de ses effets. Par exemple, dans sa Recommandation de 2005 sur le contrôle des fusions, l’OCDE qualifie de « fusion transnationale » toute fusion soumise à contrôle au titre des lois sur les fusions de plusieurs juridictions.

6. Quel que soit le motif justifiant la dimension transnationale d’une fusion, les avis divergent quant au nombre de juridictions qu’une telle opération devrait couvrir. Certains parleront de fusion transnationale dès lors qu’une fusion concerne au moins deux juridictions, tandis que pour d’autres, cette qualification sous-entend une opération de plus grande envergure et doit donc être réservée aux fusions relevant de plus de deux juridictions. Le premier point de vue (le moins restrictif) peut sembler plus sensé, étant donné que la différence entre ces deux approches est quantitative et non qualitative. Cela signifie que lorsqu’il s’agit de réglementer ces fusions, les mêmes questions (ou problèmes) sont susceptibles de se poser dans une situation comme dans l’autre. Parmi ces points communs, on notera le fait que la notification de la fusion doive être effectuée dans plusieurs juridictions, ainsi que le risque d’incohérence entre les décisions prises par les différentes autorités de la concurrence concernées.

2.2 **Nature et spécificités du contrôle des fusions**

7. Le contrôle des fusions est un aspect très particulier du droit de la concurrence\(^2\). Les opérations de fusion sont des transactions d’affaire à part entière et se distinguent par conséquent fondamentalement d’autres comportements anticoncurrentiels tels que les ententes et les abus de position dominante\(^3\). Les fusions soulèvent des questions structurelles plutôt que des problèmes de comportements passagers. Elles peuvent potentiellement conditionner toute l’évolution future d’un pan entier de l’économie puisqu’elles modifient la structure même de tout un secteur d’activité. Par ailleurs, du point de vue de l’intérêt du public, les fusions ne sauraient être classées parmi les comportements anticoncurrentiels préjudiciables tels que les ententes et les abus de position dominante, du fait qu’elles produisent souvent à terme des effets positifs\(^4\).

8. Les fusions comportent habituellement des risques commerciaux et financiers non négligeables et ont souvent un impact sur les marchés financiers et les bourses. Cela augmente leur valeur aux yeux des

---

\(^1\) Voir plus bas le paragraphe 21 qui établit différents types de fusions transnationales dans les pays en développement et les économies émergentes.

\(^2\) Voir de manière générale le rapport spécial publié par le Forum mondial sur la concurrence et la politique commerciale de l’IBA, *Policy Directions for Global Merger Review*.

\(^3\) Il convient toutefois de rappeler que les fusions et ces autres phénomènes anticoncurrentiels peuvent parfois se confondre partiellement. Par exemple, il peut être considéré qu’une fusion constitue un abus de position dominante si elle contribue à renforcer une telle position. Voir l’affaire C-6/72 Europemballange Corporation et Continental Can Company Inc. c. Commission [1973] REC 215.

entreprises et nécessite que soit développée pour elles une approche spéciale au sein du cadre réglementaire général de la concurrence. Dans ce contexte, il est important d’insister sur le rôle que le contrôle des fusions devrait jouer dans la pratique. S’il permet certes d’éviter les phénomènes anticoncurrentiels, le contrôle des fusions aide également les entreprises à prendre des décisions judicieuses dans l’élaboration de leurs stratégies commerciales et d’affaires à long terme. Ce point est d’ailleurs crucial s’agissant des pays en développement et des économies émergentes : le contrôle des fusions dans ces économies peut avoir un impact positif sur la restructuration de différents secteurs de l’économie et améliorer les perspectives de performances économiques, tout en préservant la concurrence et en protégeant les consommateurs.

9. Le contrôle des fusions transnationales est un sujet à multiples facettes. Il est intéressant de souligner l’interaction de tous les éléments suivants : politique de la concurrence et autres considérations relevant des pouvoirs publics ; questions de compétence, de procédure et de fond liées au contrôle des fusions ; régimes juridiques et intérêts commerciaux ; et préoccupations et intérêts nationaux, régionaux et mondiaux. Cette interaction particulière renforce l’importance du contrôle des fusions et accentue les difficultés qui y sont associées, notamment pour ce qui est des opérations de fusion impliquant des éléments transnationaux.

10. Le contrôle des fusions a vocation à rendre possible la réalisation d’objectifs de politique publique concernant la structure de tel ou tel secteur d’activité dans une juridiction donnée. Il porte sur conséquences commerciales et économiques d’une fusion pour la juridiction concernée plutôt que sur les processus en amont de la transaction. Contrôler les opérations de fusion peut permettre de maintenir en place certaines structures de marché et de garantir une concurrence réelle. Mais le contrôle des fusions peut cacher des objectifs plus spécifiques qui diffèrent d’une juridiction à l’autre. Néanmoins, selon le consensus qui se dégage à l’échelon mondial, l’objectif du contrôle des fusions est de maintenir des structures de marché favorables à la concurrence dans l’optique de garantir le bien-être du consommateur.

11. Un certain nombre d’évolutions intervenues ces dernières années ont conduit de nombreux pays et plusieurs organes et organisations internationaux à inscrire le contrôle des fusions à leur ordre du jour. Parmi ces évolutions, il convient de citer les suivantes.

12. Premièrement, comme précisé plus haut, le contrôle des fusions trouve sa justification dans des considérations relevant de la politique de la concurrence ou de la politique industrielle. Par conséquent, un pays doit présenter un niveau de développement social et politique suffisant avant de pouvoir mettre en place un contrôle des fusions. De plus en plus de pays – dont beaucoup de pays en développement et d’économies émergentes – ont depuis quelques années atteint ce niveau, d’où la place importante qui lui est désormais accordée. Les fusions devraient donc être abordées selon deux angles de vue opposés. D’un côté, elles sont des opérations essentielles pour stimuler le développement des économies locales et, de l’autre, ces mêmes opérations sont susceptibles de provoquer des bouleversements, d’introduire de


7 Par exemple, protéger des concurrents locaux ou de petite et de moyenne taille, réaliser divers objectifs socioéconomiques ou sociopolitiques, sauvegarder l’emploi, encourager l’esprit d’entreprise et atteindre divers objectifs de politique industrielle, notamment promouvoir la compétitivité internationale de l’économie locale et développer des entreprises nationales solides.

13. Deuxièmement, depuis les années 1980, il est reconnu dans le monde entier que le caractère très particulier des opérations de fusion nécessite que soient imaginés des règles et des instruments spécifiques sur mesure pour les réglementer\textsuperscript{10}. L’expérience d’un certain nombre de juridictions clés a mis en exergue le caractère inadéquat des dispositions classiques du droit de la concurrence, comme par exemple celles applicables à l’abus de position dominante et aux ententes horizontales, si elles sont utilisées comme des instruments de contrôle des fusions\textsuperscript{11}.  

14. Troisièmement, en raison du phénomène de mondialisation engagé depuis le milieu des années 1990, un nombre considérable d’opérations de fusion comportent d’ordinaire des éléments transnationaux, y compris lorsqu’il s’agit de transactions entre des entreprises locales\textsuperscript{12}. Dans la pratique, de telles opérations peuvent facilement affecter des marchés locaux de divers pays des cinq continents. Beaucoup de ces pays sont des pays en développement et des économies emergentes situés dans différentes régions.  

15. Quatrièmement, un certain nombre d’organismes et d’organisations internationales se sont employés à promouvoir l’importance du contrôle des fusions transnationales. Le Réseau international de la concurrence (RIC) y a consacré presque exclusivement ses premières années d’existence, et l’Organisation pour la coopération et le développement économiques (OCDE) a organisé ces vingt dernières années de nombreuses tables rondes importantes à ce sujet\textsuperscript{13}. La Recommandation de 2005 de l’OCDE sur le contrôle des fusions est d’ailleurs l’un des principaux fruits de ce grand débat de politique publique (voir Encadré 1)\textsuperscript{14}. La Conférence des Nations unies sur le commerce et le développement (CNUCED) a, elle aussi, pris des décisions à ce sujet.  


\textsuperscript{10} Voir \textit{Ibid}.  

\textsuperscript{11} Voir, par exemple, l’expérience de l’Union européenne avant l’adoption du premier règlement relatif aux opérations de concentration entre entreprises, le Règlement 4064/89. Jusqu’à 1989, la Commission européenne se fondait sur les articles 101 (interdisant les accords anticoncurrentiels) et 102 (interdisant les abus de position dominante) du Traité sur le fonctionnement de l’Union européenne pour réglementer les opérations de fusion. Voir l’affaire \textit{Continental Can}, mentionnée à la note 3 ci-dessus, pour ce qui est du recours à l’article 102 à cet égard. Bien qu’il ait été considéré que ces deux articles pouvaient être invoqués en cas d’opérations de fusion, il est apparu clairement qu’ils n’étaient pas adaptés à cette finalité. Il a donc été jugé nécessaire de prévoir un instrument spécifique au contrôle des fusions.  


\textsuperscript{14} Voir également la très utile note du Secrétariat de l’OCDE sur \textit{La coopération internationale en matière de fusions transnationales} (2001).
initiatives dans le domaine du contrôle des fusions\textsuperscript{15}. Le travail de ces organismes a non seulement permis la constitution d’une « banque d’informations », mais a également apporté aux pays en développement et aux économies émergentes des éclairages très précieux sur la question du contrôle des fusions, et leur a fourni une plateforme pour élaborer leurs règles nationales et concevoir leurs politiques dans ce domaine\textsuperscript{16}.

\begin{table}[h]
\centering
\begin{tabular}{|p{\linewidth}|}
\hline
\textbf{Box 1. Recommandation de 2005 de l’OCDE sur le contrôle des fusions} \\
\textbf{La Recommandation de 2005 sur le contrôle des fusions propose un éventail de suggestions dont l’objectif est, d’une part, de rendre le contrôle des fusions efficace et efficient et, d’autre part, de faire en sorte qu’il intervienne en temps opportun. Il s’agit par exemple de veiller à ce que les autorités de la concurrence puissent obtenir les informations nécessaires à leur évaluation de la fusion ; de réduire les coûts inutiles imposés aux parties à la fusion ; de permettre une plus grande souplesse dans le processus d’examen de la fusion ; et d’utiliser des critères objectifs pour (i) déterminer si et quand une fusion doit être notifiée et (ii) arrêter les paramètres d’attribution de compétence sur les opérations de fusion.} \\
\textbf{La Recommandation souligne également combien il est important que les pays veillent au respect de principes fondamentaux tels que la transparence du processus d’examen de la fusion et l’équité procédurale, ainsi que le droit pour les parties d’être entendues pendant la procédure (lequel droit devrait être étendu aux tiers ayant un intérêt légitime dans la fusion examinée). Un autre principe cité en particulier est celui de non-discrimination entre les entreprises nationales et étrangères.} \\
\textbf{La Recommandation souligne la nécessité et l’importance d’une coopération et d’une coordination bilatérale ou multilatérale entre les autorités de la concurrence en matière de contrôle des fusions. Elle aborde un certain nombre de questions liées à la coopération et à la coordination, essentiellement celle de la confidentialité des informations. La Recommandation encourage les parties à la fusion à envisager des déclarations de renonciation à leur droit de confidentialité, lorsque la situation le permet. Parallèlement, cependant, elle insiste sur la nécessité pour les autorités de la concurrence de disposer des mesures de sauvegarde nécessaires concernant l’échange d’informations confidentielles.} \\
\textbf{La Recommandation invite les pays à examiner régulièrement leurs lois en matière de fusions en vue de les améliorer et de les faire converger vers les meilleures pratiques reconnues dans ce domaine.} \\
\end{tabular}
\end{table}

\textsuperscript{16} La large couverture médiatique consacrée aux opérations de fusion complexes explique également l’attention croissante accordée au contrôle des fusions\textsuperscript{17}.

\textsuperscript{17} L’attention internationale portée au contrôle des fusions a eu l’effet d’un catalyseur sur les discussions menées non seulement sur l’impact socioéconomique des fusions pour le secteur concerné, dans le cadre de la CNUCED ont été réalisées un certain nombre de publications traitant du contrôle des fusions, certaines d’entre elles étant plus spécifiquement focalisées sur les pays en développement. Voir, par exemple : Correa, Paulo et Aguiar, Frederico, « Le contrôle des fusions dans les pays en développement : Leçons tirées de l’expérience du Brésil » (CNUCED, 2002) ; et la note du Secrétariat de la CNUCED, « Sensibilisation aux questions de concurrence, contrôle des fusions et application effective du droit en période de difficultés économiques » (CNUCED, 2010).

Ce point particulier sera abordé plus en détail au paragraphe 54 ci-dessous dans le cadre de la coopération multilatérale.

Le prestige dont jouissent certaines fusions est lié aux espoirs que suscitent ces transactions souvent considérées comme une solution à des problèmes sectoriels majeurs ou comme une tentative audacieuse de récolter des bénéfices commerciaux (comme de nouvelles synergies) et de faire jaillir de nouvelles sources de revenus.
mais aussi sur la nature juridico-politique du processus même de contrôle de ces transactions. Ce dernier point pose un certain nombre de questions, et notamment : (i) la nature des pouvoirs et du mandat confiés à l’autorité de la concurrence, y compris son indépendance vis-à-vis du gouvernement en fonction ; (ii) si cette dernière se doit d’évaluer les fusions purement et simplement du point de vue de la concurrence ou si des objectifs socioéconomiques plus larges doivent être pris en considération ; (iii) jusqu’à quel point elle pourra ou souhaitera collaborer avec d’autres autorités de la concurrence (ce point est abordé plus en avant dans le contexte de la coopération internationale) ; et (iv) fondamentalement, dans quelle mesure un régime de contrôle des fusions répond aux objectifs de telle ou telle politique économique nationale.

18. Ces questions revêtent une importance accrue lorsque de multiples autorités nationales de la concurrence interviennent dans une même opération de fusion. La coexistence de multiples examens est l’occasion de mettre en comparaison différentes approches, et notamment la compatibilité des objectifs visés, les déficiences des procédures de mise en œuvre et la protection des consommateurs locaux. Ces approches peuvent dans certains cas s’avérer très divergentes. Les points de vue adoptés par les différents pays en matière de politique de contrôle des fusions sont le reflet des préférences politiques et économiques nationales. Par conséquent, le degré d’intervention des autorités visant à pallier certaines imperfections du marché variera souvent considérablement.

19. Les questions relatives aux opérations de fusions transnationales sont importantes pour tous les types d’économies de par le monde, qu’elles soient petites ou grandes, très développées ou émergentes. Cela étant, ce sujet revêt pour les pays en développement et les économies émergentes une importance particulière, qui devrait aller crescendo au cours de la prochaine décennie. Ces économies se trouvent cependant confrontées à des obstacles de taille lorsqu’elles souhaitent mettre en place des régimes efficaces de contrôle des fusions capables de répondre aux défis posés par les opérations de fusion transnationales.


21. On peut imaginer un certain nombre de scénarios dans lesquels les caractéristiques uniques des pays en développement et des économies émergentes ont un impact sur les fusions transnationales.

- Premièrement, une fusion transnationale peut impliquer deux entreprises étrangères ou plus, situées dans la même juridiction étrangère, mais dont une au moins réalise des activités dans le pays en développement ou l’économie émergente concerné.
- Deuxièmement, une même fusion transnationale peut impliquer deux entreprises ou plus, situées dans des juridictions étrangères différentes.
- Troisièmement, les entreprises étrangères en question peuvent n’avoir aucune présence dans le pays en développement ou l’économie émergente concernée, mais leur fusion (en particulier par

la création d’une entreprise commune de plein exercice)\(^\text{19}\) peut leur conférer ou conférer à l’entité née de la fusion une telle présence.

- Quatrièmement, l’une au moins des entreprises à la fusion peut être située dans le pays en développement ou l’économie émergente concerné.

22. Les caractéristiques particulières des pays en développement et des économies émergentes rendent plus complexe le contrôle des fusions dans ces économies, ce qui accentue d’autant les défis auxquelles ces dernières sont confrontées.

3. Défis spécifiques à relever par les pays en développement et les économies émergentes

23. Les pays en développement et les économies émergentes se heurtent à des défis colossaux lorsqu’ils cherchent à mettre en place des régimes de contrôle des fusions et, de manière plus générale, des régimes de droit de la concurrence efficaces\(^\text{20}\). Ces dix dernières années plus particulièrement ont vu paraître pléthore de publications universitaires, d’études et de rapports de diverses organisations internationales abordant et définissant en détail les défis que suppose la mise en place de régimes de droit de la concurrence efficaces dans ces pays. Cela étant, la question plus spécifique des défis liés au contrôle des fusions n’a pas reçu toute l’attention nécessaire.

24. Ce constat est en contradiction avec l’essor que les opérations de fusion – et notamment les fusions transnationales – connaissent à la fois en termes de valeur et de volumes depuis deux décennies, et qui s’accompagne d’une prolifération des régimes de contrôle des fusions dans le monde. Qui plus est, comme souligné plus haut, ce problème concerne au premier plan les pays en développement et les économies émergentes.

25. Cette partie du présent document se propose d’aborder les divers défis à relever pour les pays en développement et les économies émergentes dans le domaine du contrôle des fusions, ainsi que les efforts que ces derniers déploient pour traiter les opérations de fusion transnationales. L’objectif poursuivi ici n’est pas d’examiner de manière exhaustive tous les défis possibles, mais plutôt de se concentrer sur les défis d’importance majeure. Pour la plupart, cependant, ces défis ne sont pas spécifiques au contrôle des fusions, mais concernent également le droit et la politique de la concurrence de manière plus générale.

3.1 Absence d’une véritable culture de la concurrence

26. La majorité, si ce n’est la totalité des pays en développement et des économies émergentes sont dépourvus d’une culture de la concurrence profondément enracinée. Cela s’explique par un ensemble de facteurs. Il apparaît avant tout que de nombreux pays en développement et économies émergentes ont pendant longtemps subi un fort contrôle de l’État et une forte planification étatique. Par conséquent, les acteurs privés n’ont pas été autorisés à jouer un rôle important sur les marchés. De plus, en raison de leur culture dominante, ces économies ne considèrent pas suffisamment la concurrence comme un processus

\(^{19}\) Également appelées, dans certains cas, entreprises commune concentratives. Cette opération implique la création d’une nouvelle entité, indépendante de ses entités mère, et à laquelle seront transférés des éléments d’actif et du personnel, de sorte qu’elle soit en mesure de développer ses activités comme une entité autonome. Le concept de l’entreprise commune de plein exercice est défini à l’article 3(4) du règlement CE 139/2004.

économique\textsuperscript{21}. Cette culture se traduit souvent par une défense la concurrence déloyale plutôt que du droit de la concurrence, car l’idéologie la plus communément partagée en la matière revient à considérer la concurrence comme quelque chose dont tous rivaux doivent se débarrasser par des moyens illicites\textsuperscript{22}.

27. L’absence d’une véritable culture de la concurrence a un impact direct sur le rôle et la signification accordés dans la pratique au droit de la concurrence. Elle diminue considérablement la possibilité de voir émerger une application efficace du droit de la concurrence, et peut même mettre en doute la nécessité réelle d’un régime de droit de la concurrence fort, assorti d’une autorité de la concurrence puissante et indépendante. De toute évidence, moins le droit de la concurrence sera jugé important et pertinent, plus grand sera le risque de voir les pays en développement et les économies émergentes ne pas accorder au contrôle des fusions toute l’attention qu’il mérite.

28. La pression internationale et celle exercée par les pairs – parallèlement à une prise de conscience interne – ont amené les pays en développement et les économies émergentes à multiplier le nombre d’initiatives concrètes visant à promouvoir la concurrence et à créer à l’échelon national une culture de la concurrence. Néanmoins, des progrès nécessaires restent à accomplir pour accélérer le processus de privatisation et permettre aux entreprises privées de jouer un rôle accru sur les marchés.

3.2 Difficultés de la transition vers une économie de marché

29. Le processus de concurrence ne peut avoir de sens que si une économie de marché est mise en place dans le pays concerné. La transition de la Chine vers une économie de marché illustre bien ce principe. Au fur et à mesure que le système de marché a été introduit dans des pans de plus en plus importants de l’économie chinoise, diverses lois ont été adoptées pour lutter contre les pratiques anticoncurrentielles et réglementer les fusions\textsuperscript{23}. Ce processus a abouti à l’adoption en 2007 de la loi antimonopole (Anti-monopoly Law - AML), la première loi chinoise spécifiquement consacrée à des questions de concurrence et applicable aux entreprises publiques, privées, nationales et étrangères. Les dispositions de l’AML sont en substance similaires à celles que l’on retrouve dans le droit de la concurrence des pays développés. Alors que l’AML n’était entrée en vigueur que depuis deux ans, le ministère chinois du Commerce (MOFCOM), en charge du contrôle des fusions, avait déjà adopté des lignes directrices\textsuperscript{24} et des règlements\textsuperscript{25}, et arrêté un grand nombre de décisions concernant des fusions, dont l’autorisation conditionnelle ou l’interdiction de certaines transactions notables\textsuperscript{26}.

\begin{itemize}
  \item \textsuperscript{23} Notamment, par exemple, la loi de 1993 sur la lutte contre la concurrence déloyale.
  \item \textsuperscript{24} Voir les lignes directrices édictées en 2009 : \textit{Lignes directrices pour l’examen des opérations de concentration} ; \textit{Lignes directrices pour la notification des opérations de concentration} ; et \textit{Lignes directrices sur la documentation à remettre pour la notification des opérations de concentration}.
  \item \textsuperscript{25} Voir les \textit{Dispositions relatives aux seuils déterminant la notification préalable des concentrations d’entreprises}, publiées par le Conseil d’État de la République populaire de Chine (2008) ; les \textit{Mesures relatives au calcul du chiffre d’affaires dans la procédure de notification des concentrations dans le secteur financier}, publiées conjointement par le MOFCOM et par d’autres instances de réglementation du secteur financier (2009) ; les \textit{Mesures relatives à la notification des concentrations des opérateurs,}
\end{itemize}
3.3 Prépondérance de la politique industrielle


31. Au fil du temps, de nombreux pays se sont plus particulièrement concentrés sur leur politique industrielle. L’approche suivie par la Corée jusque dans les années 1980 en est un bon exemple30. Pour certains observateurs, cette approche s’est traduite par une marginalisation des considérations relatives à la concurrence, et a donné lieu à des distorsions de concurrence sur les marchés locaux, comme en témoignent les subventions accordées à des entreprises nationales et la protection qui leur a été offerte face à la concurrence étrangère31. Il convient néanmoins de noter que certains n’ont pas considéré d’un œil négatif ce traitement de faveur accordé aux champions nationaux, d’aucuns ayant en effet argué que cette approche de politique publique avait apporté des avantages non négligeables32.

32. Lorsqu’une large place est faite à des considérations autres que de concurrence, les opérations de fusions impliquant des entreprises locales peuvent être considérées comme des outils particulièrement importants pour mettre en pratique ces considérations. Mais dans ce cas, il n’est pas tenu compte des effets négatifs possibles que ces fusions peuvent avoir sur la concurrence à l’échelon local. Par conséquent, le contrôle des fusions – du point de vue de la concurrence – peut ne pas être vu d’un bon œil, en particulier

26 Parmi les affaires de fusions célèbres, il convient de citer la fusion Panasonic/Sanyo de 2010, ainsi que la décision d’interdiction rendue par le MOFCOM en 2008 concernant la proposition de fusion Coca-Cola/Huiyuan Juice Group Ltd.


28 Tel est d’ailleurs le cas dans les pays développés également. Voir notamment les expériences de pays tels que le Japon et l’Allemagne. Dans cette dernière, une décision de l’Office fédéral des ententes bloquant une fusion pour des motifs de concurrence peut être annulée par le ministre concerné – en vertu d’un mécanisme d’autorisation ministérielle prévu par la loi – si la fusion est jugée bénéfique pour la compétitivité internationale de l’économie allemande.

29 Voir la table ronde de l’OCDE, Politique de la concurrence, politique industrielle et champions nationaux (2009).

30 Voir Ibid.

31 Hyundai est un exemple significatif d’entreprise nationale bénéficiant d’un tel traitement de faveur.

par les politiciens qui peuvent privilégier des considérations autres que de concurrence plutôt que de favoriser le contrôle de ces fusions pour des motifs de concurrence\(^{33}\).

### 3.4 Le manque de ressources

33. Le contrôle des fusions nécessite de très grands moyens à la fois humains et financiers. Sans ces moyens, l’autorité de la concurrence concernée sera tout simplement incapable de mener à bien ses missions dans ce domaine. Cela est d’autant plus vrai lorsqu’il est utilisé un mécanisme de notification obligatoire\(^{34}\). Presque toutes les autorités de la concurrence des pays en développement et des économies emergentes sont confrontées à un problème majeur de manque de moyens humains et financiers adaptés. Les réservoirs de compétences des marchés locaux de l’emploi dans ces économies ne disposent pas toujours de profils présentant l’expertise nécessaire dans le domaine du droit de la concurrence. Toutefois, depuis quelques années, cette situation évolue peu à peu dans un certain nombre de pays en développement et d’économies emergentes. De plus en plus d’étudiants et de jeunes professionnels de ces économies cherchent à se spécialiser en droit de la concurrence. Il s’agit d’une évolution positive qui, dans le long terme, permettra d’améliorer nettement la situation actuelle.

34. Beaucoup d’autorités de la concurrence dans les pays en développement et les économies emergentes consacrent des efforts soutenus au recrutement et au maintien de leur personnel, ainsi qu’à la réduction des incitations susceptibles de pousser leurs jeunes fonctionnaires à quitter leur poste pour d’autres opportunités de carrières dans les secteurs privé ou universitaire\(^{35}\). Par ailleurs, sur le plan financier, ces autorités sont souvent soumises à d’importantes contraintes budgétaires qui les forcent à définir des priorités dans leur travail. Le contrôle des fusions n’est pas considéré comme une première priorité, et l’accent est habituellement mis sur d’autres domaines tels que la répression des ententes, la promotion de la concurrence et la lutte contre les abus de position dominante\(^{36}\).

35. L’application de la réglementation des fusions doit être confiée à des fonctionnaires de la concurrence possédant toute l’expertise nécessaire en droit et en économie. Cette expertise devrait inclure une bonne connaissance du fonctionnement de différents secteurs de l’économie, et les fonctionnaires de la concurrence devront intégrer les pratiques et les enjeux internationaux dans leur approche du contrôle des fusions. Cet aspect est important lorsqu’il s’agit d’évaluer efficacement une fusion transnationale et d’interagir avec des homologues étrangers s’employant eux aussi à évaluer la même fusion, éventuellement via des liens bilatéraux. À tout cela s’ajoute la nature spéciale de l’évaluation des fusions, qui doit se faire dans des délais stricts, d’où une pression considérable. Cette activité exige également une étroite communication entre les fonctionnaires chargés de l’examen de la fusion et les entreprises à la fusion, ainsi que tous tiers, et éventuellement d’autres instances publiques (telles que les instances de réglementation sectorielle) au sein d’un même pays.

36. Le manque de ressources adéquates – notamment vu la nature particulière du contrôle des fusions – explique en partie le peu d’attention dont bénéficie ce domaine dans de nombreux pays en développement et de nombreuses économies emergentes. Cette réalité vient s’ajouter au fait que, comme souligné plus haut, les fusions ont souvent été considérées comme des outils de développement économique et des moteurs de compétitivité internationale.

---

33 Voir également plus bas la partie sur le lien entre contrôle des fusions et investissements directs à l’étranger.

34 Voir plus bas la question de la notification.

35 Voir note 20 ci-dessus.

36 Tel est ce qui ressort de l’expérience de Singapour, ainsi que de nombreux autres pays dans le monde.
37. De nombreuses autorités de la concurrence dans le monde en développement estiment peut-être aussi qu’il ne leur est pas nécessaire de s’intéresser aux fusions transnationales. En effet, lorsque des fusions sont réglementées par des autorités de la concurrence étrangères plus expérimentées, les problèmes de concurrence peuvent être identifiés et résolus rapidement et efficacement sans que les pays en développement et les économies émergentes n’aient besoin d’intervenir. Certaines autorités de la concurrence (et même certains tribunaux) ont toute confiance dans les actions et les décisions étrangères pour ce qui est d’appliquer efficacement le droit. Il se peut que certaines de ces autorités dans les pays en développement et dans les économies émergentes préfèrent s’en remettre aux actions étrangères afin d’éviter d’éventuels conflits avec des autorités de la concurrence plus expérimentées. D’autres autorités de ces pays peuvent préférer se limiter à assister les autorités étrangères. Toutefois, ce cas de figure n’est peut-être pas très fréquent dans le domaine du contrôle des fusions.

38. En outre, l’option parfois choisie par les autorités de la concurrence des pays en développement et des économies émergentes de s’en remettre à des actions engagées par des autorités étrangères n’est peut-être pas une solution adéquate pour régler les problèmes potentiels susceptibles de résulter d’une fusion transnationale. Ces autorités sont soucieuses de protéger la concurrence et de sauvegarder les structures de marché concurrentielles nécessaires à leur économie locale. Une action étrangère peut ne pas traiter de manière efficace la totalité des problèmes potentiels de concurrence posés par une fusion donnée, et certains de ces problèmes peuvent être spécifiques à la juridiction locale concernée. Cela signifie que, dans ce cas, aucune action étrangère ne peut se substituer à une action locale.

39. Signalons enfin que dans certaines situations, une fusion transnationale peut avoir lieu sans que l’autorité de la concurrence du pays en développement ou de l’économie émergente concernée n’en ait connaissance. Cela a été le cas dans plusieurs pays africains, et notamment au Kenya et au Zimbabwe. Dans ce dernier pays, il est estimé qu’un certain nombre de fusions préjudiciables impliquant un élément étranger sont intervenues à l’insu de la Commission de la concurrence. Cette situation s’est nettement améliorée depuis 2002 avec le renforcement du mécanisme de contrôle des fusions et l’introduction d’une obligation de notification.

3.5 Cadre juridique inadapté

40. Lorsque le droit de la concurrence d’un pays en développement ou d’une économie émergente n’encadre pas de manière adéquate le contrôle des fusions ou ne prévoit que des dispositions de base (par exemple que la loi s’applique également aux fusions), les autorités de la concurrence éprouvent des

37 Voir plus bas la section 4.2.2 sur l’établissement de la compétence extraterritoriale concernant l’obtention d’informations.

38 Voir par exemple le point de vue de l’Autorité israélienne de la concurrence (IAA) en l’affaire portée devant la Cour suprême israélienne (siégeant en qualité de Haute cour de justice) concernant un abus de position dominante : Affaire 6623/03 Oded Lavie c. le directeur de l’autorité de la concurrence (2003). Selon l’IAA, il n’y avait aucun sens à engager des poursuites contre le comportement abusif d’une entreprise lorsqu’il avait été globalement mis fin à ce comportement suite à l’action d’une autorité de la concurrence étrangère.

difficultés à contrôler ces transactions. L’exemple du régime égyptien du droit de la concurrence est intéressant à cet égard (voir Encadré 2).

41. Pour être efficace, un régime de contrôle des fusions nécessite plus qu’une simple disposition de loi interdisant les fusions qui comporteraient des effets néfastes ou exigeant simplement la notification de toute fusion. Dans la pratique, cela nécessite un mécanisme complet de réglementation des fusions, et notamment : des procédures de notification bien établies ; une interaction entre les autorités de la concurrence, les parties à la fusions et tous tiers ; ainsi que des règles et des principes établissant clairement les pouvoirs de l’autorité de la concurrence et les obligations de chacun (l’autorité, les parties à la fusion et les tiers intéressés).

<table>
<thead>
<tr>
<th>Box 2. Contrôle des fusions en Égypte</th>
</tr>
</thead>
<tbody>
<tr>
<td>L’article 11(2) de la loi égyptienne de 2005 sur la protection de la concurrence et l’interdiction des pratiques monopolistiques prévoit simplement que l’une des fonctions de l’Autorité égyptienne de la concurrence (Egyptian Competition Authority - ECA) est de recevoir les notifications de fusions. L’article 44 du texte définissant les attributions de l’Exécutif reprend d’ailleurs cette idée, quoique de manière plus détaillée. Il dispose en effet que l’autorité devra, dans un délai de 30 jours, recevoir notification par les entités impliquées, de l’acquisition de tous actifs, droits de propriété, usufruits ou actions, de la création de tous syndicats, de la réalisation de toutes fusions, concentrations ou gestions communes impliquant au moins deux entités ». L’article 45 du même texte dresse uniquement une liste succincte du type d’informations qui devraient être communiquées dans le cadre de la notification. Aucun mécanisme spécifique n’a été mis en place dans la pratique, même si un formulaire de notification très simple, mais insuffisant, a été conçu. Concrètement, les notifications reçues donnent lieu à des actions très restreintes. Les informations soumises par les parties à une fusion sont archivées par l’ECA, mais ne sont pas exploitées en vue d’évaluer formellement la fusion en question.</td>
</tr>
</tbody>
</table>

3.6 Problèmes de mise en œuvre

42. La mise en œuvre d’un régime de droit de la concurrence dans un pays en développement ou une économie émergente peut représenter un véritable défi. Ce processus s’accompagne souvent de diverses difficultés, dont celles de configurer les institutions, de doter l’autorité de la concurrence de l’expertise nécessaire ou encore de gérer les relations entre l’autorité et le gouvernement ou d’autres organes publics. L’opération peut s’avérer extrêmement lente et chronophage 40, en particulier lorsque le contrôle des fusions ne figure pas parmi les priorités des pouvoirs publics et des autorités de la concurrence de ces pays. Par conséquent, la lenteur de la mise en œuvre complète d’un régime de droit de la concurrence peut dans la pratique se traduire par un retard significatif dans la mise en œuvre et le fonctionnement efficace du contrôle des fusions.

3.7 Rôle des investissements directs à l’étranger

43. Dans les pays en développement et les économies émergentes, les investissements directs à l’étranger (IDE) sont cruciaux sur le plan économique et politique 41, comme l’ont reconnu elles-mêmes bon nombre de ces économies, ainsi que plusieurs organisations internationales. Certaines de ces

40 La Chine, qui a mis vingt ans à se doter d’un droit de la concurrence, est l’un des exemples les plus flagrants à cet égard. Voir, plus récemment, la position de Hong-Kong, où a été rédigé un projet de loi qui devrait être adopté en 2011. On trouvera également d’autres exemples du même type dans le Moyen Orient et en Afrique.

organisations – et principalement la Banque mondiale – ont vivement préconisé la facilitation des flux d’IDE vers les pays en développement et les économies émergentes afin d’amener ces économies à s’ouvrir à l’international et de les voir s’intégrer dans l’économie mondiale.

44. La question de savoir si les IDE sont perçus de manière positive par tous les pays en développement et toutes les économies émergentes dans le monde reste cependant ouverte. Les attitudes de ces économies semblent diverger sur ce point. À une extrémité du spectre se trouvent les économies qui accueillent les IDE à bras ouverts et invitent chaleureusement les entreprises étrangères (et leurs pouvoirs publics) à s’aventurer dans leur paysage économique (et éventuellement politique)\(^\text{42}\). Ces économies tendent à considérer les IDE comme un moteur de développement technologique et de compétitivité internationale\(^\text{43}\). À l’autre extrémité du spectre, d’autres pays ne semblent pas partager le même enthousiasme et tendent à contrôler de manière stricte les participations étrangères dans différents secteurs et marchés de leur économie nationale\(^\text{44}\).

45. D’ordinaire, les pays en développement et les économies émergentes favorables à l’entrée d’IDE adoptent à cette fin des mesures soigneusement conçues pouvant inclure de forte incitations fiscales ou d’importantes concessions d’ordre financier ou concernant les taxes douanières. Cela étant, une attitude positive vis-à-vis des IDE peut aller de pair avec une approche davantage non interventionniste de la réglementation plus généralement. Plus des pouvoirs publics s’emploient à encourager les IDE, plus ils risquent de se montrer réticents à l’idée d’adopter pleinement un système de contrôle des fusions et d’opter pour un mécanisme de nature à réglementer efficacement les fusions transnationales.

46. La fusion transnationale est l’une des multiples formes que peuvent prendre les IDE. Il s’agit du cas de figure où une entreprise étrangère sans aucune présence dans le pays concerné acquiert une entreprise locale établie (ou une autre entreprise étrangère développant ses activités) dans cette économie. Cependant, il se peut que la ou les entreprises étrangères impliquées dans une fusion transnationale soient déjà présentes dans le pays en question. Dans un cas comme dans l’autre, bien que la fusion puisse poser des problèmes de concurrence, il se peut que les pouvoirs publics concernés choisissent malgré tout de ne pas réglementer une telle transaction, par crainte de voir les entreprises étrangères impliquées décider en retour soit de ne pas « investir », soit de quitter le marché national. La ou les entreprises étrangères impliquées dans une opération de fusion peuvent décider ou menacer de déserté le marché intérieur d’un pays en développement ou d’une économie émergente si l’autorité de la concurrence de ce pays choisit de subordonner cette fusion à certaines conditions.

47. Les pouvoirs publics et/ou l’autorité de la concurrence d’un pays en développement ou d’une économie émergente peuvent estimer ne pas être en position de force dans leurs rapports avec la ou les entreprises impliquées dans une fusion transnationale. Cette perception peut être d’autant plus prononcée si le pays a mis particulièrement l’accent sur les IDE et sur la nécessité de les attirer.

\(^{42}\) Voir Dabbah, note 22 ci-dessus.

\(^{43}\) Dans certains pays en développement et certaines économies émergentes, le droit de la concurrence peut lui-même être utilisé afin d’attirer des IDE. On constate en effet dans beaucoup de ces économies une prise de conscience croissante du fait qu’un droit de la concurrence devrait être adopté et utilisé dans cette optique.

\(^{44}\) Parmi les différentes conditions susceptibles d’être posées figurent le fait que ces IDE devraient favoriser la croissance économique, le développement technologique et l’amélioration de la qualité des biens ou des services, augmenter les opportunités d’emploi ou stimuler l’entrée du pays sur les marchés internationaux. Dans certains cas, le droit concerné peut comporter d’autres conditions strictes visant à éviter que l’entreprise bénéficiant des IDE n’acquière une position de monopole sur les marchés locaux.
48. L’existence de régimes efficaces de contrôle des fusions dans les pays en développement et dans les économies émergentes ne peut pas être dans tous les cas considérée comme un obstacle qui entraverait partiellement ou totalement l’entrée d’IDE. Un contrôle efficace des fusions et, plus généralement, une application efficace du droit de la concurrence peuvent, en effet, être perçus comme complémentaires des IDE en ce qu’ils constituent un mécanisme qui permet de lever les restrictions à ces investissements tout en améliorant la sécurité juridique de l’environnement des entreprises et du cadre réglementaire. Il y a lieu de rappeler que, dans bien des cas, les entreprises étrangères (et les dirigeants de leurs pays) comptent sur les marchés des pays en développement et des économies émergentes tout autant que ces derniers ont besoin de ces entreprises et des pouvoirs publics de leurs pays. Cependant, l’idée prévaut que l’absence d’un tel contrôle ou d’une telle répression peut s’avérer particulièrement attirante pour ces entreprises, qui y voient un bon environnement dans lequel investir.

4. Coopération, compétence et mesures correctives

49. Après les défis auxquels sont confrontés les pays en développement et les économies émergentes en matière de contrôle des fusions, après les caractéristiques spéciales avec lesquelles ils doivent composer, il convient de s’intéresser aux questions dont la portée pratique est éminemment importante dans ce domaine. Cette partie du document abordera trois thèmes clés qui sont au cœur même de la réglementation des fusions transnationales, à savoir : la coopération entre autorités de la concurrence ; la compétence (y compris pour ce qui est de la notification de la fusion) ; et les correctifs à apporter à certaines fusions. Ces aspects sont essentiels au bon fonctionnement global d’un mécanisme de contrôle des fusions. L’étude de ces questions permet également d’illustrer de manière concrète de nombreux défis auxquels sont confrontés les pays en développement et les économies émergentes.

4.1 Coopération entre autorités de la concurrence

50. Au fil des ans, et plus particulièrement depuis les années 1980, la coopération entre autorités de la concurrence a fait l’objet d’une attention particulière dans le monde. Cette coopération peut prendre diverses formes. Il est d’usage de distinguer trois principaux types de coopération : la coopération multilatérale ; la coopération régionale ; et la coopération bilatérale. Toutes ces formes de coopération concernent directement les pays en développement et les économies émergentes, même si certaines présentent pour eux légèrement plus d’intérêt que d’autres.

4.1.1 Coopération multilatérale

51. La coopération multilatérale dans le domaine du droit de la concurrence est le plus ancien des trois types de coopération évoqués ci-dessus. Elle est née des efforts accomplis dès la première moitié du vingtième siècle dans le but de créer une organisation internationale du commerce, dont le rôle escompté était de réglementer les pratiques commerciales restrictives. Cette initiative particulière a abouti à la mise en place d’une coopération généralement appelée coopération fondée sur des dispositions juridiques


contraignantes. Elle reposait en effet sur des obligations juridiquement contraignantes imposées aux pays dans le cadre d’un accord multilatéral ayant vocation à créer un organe international compétent dans le domaine du droit de la concurrence. La tentative (infructueuse) menée dans les années 1990 d’introduire le droit de la concurrence au sein de l’Organisation mondiale du commerce est une variante de la même idée.

52. La coopération multilatérale de type contraignant n’est cependant pas la seule qui existe. La coopération peut également prendre la forme de dispositions juridiques non contraignantes. Il s’agit en d’autres termes d’une coopération sans engagements contraignants de la part des pays. Les origines de ce type de coopération remontent, dans les années 1980, à l’adoption par la CNUCED de son ensemble de principes et de règles convenus au niveau multilatéral.


54. La coopération multilatérale non contraignante concerne directement les pays en développement et les économies émergentes dans le domaine du contrôle des fusions. Ce type de coopération présente l’avantage de répondre aux différents intérêts et caractéristiques de ces pays. L’expérience du RIC montre comment cette forme de coopération incite fortement les autorités de la concurrence de ces économies à mettre en œuvre des principes ou des recommandations générés à l’échelon international. Cette expérience montre également comment ces autorités peuvent se voir proposer de participer au processus de délibération et d’y jouer un rôle important. Le principe de flexibilité qui sous-tend le concept de coopération multilatérale est un argument déterminant pour les pays en développement et les économies émergentes.

55. La coopération multilatérale non contraignante aide à promouvoir des règles uniformes, quelles que soient les différences entre pays développés et moins développés. Cette notion est particulièrement importante dans le domaine du contrôle des fusions transnationales, où les autorités de la concurrence d’un pays en développement peuvent tout à fait être amenées à réglementer des fusions transnationales avec des autorités de la concurrence établies de plus longue date et plus expérimentées. Ce type particulier de coopération présente certains avantages évidents, surtout par rapport à d’autres formes de coopération, notamment la coopération bilatérale. Elle est susceptible de faire émerger une convergence et une harmonisation sans pour autant imposer ni règles ni principes ou normes aux pays en développement ou à leurs autorités de la concurrence. Elle ouvre également la voie à l’élaboration de politiques publiques de manière coordonnée.

48 Il convient de noter que cet ensemble a été élaboré grâce à d’importants efforts accomplis par les pays en développement. Néanmoins, il ne fait que brièvement référence au contrôle des fusions.


50 Voir, par exemple, les changements introduits par le Brésil concernant ses seuils de notification sur la base des principes de l’OCDE et du RIC, expliqués dans l’Encadré 4 ci-après.

qualité dans ces pays en facilitant la constitution d’une vaste banque de principes et d’idées dont ces économies peuvent s’inspirer lorsqu’elles développent leur propre expérience dans le domaine du contrôle des fusions.

4.1.2 Coopération régionale

4.1.2.1 Généralités

56. La coopération régionale en matière de droit de la concurrence a connu un essor important dans les pays en développement. Bien que ce type de coopération ne se soit pas avéré pleinement efficace, un certain nombre d’initiatives ont été lancées. Les plus connues sont les suivantes : l’Association des nations de l’Asie du Sud-Est (ASEAN) ; le Marché commun du Sud (MERCOSUR) ; le Marché commun d’Afrique orientale et australe (COMESA) ; et l’Union économique et monétaire ouest-africaine (UEMOA). Elles sont d’ailleurs les seules communautés régionales qui existent aujourd’hui52.

57. La coopération régionale dans le domaine du droit de la concurrence en général et dans celui du contrôle des fusions plus particulièrement peut se faire selon différents modèles, dont il convient d’en décrire trois.

- Premièrement, la coopération régionale peut prendre la forme d’un forum de consultation et de partage d’expérience entre pays concernés, facilitant aussi l’offre d’assistance technique ou l’aide au renforcement des compétences dans ces pays. Ce forum peut être utilisé par les pays concernés dans le but spécifique de mettre en place chez eux un droit national de la concurrence ou des régimes nationaux de contrôle des fusions.

- Deuxièmement, il existe le modèle de l’Union européenne (UE), qui consiste à créer une ou plusieurs institutions ayant compétence en matière d’application du droit à l’échelon régional, ainsi qu’un réseau régional rassemblant les autorités de la concurrence nationales et régionales concernées (comme le Réseau européen de la concurrence – REC).

- Troisièmement, la coopération régionale peut reposer sur des approches visant à faire émerger une convergence et une harmonisation du droit procédural et/ou positif des régimes de droit de la concurrence des pays concernés.

58. Les avis divergent quant à la capacité de la coopération régionale de favoriser concrètement le développement du contrôle des fusions (dans le cadre du droit de la concurrence) dans les pays en développement et les économies émergentes. D’un côté, cette coopération a été jugée particulièrement adaptée à ces économies pour toute une série de raisons. Premièrement, il convient de rappeler les caractéristiques spécifiques de ces économies. Deuxièmement, la politique de la concurrence est perçue comme étant en adéquation avec, plus généralement, la coopération économique entre les pays, et comme un complément de la politique commerciale. Ces deux domaines – la coopération économique et la politique commerciale – constituent la pierre angulaire de la coopération régionale. Troisièmement, l’idée est largement répandue que la création d’un « centre de gravité » à un échelon régional renforce le statut et l’importance du droit de la concurrence au sein des différents pays concernés. Cela peut contribuer à faciliter la fourniture d’une assistance technique entre les autorités de la concurrence participantes afin de renforcer les compétences nationales en la matière. Un tel centre de gravité présenterait aussi l’avantage d’harmoniser les différentes règles et normes nationales, ce qui bénéficierait au monde des entreprises,  

soucieuses de réduire les coûts, de pouvoir compter sur une plus grande sécurité juridique et d’évoluer dans des environnements réglementaires similaires. Quatrièmement, la coopération régionale est perçue comme un moyen efficace de régler des problèmes de concurrence graves (en particulier ceux de nature transnationale) dans les pays concernés dépourvus de régimes nationaux efficaces en matière de contrôle des fusions.

L’expérience de l’Union européenne, dont les efforts dans le domaine du contrôle des fusions ont été couronnés de succès, illustre parfaitement les avantages décrits au paragraphe précédent. Cette expérience est la preuve qu’une approche régionale peut contribuer à la mise en place d’une application efficace et efficiente du droit en matière de fusions transnationales.

De nombreuses initiatives de coopération régionale dans le monde se sont inspirées du modèle de l’UE, en particulier dans une période de mondialisation intense accompagnée d’une recrudescence des problèmes de concurrence présentant une dimension transnationale. Force est de constater que la coopération régionale peut, dans certains cas, constituer un instrument utile pour régler (et, le cas échéant, réglementer) des questions de concurrence de nature transnationale plus efficacement que ne peut le faire l’application du droit national.

Néanmoins, mettre en place une coopération régionale efficace dans le domaine du contrôle des fusions dans les pays en développement et les économies émergentes est un objectif extrêmement difficile à atteindre et ambitieux. En témoigne le fait qu’à ce jour, pas une seule initiative régionale ne s’est avérée efficace ou pleinement viable. La création d’une coopération régionale en matière de réglementation des fusions transnationales nécessite aussi que suffisamment de progrès soient accomplis dans le domaine plus général du droit de la concurrence. L’efficacité d’un mécanisme régional de contrôle des fusions requiert l’existence d’un contrôle des fusions dans au moins une partie (si ce n’est la totalité) des pays concernés en premier lieu. Or, il se peut que ces points ne figurent pas parmi les priorités des ordres du jour régionaux, eux-mêmes dominés par d’autres questions économiques et politiques plus urgentes, telles que les conflits régionaux et la pauvreté. Par ailleurs, il n’est pas certain – étant donné l’absence de régimes efficaces de contrôle des fusions dans de nombreux pays en développement et économies émergentes – qu’une approche descendante permettrait d’établir avec succès des mécanismes de contrôle des fusions dans les pays composant le groupement régional en question.

L’approche dite descendante repose sur l’idée que l’existence à l’échelon régional d’un cadre réglementaire de concurrence solide et élaboré pourrait inciter les pays concernés à renforcer leurs propres régimes nationaux et à veiller à harmoniser leurs normes au sein de ces régimes. On peut néanmoins s’interroger sur la pertinence de cette approche, étant donné que les efforts déployés pour atteindre cet objectif seraient, de toute façon, sapés par l’absence ou la non-exécution du droit de la concurrence dans certains des pays concernés.

En outre, il serait indispensable que le régime régional et les régimes nationaux fonctionnent en harmonie pour garantir une coopération totale et efficace. Dans la pratique, cela suppose que soient bien définies d’une part les relations entre les acteurs régionaux et nationaux, et d’autre part celles entre les différents régimes nationaux des pays concernés.

Une façon d’y parvenir est de recourir au principe du guichet unique, selon lequel, lorsqu’une transaction est examinée à l’échelon supérieur (régional), elle sera exclue de la juridiction des autorités de la concurrence à l’échelon inférieur (national). Voir le règlement (CE) 139/2004 pour la définition et le fonctionnement de ce principe.

64. Enfin, il convient d’ajouter un dernier commentaire sur les avantages de l’harmonisation des règles nationales en matière de fusion dans les pays en développement et les économies émergentes appartenant à une même structure régionale (comme évoqué ci-dessus). Même dans le cadre d’une approche régionale globale de l’harmonisation, le succès ne peut être garanti tant que les pays concernés présentent des divergences majeures dans leurs régimes juridiques, politiques et économiques, ainsi que dans leurs caractéristiques. Or, il est évident que les pays en développement membres d’organisations ou de communautés régionales présentent des différences de taille. Dans ces circonstances, la réussite de toute initiative d’harmonisation sera donc d’autant plus difficile. Par ailleurs, les pays appartenant à une même communauté peuvent avoir atteint des stades de développement économique différents, avec des degrés de puissance économique et commerciale divers. Toute tentative d’harmonisation – quel que soit le mécanisme utilisé à cette fin – risque fort d’aboutir à une situation où un pays ou un nombre restreint de pays dominent le processus, d’où de probables objections de la part des pays moins avancés. À l’inverse, il se peut qu’une stratégie d’harmonisation suive une approche du plus petit dénominateur commun, d’où un mécanisme peu productif dans la pratique.

4.1.2.2 Évaluation des initiatives régionales actuelles

65. Il n’est peut-être pas inutile à ce stade de proposer une évaluation des initiatives régionales actuelles, et notamment des quatre exemples cités plus haut : l’Association des nations de l’Asie du Sud-Est (ASEAN) ; le Marché commun du Sud (MERCOSUR) ; le Marché commun de l’Afrique orientale et australe (COMESA) ; et l’Union économique et monétaire ouest-africaine (UEMOA).

- Association des nations de l’Asie du Sud-Est (ASEAN)\(^{55}\)

66. Divers documents de l’ASEAN font allusion au droit et à la politique de la concurrence\(^{56}\). Plus concrètement, des mesures ont été prises dans l’objectif de mettre en place une forme de coopération régionale. Parmi ces dernières figurent l’adoption des lignes directrices de l’ASEAN sur la politique de la concurrence (ASEAN Regional Guidelines on Competition Policy) et la publication du manuel à l’attention des entreprises sur la politique et le droit de la concurrence au sein de l’ASEAN en 2010 (Handbook on Competition Policy and Law in ASEAN for Businesses in 2010)\(^{57}\). Cela étant, aucun cadre spécifique n’a été créé à cette fin\(^{58}\).

---

\(^{55}\) L’Association des nations de l’Asie du Sud-Est (ASEAN) a été créée en 1967 à Bangkok et compte actuellement dix États membres. L’ASEAN a pour but de renforcer l’intégration politique, socioculturelle et économique de ses membres. Dans la pratique, l’accent a néanmoins été mis sur le troisième de ces aspects. Voir la proposition de création de la Communauté économique de l’ASEAN (AEC).

\(^{56}\) Voir le paragraphe 41 de l’ASEAN Economic Community Blueprint 2007, aux termes duquel tous les pays membres « s’efforceront d’introduire une politique de la concurrence… d’ici 2015 ». Le même paragraphe prévoit également la création d’un « réseau d’autorités ou d’agences en charge de la politique de la concurrence, qui tiendra lieu de forum pour discuter et coordonner les politiques de concurrence » et encourager l’organisation « d’activités/programmes de renforcement des compétences destinés aux pays membres de l’ASEAN dans le cadre de l’élaboration de leur politique nationale de la concurrence ». Le programme est consultable à l’adresse : http://www.aseansec.org/21083.pdf

À ce jour, seuls cinq membres de l’ASEAN ont adopté un droit de la concurrence, dont certaines dispositions couvrent le contrôle des fusions. Cela étant, le droit et la politique de la concurrence figurent parmi les priorités de l’association, et la situation est susceptible d’évoluer à l’avenir.

- Marché commun du Sud (MERCOSUR)

Un effort spécifique a été déployé au sein du MERCOSUR dans le but d’harmoniser les régimes nationaux de droit de la concurrence de ses différents pays membres. Cette tentative particulière était perçue comme une étape incontournable vers l’intégration régionale. Pourtant, peu de progrès ont été enregistrés dans la pratique jusqu’en 1996, lorsque l’Argentine, le Brésil, le Paraguay et l’Uruguay ont adopté dans le cadre du MERCOSUR le protocole Fortaleza, par lequel ils se sont engagés à se doter d’un cadre institutionnel commun pour résoudre les problèmes de concurrence. Ce protocole prévoyait à cette fin un éventail d’outils de coopération entre autorités nationales de la concurrence. Il préconise également une plus grande harmonisation entre les régimes nationaux du droit de la concurrence des pays du MERCOSUR dans le domaine du contrôle des fusions. Néanmoins, bien que ce protocole soit officiellement entré en vigueur depuis 2000, il n’a toujours pas réellement été mis en œuvre dans la pratique.

Le manuel s’adresse aux entreprises opérant dans la région ASEAN. Il fournit des informations de base et des explications concernant les principes et concepts clés de la politique et du droit de la concurrence. Il donne aussi un aperçu du droit positif et procédural de la concurrence dans les pays membres de l’ASEAN.

Il convient de noter qu’à ce jour, l’ASEAN ne s’est dotée d’aucune autorité de la concurrence officielle. Néanmoins, en 2007, les dirigeants de l’ASEAN sont parvenus à un accord prévoyant la création d’un réseau d’autorités locales de la concurrence qui pourrait tenir lieu de forum pour discuter et faciliter la coordination sur les questions de concurrence et développer un cadre de politique régionale. Un groupe d’experts – le groupe d’experts ASEAN sur la concurrence (ASEAN Experts Group on Competition - AEGC) – a été constitué à cette fin, avec pour mission d’étudier le droit et la politique de la concurrence, et notamment l’application du droit à l’échelon régional, et de formuler des recommandations à cet égard. Le groupe a concentré ses travaux sur des questions telles que le renforcement des compétences au sein des autorités nationales de la concurrence, la promotion de la concurrence, l’institution de nouvelles autorités de la concurrence et la définition des priorités de ces autorités.

Il s’agit de l’Indonésie, de Singapour, de la Thaïlande, du Vietnam et de la Malaisie.

Le marché commun du Sud (MERCOSUR) a été créé en 1991. Le MERCOSUR repose sur un accord de libre-échange régional conclu entre quatre nations sud-américaines (Argentine, Brésil, Paraguay et Uruguay). Le Venezuela a signé un accord d’adhésion et attend actuellement sa ratification avant d’être formellement admis en qualité d’État membre à part entière. La Bolivie, le Chili, la Colombie, l’Équateur et le Pérou ont le statut de membres associés.

Certaines des évolutions intervenues en matière de concurrence avant 1996 s’annonçaient pourtant prometteuses. On notera par exemple le protocole Ouro Preto, signé en 1994, qui prévoyait un mécanisme de règlement de différend.
Box 3. Le protocole du MERCOSUR

Le Brésil et le Paraguay sont les seuls pays à avoir ratifié ce protocole, l’Argentine et l’Uruguay devant encore donner leur accord. Par ailleurs, seuls le Brésil et l’Argentine sont dotés d’un droit de la concurrence assorti d’un régime des fusions, ainsi que d’autorités de la concurrence qui se consacrent entièrement à leurs activités de concurrence. Bien que le protocole n’ait pas été totalement ratifié, il convient de noter qu’un « réseau » informel existe entre les autorités nationales de la concurrence des États membres du MERCOSUR. À titre d’exemple, on citera en 2007 la décision du Conseil administratif brésilien de défense économique (Conselho Administrativo de Defesa Econômico - CADE) de bloquer la fusion entre Saint Gobain et Owens Corning en raison des effets néfastes potentiels que l’opération présentait pour la concurrence dans les marchés pertinents, compte tenu des risques de concentration sur ces marchés (plus particulièrement sur le marché de la fabrication du verre) au Brésil. Le CADE a pris l’initiative d’en informer les autorités de la concurrence des États membres du MERCOSUR concernés.

69. La charge d’appliquer et de faire respecter le protocole a été confiée à la Commission du commerce (CC) du MERCOSUR et à la Commission de défense de la concurrence (CDC)65.

70. Cela étant, le protocole n’a pas encore atteint son plein potentiel66. Pour y « remédier », un protocole d’accord a été signé en 2003 dans le but de stimuler la coopération au sein du MERCOSUR. Ce protocole d’accord aborde les points suivants : les procédures de notification ; le partage d’informations ; et l’assistance technique. Il a été mis en œuvre au sein des systèmes juridiques des États membres du MERCOSUR67.

---

65 La CDC est censée être composée d’autorités nationales de la concurrence. La CC et la CDC ne sont pas des organes supranationaux. La CDC a été crée dans le but de mener des investigations intra régionales, lesquelles se déroulent en trois étapes. La procédure est tout d’abord déclenchée à la demande d’une partie « intéressée », qui s’adresse pour cela à l’autorité de la concurrence du pays directement concerné. Après avoir rendu une décision préliminaire déterminant s’il existe ou non des implications pour le MERCOSUR, cette autorité décide de soumettre ou non l’affaire à la CDC pour une deuxième décision. Lors de la deuxième étape, la CDC doit établir s’il y a infraction au protocole et recommander l’imposition de sanctions et/ou d’autres mesures. Enfin, par le biais d’une directive, la décision de la CDC est soumise à la TC en vue de l’adoption d’une décision finale.


Marché commun de l’Afrique orientale et australe (COMESA)

Le COMESA s’est, à de nombreux égards, inspiré du modèle de l’UE. La majorité des États membres du COMESA ayant engagé une transition économique, la nécessité d’un droit de la concurrence s’est fait sentir, et le droit de la concurrence a par conséquent été l’une des premières pierres de ce marché commun. Cette transition semble avoir permis de mettre en lumière et d’exprimer le besoin d’un cadre régional pour résoudre des situations potentiellement anticoncurrentielles.

Certains États membres du COMESA disposent de régimes nationaux de contrôle des fusions, mais ces derniers ont été jugés inadéquats pour traiter des questions transnationales et multi juridictionnelles complexes. Il a été reconnu que la coopération au niveau bilatéral pourrait permettre de remédier à certains de ces problèmes, mais qu’un cadre régional serait plus adapté et plus durable.

Le droit et la politique de la concurrence du COMESA prévoient un mécanisme d’harmonisation des règles et des politiques de concurrence de ses États membres, dont le but est de réduire au minimum et d’éviter les conflits. Aux termes de l’article 55(3) du traité du COMESA, un droit régional de la concurrence a été adopté sous forme de règles dites règles de concurrence du COMESA. Un organe expressément désigné, la Commission de la concurrence du COMESA – compétente en matière de droit de la concurrence – est chargé de faire appliquer ces règles.

Pour ce qui est du contrôle des fusions, les règles du COMESA ont un vaste champ d’application, qui couvre notamment la notification et le contrôle des fusions et des acquisitions. Le contrôle des fusions est traité à la partie 4 des règles, qui contient des dispositions relativement détaillées. Toutefois, ces dernières n’ont pas un caractère exhaustif et s’avèrent incomplètes à de nombreux égards. La Commission de la concurrence du COMESA a compétence en matière de « fusions notifiables ».

Le traité instituant le Marché commun de l’Afrique orientale et australe (COMESA) a été signé le 5 novembre 1993 et rassemble 18 nations africaines. Le COMESA ressemble davantage à une structure générale, étant donné qu’il coiffe d’autres organisations régionales telles que la Communauté d’Afrique de l’Est (East African Community - EAC) et la Communauté de développement de l’Afrique australe (Southern African Development Community - SADC). L’impact du COMESA sur ces organisations régionales est clair. Par exemple, un protocole d’accord a été signé avec l’EAC, aux termes duquel l’EAC s’est engagée à adopter et à mettre en œuvre le programme de facilitation et de libéralisation du commerce du COMESA. Un groupe de travail conjoint a également été constitué avec la SADC afin d’harmoniser ses programmes avec ceux du COMESA.

Voir Aide Memoire: Trade Capacity Building: Strengthening the COMESA trade region through a culture of competition (COMESA, 2008).

Voir Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (CNUCED, 2005).

Voir, par exemple, les points de vue du Kenya, de la Zambie et du Zimbabwe qui, préalablement à la création du COMESA, ont ouvertement reconnu l’insuffisance des règles nationales de concurrence pour lutter contre les pratiques anticoncurrentielles constatées à l’échelon régional.

La Commission est une personne morale dotée d’une personnalité juridique internationale.

Ces règles sont censées prévaloir sur les lois nationales : en cas de conflit, les règles du COMESA doivent l’emporter sur le droit national concerné (article 5(2) des Règles). Cette notion de primauté du droit régional sur le droit national a été empruntée à l’UE.

Voir ci-dessous, par exemple, les délais octroyés à la Commission pour l’examen des fusions (article 25 des Règles).
Une fusion notifiable est une fusion présentant une dimension régionale, selon le concept défini à l’article 23(2), qui requiert pour cela deux conditions : (i) l’une au moins des deux entreprises impliquées opère dans au moins deux États membres du COMESA, et (ii) les seuils de chiffres d’affaires annuels cumulés ou d’actifs cumulés – prévus à l’article 23(3) des Règles – sont dépassés. La notification de ces fusions à la Commission est obligatoire. La Commission peut cependant exiger la notification d’une fusion qui ne remplirait pas ces deux conditions si elle estime que l’opération est susceptible de restreindre sensiblement la concurrence ou de porter atteinte à l’intérêt du public. La Commission utilisera le test de diminution significative de la concurrence pour évaluer les fusions sur le fond dans un délai de 120 jours pouvant être étendu si la Commission le juge nécessaire pour mener à bien ses investigations. L’article 26 des Règles traite des procédures utilisées par la Commission pour réaliser son examen, des facteurs pris en compte dans le cadre de son évaluation de la fusion, et des conclusions éventuelles auxquelles une enquête peut aboutir. Le même article définit les pouvoirs conférés à la Commission pour réaliser son évaluation d’une fusion.

- Union économique et monétaire ouest-africaine (UEMOA ou WAEMU)  

Un régime régional de droit de la concurrence a été mis en place au sein de l’UEMOA. La Commission de l’UEMOA a compétence pour faire appliquer les règles de concurrence sous le contrôle de la Cour de Justice, elle-même habilitée à statuer sur les décisions rendues et sur les amandes infligées par la Commission.

En 2002, le conseil des ministres de l’UEMOA a adopté la législation communautaire sur la concurrence, entrée en vigueur en janvier 2003. Cette législation s’articule autour de cinq éléments : (i) le contrôle des pratiques anticoncurrentielles à l’intérieur de l’UEMOA ; (ii) les règles et procédures applicables aux ententes et aux abus de positions dominantes à l’intérieur de l’UEMOA ; (iii) le contrôle des aides d’État à l’intérieur de l’UEMOA ; (iv) la transparence des relations financières d’une part entre les États membres et les entreprises publiques, et d’autre part entre les États membres et les organisations internationales ou étrangères ; et (v) la coopération entre la Commission et les structures nationales de concurrence des États membres pour l’application de la législation de l’UEMOA.

Le traité instituant l’UEMOA ne fait donc aucune allusion spécifique au contrôle des fusions. Néanmoins, la position de l’UEMOA a été de dire que cela n’excluait pas pour autant la possibilité de...
contrôler les opérations de fusion. Elle considère en effet que ces opérations peuvent être contrôlées en vertu des dispositions relatives à l’abus de position dominante ⁸².

4.1.2.3 Remarques concernant les initiatives régionales actuelles

79. L’objectif d’une pleine coopération régionale dans le domaine du contrôle des fusions dans les pays en développement est ambitieux, et la mise en place d’un cadre à part entière pour le contrôle des fusions à l’échelon régional ne saurait faire l’économie – au minimum – de certaines étapes préliminaires. La première de ces étapes consiste à supprimer les sérieux obstacles politiques auxquels se heurtent les pays en développement et les économies émergentes. Les progrès que les pays concernés accompliront à la fois en termes d’application du droit de la concurrence et, plus généralement, d’intégration économique participeront à promouvoir les questions relevant du droit de la concurrence sur les ordres du jour régionaux. Vu la nature hautement complexe du processus d’intégration économique, il est très probable qu’éclatent des désaccords politiques, qui auront un impact sur le droit de la concurrence, et en fin de compte, sur le contrôle des fusions.

80. Au-delà des dissensions politiques potentielles, certaines contraintes « fonctionnelles » posent aussi de sérieux problèmes. S’agissant de leur expérience du contrôle des fusions, les pays concernés présentent des disparités considérables. Il serait par conséquent prématuré d’imaginer qu’une coopération régionale puisse suffire à introduire un contrôle efficace des fusions dans toute une région et surmonter les contraintes nationales. Dans un premier temps, la priorité devrait aller à l’introduction et à l’application efficaces au plan national de règles régissant le contrôle des fusions dans les pays concernés. Il est indispensable que les pays partagent un même niveau de développement pour que la coopération régionale fonctionne efficacement dans ce domaine. Une solution pourrait consister à faire évoluer de manière ascendante les règles en matière de contrôle des fusions dans les différentes régions du monde en développement. En d’autres termes, chaque pays mettrait au point son propre régime en la matière et s’emploierait à améliorer sa mise en application. Cette façon de faire permettrait plus aisément de parvenir à une coopération significative à l’échelon régional.

81. Les communautés régionales de par le monde en développement manquent souvent des outils nécessaires pour résoudre les questions et problèmes inhérents à l’exercice de la compétence par certaines autorités régionales ⁸³. Il est surtout important de disposer d’outils adéquats pour ce qui suit : (i) la répartition des compétences entre le niveau « communautaire » et les niveaux « nationaux » ; (ii) l’attribution du rôle et des pouvoirs des autorités régionales en matière d’exécution du droit (par exemple, si elles seront habilitées (et si oui, comment) à consulter et à recueillir des informations dans telle ou telle affaire auprès d’entreprises opérant dans les différents pays) ; et (iii) la mise en place de garanties nécessaires en cas d’accroissement de la charge de travail au-delà des capacités des autorités régionales (par exemple, la possibilité d’impliquer les autorités nationales de la concurrence afin d’alléger la charge de travail pesant sur les autorités régionales).

82. La question est d’autant plus complexe que certains pays en développement ou certaines économies émergentes sont membres de plusieurs communautés régionales ⁸⁴ à la fois. Cela pose certaines difficultés quant à la question de savoir si tel ou tel pays donnera la priorité au cadre de contrôle des fusions d’une communauté plutôt que d’une autre. L’existence de chevauchements d’adhésions peut saper

⁸² L’article 88 (b) interdit les pratiques « assimilables » à des situations d’abus de position dominante et a été imaginé dans le but de servir de base juridique à un certain degré de contrôle des fusions.

⁸³ Voir La répartition des compétences entre les autorités communautaires et nationales chargées des questions de concurrence dans l’application des règles de concurrence. (CNUCED, 2008).

⁸⁴ Ce cas de figure se rencontre surtout sur le continent africain.
les perspectives réelles de création d’un régime de contrôle des fusions pleinement efficace à l’échelon régional.

83. De toute évidence, les communautés régionales dénombrées parmi les pays en développement et les économies émergentes se sont inspirées du modèle de l’UE. S’il est avantageux de s’appuyer sur l’expérience de l’UE, il convient néanmoins d’être bien conscient que toute tentative de transposition du modèle européen a aussi ses limites. Il a fallu à l’UE plus de cinq décennies (y compris 20 longues années de travail intensif dans le domaine du contrôle des fusions) pour atteindre son niveau de développement actuel dans le domaine du droit de la concurrence et plus particulièrement du contrôle des fusions. Le développement du droit de la concurrence dans de nombreux pays en développement ou économies émergentes n’en est encore qu’à ses balbutiements, et les caractéristiques de ces pays, ainsi que leur histoire diffèrent aussi significativement de ceux de l’UE.

84. Une grande partie des travaux et des discussions menés sur la coopération régionale est restée purement académique. Des efforts considérables doivent être faits pour promouvoir les programmes de coopération régionale. Plus particulièrement, la « mise en œuvre » à l’échelon national des règles et principes régionaux est pour cela bien souvent cruciale. Comme précisé plus haut, cela passe par la mise en place de régimes nationaux de contrôle des fusions dans les pays concernés85. Une autre contrainte majeure qui pèse sur toutes les organisations régionales du monde en développement est l’extrême lourdeur de la bureaucratie, qui rend beaucoup plus difficile toute prédiction quant à l’évolution future de la coopération régionale et à sa mise en application efficace86.

85. L’incertitude quant à la question de savoir si ces communautés régionales devraient se concentrer davantage sur des objectifs économiques ou politiques exacerbe les problèmes auxquels se heurte la coopération régionale. La question du contrôle des fusions ne peut être appréhendée à travers le seul filtre du droit de la concurrence, et ne peut être dissociée de l’interaction de questions économiques et politiques plus larges. Par conséquent, la coopération ne peut être une question isolée et, dans presque tous les cas, elle dépendra des circonstances économiques et politiques plus générales qui prévaudront dans la région et dans chacun des pays concernés.

86. Un dernier commentaire concerne les contraintes en termes de capacités, dont souffrent bon nombre des communautés régionales dans les pays en développement. Comme indiqué dans la partie précédente du document, les membres de ces communautés sont généralement des économies de petite taille qui manquent des ressources nécessaires pour être en mesure de mettre en place des régimes nationaux de contrôle des fusions efficaces, et à plus forte raison pour consacrer des moyens à un régime régional de contrôle des fusions. Or ces besoins peuvent être extrêmement élevés. Beaucoup de ces pays ne considèrent pas l’investissement de ressources dans le contrôle des fusions à l’échelon régional comme une priorité nationale87.

85  Par exemple, la mise en œuvre du protocole du MERCOSUR nécessiterait l’introduction de régimes de droit de la concurrence et l’institution d’autorités nationales de la concurrence en Uruguay et au Paraguay, qui sont tous deux des États membres.

86  Il est important d’établir à l’échelon national une structure institutionnelle appropriée, dotée de ressources financières et d’une expertise suffisantes pour garantir une mise en œuvre réussie.

4.1.3 Coopération bilatérale

87. La coopération bilatérale est devenue l’un des outils préférés des autorités de la concurrence pour s’engager dans toute une palette d’activités de mise en application du droit ou d’activités connexes. La coopération bilatérale peut être formelle (sur la base d’un accord) ou informelle (sans la conclusion d’aucun accord, voire de fait). Les paragraphes suivants font référence à des accords de coopération bilatéraux concernant spécifiquement la concurrence, qu’il convient de distinguer des liens bilatéraux plus larges qui existent entre les pays, comme les accords de libre-échange et les protocoles d’accords. Bien que ces derniers contiennent souvent des dispositions relatives au droit de la concurrence, ils ne peuvent néanmoins faire office de support adéquat pour engager une coopération bilatérale dans le domaine du droit de la concurrence.

88. Le nombre d’accords de coopération bilatérale a augmenté de manière assez remarquable depuis les années 1990. Cependant, vu le nombre d’autorités de la concurrence qui existent, ce chiffre reste relativement peu élevé. La grande majorité des accords et des liens bilatéraux ont été conclus entre des agences expérimentées dans le droit de la concurrence, dans le monde développé. On constate donc une absence d’accords de coopération bilatérale en matière de droit de la concurrence dans les pays en développement et les économies émergentes. Cela mérite d’ailleurs d’être souligné, étant donné la force des liens qui existent, comme cela a été dit plus haut, entre nombre des pays de ces régions. Cette absence peut s’expliquer par exemple par le fait que le droit de la concurrence a été introduit seulement récemment dans ces différents pays, et que l’application du droit de la concurrence (sans parler du contrôle des fusions) n’est pas encore parvenue à une maturité suffisante pour rendre possible la conclusion de tels accords ou pour qu’elle soit jugée nécessaire. Cela étant, compte tenu de l’ampleur du commerce « transnational » ou « interrégional » dans ces régions et vu le nombre d’entreprises qui opèrent dans les différents pays qui les composent, la probabilité de fusions comportant des éléments transnationaux est réelle.

89. L’absence de liens bilatéraux des autorités de la concurrence dans les pays en développement et les économies émergentes peut aussi s’expliquer par la nature des relations que ces autorités entretiennent avec les autorités de la concurrence plus expérimentées des pays développés. L’absence de règles du jeu uniformes entre ces deux groupes de pays y est pour beaucoup. S’y ajoute le fait que les autorités expérimentées sont souvent soumises à des contraintes de temps lorsqu’elles enquêtent sur des fusions. Toute coopération bilatérale avec les autorités des pays en développement et des économies émergentes risque d’être perçue par les autorités des pays développés comme étant contraire à l’objectif d’efficience qui leur est imposé dans leurs investigations.

90. Des accords de libre-échange bilatéraux ont été conclus entre différents pays d’une même région. Certains de ces accords comportent des dispositions de concurrence, bien que ce type de support ne constitue sans doute pas le meilleur moyen de mettre en place une coopération bilatérale dans le domaine du contrôle des fusions. L’absence d’accords de coopération bilatérale formels ou spécifiques à la concurrence ne signifie par pour autant qu’il n’existe aucune coopération. La coopération bilatérale peut en effet prendre diverses formes : réunions conjointes entre fonctionnaires de la concurrence, séminaires de formation, ou encore ateliers organisés de manière informelle.

91. La coopération bilatérale apporte un certain nombre d’avantages non négligeables aux pays, et plus particulièrement à leurs autorités de la concurrence. Ces derniers ont été recensés et mis en avant par l’OCDE dans sa Recommandation de 1995\(^{88}\). La Recommandation énumère les avantages spécifiques suivants : (i) atteindre une meilleure efficience dans l’application de la réglementation et le déroulement des enquêtes ; (ii) éviter les conflits de compétence ; (iii) protéger les intérêts légitimes des pays ; (iv)

\(^{88}\) Voir la Recommandation du Conseil de l’OCDE sur la Coopération entre pays membres dans le domaine des pratiques anticoncurrentielles affectant les échanges internationaux (1995).
réduire le besoin d’échange d’informations confidentielles ; (v) favoriser les intérêts des parties à la fusion et promouvoir la sécurité juridique ; et (vi) créer des liens plus étroits entre l’autorité de la concurrence concernée et la fusion en question.

92. Ces avantages présentent un intérêt direct pour les pays en développement et les économies émergentes. La coopération bilatérale devrait donc être une avancée positive pour ces économies. En réalité, cependant, les pays en développement et les économies émergentes se heurtent à de sérieux obstacles lorsqu’ils cherchent à faire de la coopération bilatérale un outil efficace de contrôle des fusions. En particulier, comme expliqué plus haut, les chances qu’une autorité de la concurrence expérimentée accepte de conclure un tel accord avec une autorité de la concurrence d’un pays en développement sont très minces. Dans une certaine mesure, il est vrai qu’une autorité de la concurrence d’un pays développé envisagera de conclure un accord de coopération bilatérale uniquement avec des pays en développement et des économies émergentes dont le régime de contrôle des fusions a été conçu sur le modèle des pays développés et à la condition que le pays en question présente par ailleurs des caractéristiques économiques et politiques de nature à faciliter une telle coopération.

93. La coopération bilatérale ne peut fonctionner que si les deux parties à l’accord tirent des avantages ou au moins estiment qu’elles tireront des avantages d’une telle coopération. Les exemples de coopération bilatérales UE-États-Unis et Australie-Nouvelle-Zélande le prouvent clairement. Ces deux exemples sont les plus réussis en matière de coopération bilatérale dans le domaine du droit de la concurrence. Le succès de ces deux expériences est en grande partie dû aux similitudes entre les parties. Pour ce qui concerne l’UE et les États-Unis, il convient de rappeler qu’il s’agit des deux régimes de droit de la concurrence les plus évolués au monde, avec qui plus est de nombreux et importants chevauchements de compétences, notamment s’agissant des opérations de fusion. Quant à l’Australie et à la Nouvelle-Zélande, ces deux pays ont atteint un niveau de développement économique similaire, noué des liens politiques étroits et établi une confiance mutuelle.

94. Malgré les inconvénients que présente la coopération bilatérale pour les pays en développement et les économies émergentes qui souhaiteraient s’ouvrir à l’international, il peut néanmoins s’avérer bénéfique pour ces économies d’essayer d’établir entre elles ou avec des pays développés des liens bilatéraux dans le domaine du droit de la concurrence. Ces liens ne doivent pas forcément concerner exclusivement la coopération dans le cadre d’actions ponctuelles d’application du droit, mais peuvent porter sur la formation technique ou le renforcement des compétences. De telles initiatives seraient particulièrement utiles dans le domaine du contrôle des fusions, vu les besoins spécifiques que ces activités requièrent (voir plus haut), notamment en termes de ressources, et plus particulièrement d’expertise. Par ailleurs, le resserrement de tels liens bilatéraux pourrait également stimuler les perspectives de rapprochement et d’harmonisation.

---

89 L’idée sous-jacente à ce dernier point est qu’une fusion donnée sera évaluée par l’autorité de la concurrence qui lui correspond.


92 Il est important de souligner que cette perspective ne saurait être complètement exclue, même en l’absence d’accord de coopération formel. Voir par exemple les consultations menées entre la Commission de la concurrence du Zimbabwe et la Commission australienne de la concurrence et du consommateur dans le cadre de la fusion Coca-Cola Company/Cadbury-Schweppes, citée à la note 45 ci-dessus.

93 Voir ci-dessus.
4.2 Questions juridictionnelles

95. La question des champs de compétences est au cœur même du mécanisme de contrôle des fusions. Le processus de contrôle des fusions commence lui-même par la question de la compétence, qui consiste à déterminer si une transaction donnée relève de tel ou tel régime et si les exigences juridictionnelles correspondantes sont respectées. Ce sont les réponses à ces questions qui déclenchent dans la pratique l’évaluation d’une fusion. Lorsque les seuils juridictionnels ne sont pas atteints, la notification de la fusion ne sera pas nécessaire et, par conséquent, l’autorité de la concurrence concernée ne procédera pas à l’évaluation de l’opération94.

96. La question de la compétence revêt une importance particulière s’agissant des opérations de fusion transnationales en raison de la forte probabilité que ces opérations doivent être notifiées en prévision dans de nombreuses juridictions. Cette question revient entre autres choses à déterminer si ces fusions, lorsqu’elles impliquent des entreprises étrangères, devraient dans tous les cas tomber sous le coup des règles locales établies en matière de fusions dans une juridiction donnée ou si ce principe devrait être subordonné à certaines circonstances95. Pour les pays en développement et les économies émergentes, cette question est particulièrement pertinente dans le contexte du contrôle des fusions transnationales.

4.2.1 Notification

97. La grande majorité des régimes de contrôle des fusions comportent un mécanisme de notification obligatoire. Seules quelques juridictions de par le monde (dont le Royaume-Uni, le Chili, l’Australie et la Nouvelle-Zélande) sont dotées d’un mécanisme de notification volontaire. Lorsqu’il élabore ou met en œuvre un régime de contrôle des fusions, un pays en développement ou une économie émergente doit déterminer s’il utilisera une notification obligatoire ou volontaire et, plus important encore, quel sera le niveau des seuils juridictionnels qui déclenchent la notification à l’autorité de la concurrence compétente. C’est une question complexe qui mérite une réflexion approfondie. Ces seuils devraient, d’une part, refléter la taille de l’économie en question et les niveaux de sensibilité du pays et, d’autre part, tenir compte comme il se doit des intérêts des entreprises engagées dans des opérations de fusion.

98. Il est particulièrement difficile de fixer les seuils juridictionnels au niveau approprié, le risque étant d’établir des seuils trop élevés, ou au contraire trop bas. Il existe dans un cas comme dans l’autre un certain nombre d’implications. Si les seuils sont trop élevés, certaines fusions problématiques (qui justifieraient normalement une évaluation sur le fond), risquent d’échapper à tout contrôle. Si ces mêmes seuils sont en revanche fixés à un niveau trop bas, le nombre de fusions tombant sous le coup des règles de notification augmentera considérablement96. Il est possible que certaines de ces fusions ne présentent pas un lien suffisamment important avec la juridiction concernée (Voir Encadré 4), ce qui aura de sérieuses répercussions en termes de moyens, vu les ressources très limitées dont disposent les autorités de la concurrence dans les pays en développement et les économies émergentes. Ce problème viendra s’ajouter aux réglementations superflues auxquelles les parties à des fusions transnationales seront soumises. Ce point mérite d’être souligné tout particulièrement, étant donné que la plupart des fusions n’entraînent pas de problèmes de concurrence.

94 Il convient de garder à l’esprit que la compétence peut toutefois être exercée dans ce cas par l’autorité de la concurrence concernée. Voir par exemple la disposition des Règles du COMESA à ce propos, note 73 ci-dessus et texte correspondant. Voir également les cas où existe un mécanisme de notification facultative, et où l’autorité de la concurrence peut choisir d’examiner une fusion ex post.

95 Dans certaines juridictions, il existe une exemption pour certains types de fusions dites « étrangères ». Voir, par exemple, l’exemption prévue par le régime états-unien de contrôle des fusions.

Box 4. Réforme des seuils de notification au Brésil

Il est intéressant de citer le changement intervenu au Brésil.

Aux termes de la section 54 de la loi sur la concurrence de 1994, la notification est obligatoire pour toutes les fusions, acquisitions, créations d’entreprises communes, ou de tout autre type de groupement constitué en société dans la mesure où : la transaction génère des effets au Brésil ; et où elle se traduit par une part de marché égale ou supérieure à 20 % du marché pertinent ; ou si l’une des parties à la transaction a réalisé un chiffre d’affaires supérieur à 400 millions R $ au titre de l’exercice précédent.

Pendant longtemps, les autorités brésiliennes de la concurrence ont opté pour une interprétation large du concept d’« effets au Brésil ». Ce choix était encouragé par le libellé de la section 54, qui omet toute référence géographique au Brésil pour ce qui est des seuils de part de marché et de chiffre d’affaires. Avec des seuils aussi bas, beaucoup de fusions qui n’avaient aucun impact sur la concurrence dans les marchés locaux devaient être notifiées au Conseil administratif brésilien de défense économique (CADE).

Dans une décision phare rendue le 19 janvier 2005, le CADE a donné une nouvelle interprétation du concept des effets et du critère du chiffre d’affaires. Il a en effet déclaré à cette occasion que la notification devrait intervenir en cas de transactions impliquant des entités économiques dont le chiffre d’affaires dépasse les 400 millions R$ – au Brésil – au titre de l’exercice précédent. Ce changement significatif a été facilité par l’adoption du principe de pertinence du lien juridictionnel, conformément aux préconisations de l’OCDE et du RIC. Ce changement de position a entraîné une diminution sensible du nombre de fusions qui auraient sinon dû être notifiées au Brésil. Par conséquent, aujourd’hui, seules devraient être notifiées les fusions pour lesquelles le chiffre d’affaires au Brésil est supérieur au seuil mentionné.

Il convient de préciser qu’une proposition de modification de la loi est actuellement débattue au Brésil (Projet de loi 06/2009), laquelle vise à faire établir la compétence sur la seule base des seuils de chiffre d’affaires, à l’exclusion des seuils de part de marché. Cette proposition suit également les meilleures pratiques de l’OCDE et du RIC (voir note 97 ci-dessous et le texte correspondant).

99. Les travaux de l’OCDE et du RIC montrent toute la difficulté que suppose la détermination de la pertinence du lien juridictionnel et la fixation du niveau approprié des seuils devant déclencher la notification. Les principes du RIC publiés sur cette question97 font apparaître que la définition des critères de fixation de tels seuils est difficile. Cela tient en partie au caractère général des critères proposés par ces principes, à savoir qu’ils doivent être clairs, compréhensibles et fondés sur des facteurs quantitatifs et non pas subjectifs mais objectifs98.

100. La Recommandation de 2005 de l’OCDE sur le contrôle des fusions apporte un éclairage supplémentaire sur cette question. Selon cette Recommandation, les pays membres de l’OCDE devraient affirmer leur compétence uniquement lorsqu’une fusion présente un lien pertinent avec leur juridiction. Elle préconise également que les critères utilisés pour déclencher la notification soient clairs et objectifs. Il est évident que ces recommandations témoignent d’une volonté de réduire les coûts et la charge qui pèsent sur les entreprises à une fusion et les tierces parties. Elles sont donc bienvenues.

4.2.2 Obtenir des informations et partager des informations avec d’autres autorités de la concurrence

101. Une autre question relative à la répartition des compétences, et qui a une importance pratique de premier plan, concerne les outils et les pouvoirs nécessaires pour la recherche et la collecte d’informations

97  Voir les pratiques recommandées du RIC Merger notification and review procedures.

98  Les critères tels que le montant du chiffre d’affaires et des actifs sont considéré comme étant objectifs, tandis que celui de la part de marché est jugé subjectif.
dans les affaires de fusion et pour le partage d’informations entre autorités de la concurrence. D’ordinaire, dans les affaires de fusion, les parties à la fusion fournissent elles-mêmes les informations lorsqu’elles notifient l’opération. Cependant, les autorités de la concurrence des pays en développement et des économies émergentes éprouvent certaines difficultés d’une part à obtenir des informations des entreprises impliquées dans des fusions transnationales et d’autre part à échanger avec elles des informations. Pour bien cerner toute cette question, il convient de la replacer dans le contexte plus général de l’affirmation de la compétence extraterritoriale des autorités de la concurrence (en particulier de celles des pays en développement et des économies émergentes) sur ces opérations.

102. La doctrine de l’extraterritorialité a suscité le débat chez les professionnels du droit de la concurrence. L’usage agressif de cette doctrine dans certaines régions du monde a engendré des différends et des conflits entre pays et a poussé certains pays et leurs autorités à prendre des mesures visant à bloquer les initiatives extraterritoriales lancées par d’autres pays.

103. Il n’en reste pas moins que la doctrine de l’extraterritorialité a un rôle important à jouer dans le domaine du droit de la concurrence et plus particulièrement dans celui du contrôle des fusions. Sans cette doctrine, quelques-unes au moins des transactions potentiellement néfastes pour la concurrence pourraient échapper au contrôle des autorités. Le rôle de l’extraterritorialité est d’autant plus important en l’absence d’une stratégie multilatérale efficace dans le pays concerné et compte tenu des limites de la coopération bilatérale.

104. Le concept d’extraterritorialité est indissociable de la notion de contrôle des fusions. Cette idée doit être appréciée au regard du libellé et de la nature des seuils juridictionnels – présents dans divers régimes de contrôle des fusions – qui déclenchent la notification (obligatoire ou volontaire) des fusions. Les confirmations judiciaires données aux États-Unis et en Europe renforcent cette idée. Cependant, pour un pays en développement ou une économie émergente, affirmer sa compétence hors de ses frontières dans le cadre d’affaires de fusions transnationales reste un défi.

99 Voir Dabbah, ch. 8, note 52 ci-dessus. On parle d’extraterritorialité dans les cas de figure où une autorité de la concurrence ou un tribunal se déclare compétent pour une situation impliquant des éléments étrangers (comme un comportement, des agissements ou des transactions d’entreprises étrangères). Un pays peut ainsi déclarer sa compétence sur la base de « effets » produits sur la concurrence sur les marchés locaux, ou sur la base de la « mise en œuvre » du comportement, des agissements ou de la transaction dans la juridiction concernée ou encore (dans certains cas) sur la base de la doctrine de « l’entité économique unique » (selon laquelle, même si la ou les entreprises concernées sont étrangères, elles peuvent néanmoins posséder une filiale locale). Les doctrines des « effets » et de la « mise en œuvre » sont les plus invoquées pour affirmer une juridiction extraterritoriale. La première est utilisée dans les régimes des États-Unis (ainsi que de nombreux autres régimes), tandis que la deuxième est utilisée dans l’UE.


101 Voir la discussion ci-dessus des paragraphes 93 et 94.


103 Cela ne signifie pas pour autant que cela soit impossible. Il existe un certain nombre d’exemples de déclarations de compétence extraterritoriale réussies, notamment dans la fusion Coca-Cola Company/Cadbury-Schweppes mentionnée à la note 45 ci-dessus.
105. Pour commencer, il se peut que les autorités de la concurrence dans les pays en développement et les économies émergentes éprouvent des difficultés à obtenir toutes les informations nécessaires pour réaliser l'examen de la fusion. Lorsque les informations pertinentes sont situées en dehors du pays en question, il peut s’avérer très difficile pour l’autorité de la concurrence concernée de les obtenir. La ou les entreprises visées peuvent refuser de se conformer aux instructions de l’autorité de fournir les informations pertinentes, et le seul moyen de se les procurer serait alors de solliciter l’assistance de l’autorité de la concurrence de ce pays. Mais, à moins qu’un accord de coopération bilatérale prévoie une assistance et un partage d’informations entre les juridictions concernées, toute coopération ad hoc de ce type est peu probable. Cela souligne la nécessité d’une coopération bilatérale, même si, comme expliqué plus haut, des obstacles de taille peuvent empêcher sa concrétisation.

106. Quand bien même l’autorité de la concurrence serait en mesure d’obtenir les informations nécessaires et déciderait que la fusion devrait être bloquée ou acceptée sous certaines conditions, elle peut encore avoir beaucoup de mal à faire appliquer sa décision si la ou les entreprises visées ne détiennent aucun actif sur les marchés locaux. La probabilité qu’une autorité réussisse à faire exécuter sa décision par la justice de la juridiction étrangère concernée est faible. La situation est d’autant plus compliquée lorsqu’existent des différences fondamentales entre deux juridictions, comme c’est le cas entre les juridictions de droit civil et celles de common law, ou lorsqu’une juridiction prévoit des sanctions pénales alors que l’autre prévoit uniquement des sanctions civiles.

4.3 Mesures correctives

107. Les mesures correctives jouent un rôle décisif dans le contrôle des fusions. Sans la possibilité d’imposer des mesures correctives, les instances de la concurrence n’auraient d’autre choix que de rejeter purement et simplement les fusions problématiques. Les mesures correctives permettent aux fusions problématiques qui présentent néanmoins des avantages évidents et non négligeables d’être autorisées lorsque ces avantages compensent les problèmes possibles de concurrence que l’opération risque d’entraîner. Avec les décisions d’autorisation sans condition et les interdictions, les mesures correctives constituent une troisième catégorie de verdict dans les affaires de fusion, à savoir l’autorisation conditionnelle.

4.3.1 Types de mesures correctives possibles

108. Différents types de correctifs peuvent être apportés aux fusions. De manière générale, on parlera de deux grandes catégories de mesures, les mesures structurelles et les mesures comportementales. Certains régimes de contrôle des fusions comportent cependant une typologie de mesures plus

104 Ce qui souligne sans doute l’intérêt d’un mécanisme de notification obligatoire plutôt que volontaire.

105 Voir les exemples cités par Dabbah, ch. 4, note 22 ci-dessus.


108 Voir en la matière les débats intéressants menés sous l’égide de l’OCDE lors de sa Table ronde sur les correctifs à apporter aux fusions (2003) et les principes du RIC concernant les mesures correctives.
sophistiquée. Ces régimes distinguent les mesures correctives structurelles, les « autres » mesures structurelles, les mesures comportementales et les autres types de mesures correctives.

109. Les autorités de la concurrence préfèrent de loin les mesures structurelles aux mesures comportementales. Les mesures structurelles sont en effet jugées plus efficaces que les mesures comportementales pour résoudre les problèmes de concurrence détectés au cours de l’évaluation d’une fusion. Par ailleurs, contrairement aux mesures comportementales, les mesures structurelles ne nécessitent pas un suivi continu. Néanmoins, imaginer des mesures correctives et élaborer une politique en la matière (y compris définir le type de mesures acceptables) est une lourde tâche pour une autorité de la concurrence, et ce plus particulièrement encore dans les pays en développement et les économies émergentes.

110. Dans le cadre de sa politique, l’autorité de la concurrence d’un pays en développement ou d’une économie émergente peut afficher une préférence pour les mesures structurelles. Dans la pratique, cependant, elle peut rencontrer certaines difficultés pour mettre en œuvre ce type de mesures correctives lorsque les parties à la fusion ne possèdent aucun actif pertinent dans la juridiction en question et (de manière plus générale) lorsque la ou les entreprises à la fusion sont en position de force dans leurs rapports avec elle.

111. Il se peut aussi que la fusion nécessite la cession de certains éléments d’actif et que l’autorité de la concurrence du pays en développement ou de l’économie émergente en question ne dispose pas de l’expérience nécessaire pour traiter ce type d’affaires aussi complexes. Il se peut également que les problèmes de concurrence mis en lumière par l’enquête soient liés à des questions à caractère comportemental comme des clauses d’exclusivité de contrats conclus entre une ou plusieurs des entreprises à la fusion et leurs clients.

112. Dans la pratique, les autorités de la concurrence des pays en développement peuvent donc être contraintes d’imposer des mesures correctives comportementales plus souvent qu’elles ne le souhaiteraient. C’est le choix qu’a fait la Corée (Voir Encadré 5). Cependant, en dépit de leurs inconvénients, il convient

---

109 Voir par exemple la classification faite par l’Office of Fair Trading et la Commission de la concurrence britanniques.
110 Les mesures structurelles prévoient la plupart du temps une cession.
111 Les autres mesures structurelles peuvent inclure l’accès à des équipements d’infrastructure ou à des éléments protégés par des droits de propriété intellectuelle.
112 Les mesures comportementales peuvent inclure la concession de licences sur des droits de propriété intellectuelle, le retrait de clauses d’exclusivité de contrats passés avec des clients ou encore des mesures de réglementation des prix.
113 Les autres types de mesures peuvent inclure la formulation de recommandations par l’autorité de la concurrence au gouvernement en place ou au parlement dans l’optique de modifier une loi ou une réglementation considérée comme une entrave à la concurrence sur le marché pertinent.
114 Si, par exemple, les entreprises sont en mesure de menacer de se retirer de la juridiction en question et/ou de développer des activités de lobbying auprès des pouvoirs publics afin d’exercer une pression importante sur les fonctionnaires de la concurrence, comme évoqué précédemment.
115 Voir par exemple le point de vue soumis par le Mexique lors de la Table ronde de l’OCDE sur les correctifs à apporter aux fusions (2003).
116 Les clauses d’exclusivité posent un réel problème dans plusieurs pays en développement ; voir principalement la situation dans différents secteurs de l’économie mexicaine, et notamment dans celui des boissons sans alcool.
de ne pas négliger l’importance et la pertinence des mesures comportementales, ainsi que la nécessité d’opter d’emblée pour ces dernières dans certains cas ou de les intégrer dans un paquet de mesures élargi.

Box 5. Le recours aux mesures comportementales en Corée

Ces dernières années, dans un certain nombre d’affaires, la Commission de la concurrence coréenne (Korean Fair Trade Commission - KFTC) a très souvent assorti de mesures comportementales ses autorisations de fusions. Deux exemples illustrent bien cette pratique.

La première concerne l’acquisition en 2007 par CJ Cable Net d’une participation dans Chungnam Broadcasting System et dans Modu Broadcasting System, qui s’est traduite par l’intégration de la télévision câblée aux services fournis par ces entreprises dans six grandes villes coréennes. La KFTC a autorisé la transaction, qu’elle a conditionnée à un paquet de mesures correctives sévères et très élaborées. Ce paquet comprenait l’interdiction : d’augmenter directement ou indirectement les prix ; de réduire le nombre de chaînes proposées par catégorie d’abonnement ; de refuser de fournir des informations sur des produits meilleur marché ou de refuser de fournir ces produits ; et de refuser les demandes visant à transformer des abonnements en services meilleur marché.

Dans la deuxième affaire, qui concernait l’acquisition en 2005 par Hite Brewery Co. de Jinro Ltd, la KFTC a largement recouru à des mesures comportementales. Parmi ces mesures figurait l’interdiction faite à l’entité née de la fusion d’augmenter les prix des boissons alcoolisées plus fortement que le taux d’inflation moyen, et ce pendant cinq ans ; l’engagement de soumettre préalablement à l’approbation de la KFTC toute augmentation de prix ; l’interdiction faite à l’entité née de la fusion d’inciter ou de contraindre de manière déloyale des fournisseurs à faire affaire avec elle dans des conditions déloyales en tirant parti de sa position ; et l’obligation pour la nouvelle entité de soumettre à la KFTC les informations concernant les transactions qu’elle conclue avec les fournisseurs de gros de boissons alcoolisées.

113. Les mesures comportementales présentent un certain nombre de caractéristiques qui les rendent attractives pour les pays en développement et les économies émergentes et particulièrement adaptées à ces derniers. Parmi ces caractéristiques, il convient de citer leur souplesse. En l’absence d’une mesure structurelle spécifique à une juridiction, une mesure comportementale permet aux autorités de la concurrence de ces pays de choisir une solution adaptée au profil et aux besoins de la juridiction en question. Cette souplesse devrait aussi inciter davantage les parties prenantes de fusions transnationales à se conformer aux conditions et obligations qui leur sont imposées en contrepartie de l’autorisation de l’opération.

114. Le type de mesures comportementales qui devraient figurer dans la boîte à outils de mesures correctives des autorités de la concurrence des pays en développement et des économies émergentes dépend des caractéristiques des marchés locaux, de l’expérience des autorités en matière d’application du droit et de leurs perspectives en termes de réglementation. Néanmoins, certaines mesures comportementales présenteront un intérêt tout particulier pour ces pays. Parmi ces dernières, on citera : (i) les mesures comportementales visant à résoudre des problèmes de restrictions verticales (y compris celles liées à des clauses d’exclusivité) ; (ii) les mesures non structurelles concernant des questions d’accès sous forme de concessions de licences de droits de propriété intellectuelle ; et (iii) l’octroi d’un accès à des équipements. Il convient toutefois de noter que, de manière générale et notamment dans les pays en développement, ces cas de figures appellent des mesures correctives plus difficiles à élaborer.

117  Décision n° 2007-274 de la KFTC, du 07.05.2007.
119  Dans certaines affaires, les autorités de la concurrence peuvent poser d’autres conditions à la fusion en recourant à d’autres outils comportementaux. Voir par exemple l’autorisation conditionnelle accordée par
115. En raison de leur coût, les pays en développement et les économies émergentes ne devraient pas recourir excessivement aux mesures comportementales. Les demandes de suivi de conformité peuvent s’avérer très exigeantes, surtout compte tenu du fait que ces autorités disposent souvent de ressources restreintes. Cela dit, tout bien pesé, les avantages dans certains cas tirés des mesures comportementales pour régler un problème de concurrence peuvent compenser ou justifier ce coût inévitable. Les autorités concernées devraient en tenir compte lorsqu’elles élaborent leur politique en matière de mesures correctives dans les affaires de fusions.

4.3.2 Consultation et coopération

116. Les dernières évolutions en matière de contrôle des fusions ont mis en exergue l’importance de la consultation et de la coopération entre autorités de la concurrence sur la question des correctifs à apporter aux fusions. Ce point est d’autant plus important que la probabilité est grande de voir éclater des conflits entre autorités de la concurrence dans un certain nombre de contextes, dont les suivants :

- premièrement, les autorités de la concurrence concernées peuvent parvenir à des conclusions contradictoires concernant les mesures correctives nécessaires à imposer dans une même affaire de fusion ;
- deuxièmement, la juridiction dans laquelle se trouve le « centre de gravité » de la fusion peut décider de ne pas la réglementer et de laisser faire la fusion sur des motifs autres que de concurrence, alors qu’une ou plusieurs autres juridictions peuvent décider d’infliger des mesures correctives en vertu de leur législation relative au contrôle des fusions ; et
- troisièmement, deux autorités de la concurrence distinctes peuvent détecter des problèmes de concurrence ayant trait à différents aspects de la même fusion, auquel cas les mesures correctives jugées nécessaires par une autorité peuvent ne pas être compatibles avec celle souhaitées par l’autre.

117. La coopération bilatérale apporte dans ce cas certains avantages considérables à la fois aux autorités de la concurrence et aux parties à la fusion\textsuperscript{120}. Les avantages pour les autorités de la concurrence ne se limitent pas exclusivement à des avantages administratifs, mais se traduisent aussi dans la pratique en avantages pour le consommateur et pour les marchés locaux. Tel est du moins le cas lorsque la coopération permet d’élaborer et de mettre en œuvre plus efficacement une mesure corrective dans une affaire donnée.

118. La possibilité d’une consultation et d’une coopération entre l’autorité de la concurrence d’un pays en développement ou d’une économie émergente et une autorité de la concurrence plus expérimentée ne doit pas être tenue pour acquise. Cela étant, elle ne peut pas non plus être complètement exclue d’office\textsuperscript{121}. La coopération entre autorités de la concurrence dans la phase qui concerne les mesures correctives peut être essentielle, notamment pour renforcer la cohérence entre ces autorités. Les débats

---

\textsuperscript{120} Voir la note de réflexion du Secrétariat de l’OCDE sur les Mesures correctives transfrontalières dans les affaires de fusion (2005).

\textsuperscript{121} Voir note 92 ci-dessus.
internationaux menés sous l’égide de l’OCDE et dans d’autres forums ont permis d’explorer diverses options de coopération, et principalement l’idée d’accords de partage du travail entre autorités de la concurrence. Cette idée mériterait d’être étudiée de manière plus approfondie, bien qu’à cette date aucun consensus n’ait émergé sur la meilleure voie à suivre dans ce domaine. Ce constat serait peut-être à rapprocher des divergences de vues sur la viabilité du concept de « juridiction responsable » dans la pratique.

4.3.3 Suivi et mise en œuvre

119. Lorsque l’autorisation d’une fusion est conditionnée par des mesures comportementales, il est important que l’autorité de la concurrence concernée prenne les moyens de suivre efficacement la mise en œuvre de ces mesures correctives. Ce point est vital pour veiller à ce que les entreprises à la fusion se conforment pleinement aux instructions qui leur ont été adressées, ainsi que pour garantir l’efficacité de la mesure corrective en question. Le suivi est aussi important, bien que dans une moindre mesure, dans le cas des mesures structurelles. Il en est de même quant à l’exécution des mesures prises : les autorités de la concurrence doivent disposer des outils et des pouvoirs nécessaires pour être en mesure de prendre des mesures coercitives lorsque des parties à une fusion ne respectent pas les conditions ou obligations prévues par les mesures correctives convenues avec ces dernières.

120. Le suivi et l’exécution ne sont pas des tâches aisées, et les moyens qu’exigent ces fonctions ne sont pas spécifiques du contrôle des fusions. Les autorités de la concurrence nécessitent en effet à cette fin des ressources humaines et financières adéquates, une contrainte qui se vérifie pour l’ensemble du domaine du droit de la concurrence, et pas seulement pour celui du contrôle des fusions.

121. Les autorités de la concurrence éprouvent de sérieuses difficultés à assurer le suivi des mesures correctives imposées dans le cadre de fusions transnationales, et à ce à deux égards. Le premier point concerne l’accès restreint aux informations nécessaires, et le second a trait au recours limité à des mesures coercitives dans le cas où les entreprises à une fusion ne respectent pas les conditions et obligations imposées au titre des mesures correctives. Il existe deux pistes possibles pour renforcer l’efficacité du suivi. On citera (i) la possibilité d’engager une action à l’encontre d’une filiale locale des parties à la fusion (s’il en existe une) et (ii) celle de recourir à la coopération. Cette dernière possibilité est peut-être plus prometteuse, bien que toute coopération doive être très étroite pour produire des résultats.

122. Dans certains cas, le succès de mesures d’exécution prises par une autorité de la concurrence dans des affaires de fusions transnationales nécessite l’assistance d’autorités de la concurrence étrangères également impliquées dans la transaction. Cette assistance a plus de chance d’être fournie si les deux autorités de la concurrence en question agissent dans le cadre d’une étroite coopération. Comme précisé plus haut, les autorités de la concurrence des pays en développement et des économies émergentes ne sont

122 Il convient de préciser que cette idée avait déjà été avancée. Elle avait effectivement été évoquée dans le rapport 2000 du Comité consultatif des États-Unis sur la politique de la concurrence internationale (International Competition Policy Advisory Committee - ICPAC). Ce rapport soutenait vigoureusement la coopération dans ce contexte et proposait la mise en place de tels arrangements de deux manières différentes : premièrement par la négociation conjointe (chaque autorité de la concurrence concernée ferait part de ses préoccupations quant à la transaction proposée, puis un ensemble de mesures correctives serait arrêté par la biais de négociations conjointes) et deuxièmement en attribuant à une juridiction la fonction de « juridiction responsable », qui serait ainsi chargée de négocier les mesures correctives avec les parties à la fusion.

123 En cas de mesures structurelles, le suivi sera important pour s’assurer que la cession est bien effectuée dans les conditions convenues entre l’autorité de la concurrence et les parties à la fusion. Une fois cette opération achevée, aucun suivi n’est plus nécessaire.

124 Voir la note 106 ci-dessus.
pas dotées de tels cadres. Il y est par conséquent beaucoup plus difficile de voir aboutir des mesures d’application du droit prises dans le cadre d’affaires de fusions transnationales.

123. Un dernier point à aborder est celui des facteurs qui ne relèvent pas de la concurrence. Dans le pays en développement concerné, il se peut que la politique industrielle ou que des considérations d’un autre ordre – comme la question des investissements directs à l’étranger – soient prioritaires. L’autorité de la concurrence concernée peut alors estimer qu’elle doit orienter son travail en matière de contrôle des fusions en fonction de ces autres considérations. Par conséquent, l’autorité peut juger que la perspective de se voir imposer des mesures correctives assorties d’un suivi et de mesures coercitives efficaces repousse les entreprises étrangères. Il se peut aussi que les pouvoirs publics fassent valoir leurs préoccupations et exertent des pressions sur l’autorité de la concurrence pour attirer les entreprises étrangères sur les marchés locaux. L’autorité peut dans ce cas choisir de développer ou de mettre en œuvre une politique fondée sur ces considérations.

5. Conclusions

124. Parmi toutes les spécialités du droit et de la politique de la concurrence, le contrôle des fusions est celle qui a eu le plus d’impact sur l’économie mondialisée. Pourtant, en termes géographiques, ce domaine est celui qui a connu le moins d’expansion. La marge de progression y est donc très grande, qu’il s’agisse de mettre en place des mécanismes efficaces pour contrôler les fusions dans tous les régimes de concurrence existant de par le monde ou de développer le contrôle des fusions à l’échelon régional et international.

125. Des progrès impressionnants ont été accomplis dans le sens d’une convergence et d’une harmonisation dans ce domaine, par le biais notamment d’instruments juridiques non contraignants. Les liens de coopération bilatérale établis entre autorités de la concurrence et présentant un intérêt direct en matière de réglementation des fusions transnationales se sont aussi multipliés. Cela vient s’ajouter à l’intensification des efforts régionaux visant à prendre à bras le corps la question du droit et de la politique de la concurrence dans de nombreux pays en développement.

126. Les pays en développement et les économies émergentes se trouvent dans une position particulière vis-à-vis du contrôle des fusions. Bien que certaines de ces économies aient mis en place des régimes de droit de la concurrence, la plupart ne disposent pas de régime efficace de contrôle des fusions et ne participent pas non plus activement à la coopération bilatérale.

127. Pour ce qui concerne la coopération multilatérale, plusieurs autorités de la concurrence de ces pays ont pris part à certaines procédures importantes au sein de l’OCDE, du RIC et de la CNUCED.

128. Ce n’est qu’en matière de coopération régionale que certaines de ces économies ont vraiment réussi à mettre en place une forme de cadre régional leur permettant de réglementer les fusions transnationales (et, plus généralement, de résoudre les problèmes de concurrence). Toutefois, aucune de ces initiatives régionales ne s’est avérée totalement efficace, et toutes sont encore loin d’avoir atteint leur pleine maturité.

129. Cet état de fait pose la question de savoir comment les pays émergents devraient s’y prendre pour concevoir leurs stratégies en matière de contrôle des fusions. Un certain nombre de points devraient être éclairés à ce propos. Il est évident que les fusions transnationales affectent de nombreux pays en développement et économies émergentes dans le monde. Des dispositions devraient donc être intégrées aux règles de concurrence actuellement en vigueur dans ces pays pour traiter les fusions transnationales. Leurs autorités de la concurrence devraient élaborer des stratégies comportant des éléments de coopération.

125 Voir la discussion menée plus haut sur ces deux questions.
multilatérale, régionale et bilatérale et reflétant la situation et les caractéristiques uniques de ces économies.

130. Les autorités de la concurrence gagneraient à s’investir plus activement dans les travaux menés à l'échelon international dans le domaine du contrôle des fusions sous les auspices d’organes tels que l’OCDE ou le RIC. Cela étofferait leur apprentissage et leur apporterait de précieux éclairages sur cette discipline hautement complexe. Cette approche apporterait à ces autorités des avantages considérables, parmi lesquels on citera la convergence et l’harmonisation, ainsi que l’interaction avec de nombreuses autres autorités de la concurrence, et notamment celles plus expérimentées.

131. Pour ce qui est de la coopération régionale, ce type de collaboration peut être utile pour mettre au point un mécanisme propre à gérer les fusions transnationales affectant plusieurs pays dans une même région. Un tel mécanisme permettra aux pays de s’unir au sein d’une force plus importante, aussi bien au niveau individuel que collectif, pour réglementer les fusions transnationales et peser davantage face aux puissantes entreprises impliquées dans ces fusions.

132. Quant à la coopération bilatérale, les chances de voir les autorités de la concurrence des pays en développement et des économies émergentes engager ce type de coopération pour telle ou telle affaire dans le cadre de mesures d’application du droit – et notamment avec des autorités de la concurrence expérimentées – ne sont pas très élevées. Néanmoins, des liens bilatéraux peuvent non seulement exister mais aussi s’avérer utiles pour mettre en place un partage des expériences, une assistance technique et un renforcement des compétences, ainsi que, de manière plus générale, pour engager des dialogues de politique publique. Toutes ces activités devraient apporter des avantages considérables aux autorités de la concurrence de ces pays.

133. Il est néanmoins plus que fondamental que les pays en développement et les économies émergentes veillent à disposer de cadres pleinement efficaces pour réglementer les fusions à l’intérieur de leurs frontières. Cela suppose : (1) de disposer d’une législation comportant les dispositions adéquates concernant les aspects essentiels du contrôle des fusions (notamment pour l’attribution de la compétence) ; (2) de pouvoir compter sur des procédures bien élaborées, applicables et transparentes (particulièrement concernant les questions de notification des fusions et de mesures correctives dans les affaires de fusion) ; (3) que tous les conseils et toutes les recommandations appropriés soient accessibles aux entreprises à une fusion et à leurs conseillers ; (4) qu’une autorité de la concurrence indépendante soit établie et dotée de l’expertise pertinente en matière de gestion du contrôle des fusions.

134. De plus, il convient de reconnaître que la mise en place d’un régime efficace de contrôle des fusions dans un pays en développement ou une économie émergente nécessite préalablement l’existence d’un régime de droit de la concurrence, à moins, bien sûr, que le pays concerné n’établisse un régime de contrôle des fusions de type sectoriel, comme cela a été le cas par exemple à Hong-Kong.

135. Il est essentiel pour un pays en développement ou une économie émergente de remplir ces conditions préalables afin de pouvoir s’atteler au problème des fusions transnationales. L’engagement dans des coopérations de type multilatéral, régional ou bilatéral n’aura de sens qu’une fois que les cadres nationaux nécessaires auront été correctement mis en place.
RÉFÉRENCES

Andrade, Maria, « Competition law in Mercosur: Recent developments » (2003) Global Competition Review 1


Coate, Malcolm et Rodríguez Armando, « The Economic Analysis of Mergers » (Center for Trade and Commercial Diplomacy. Monterrey Institute of International Studies, Monterrey, Californie, CTCD, 1997)


Dabbah, Maher, Competition Law and Policy in the Middle East (Cambridge, 2007)

Dabbah, Maher, International and Comparative Competition Law (Cambridge, 2010)


Fox, Eleanor et Sokol, Daniel, Competition Law and Policy in Latin America (Hart Publishing, 2009)


Gal, Michal, Competition Policy for Small Market Economies (Harvard, 2003)


Rosenberg, Barbara et Tavares de Araújo, Marianna, « Implementation costs and burden of international competition law and policy agreements », in Brusick, Philippe, Alvarez Ana Maria, et Cernat, Lucian (éd.), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (Nations unies, 2005)


Smith, Stephen, *Industrial Policy in Developing Countries* (Economic Policy Institute, 1991)


CNUCED, « La répartition des compétences entre les autorités communautaires et nationales chargées des questions de concurrence dans l’application des règles de concurrence », rapport (2008)

CNUCED, « Sensibilisation aux questions de concurrence, contrôle des fusions et application effective du droit en période de difficultés économiques » rapport du Secrétariat (2010)

Références aux travaux de l'OCDE

(Toutes disponibles à l’adresse www.oecd.org/concurrence)

Recommandation du Conseil de l’OCDE sur la coopération entre pays membres dans le domaine des pratiques anticoncurrentielles affectant les échanges internationaux (1995)

Recommandation du Conseil de l’OCDE sur le contrôle des fusions (2005)


Table ronde de l’OCDE sur la concurrence, la concentration et la stabilité dans le secteur bancaire (2010)

Table ronde de l’OCDE sur les fusions et les alliances des compagnies aériennes (1999)

Table ronde de l’OCDE sur les entreprises communes (2000)

Table ronde de l’OCDE sur la politique industrielle, la politique de la concurrence et les champions nationaux (2009)

Table ronde de l’OCDE sur les gains d'efficience dynamique dans l'analyse des fusions (2007)

Table ronde de l’OCDE sur l’argument de l'entreprise défaillante utilisé dans le cadre des fusions (1995)

Table ronde de l’OCDE sur la coopération internationale en matière de fusions transnationales (2001)

Table ronde de l’OCDE sur la gestion des fusions complexes (2007)

Table ronde de l’OCDE sur les fusions dans les médias (2003)

Table ronde de l’OCDE sur les correctifs à apporter aux fusions (2003)

Table ronde de l’OCDE sur l'examen des fusions sur les marchés émergents très innovants (2002)

Table ronde de l’OCDE sur les fusions dans le secteur des services financiers (2000)

Table ronde de l’OCDE sur les problèmes de lutte contre les monopoles en cas de participation minoritaire et de cumul de mandats d’administrateur (2008)

Table ronde de l’OCDE sur les effets de portefeuille dans les fusions conglomérales (2001)

Table ronde de l’OCDE consacrée à la norme de contrôle des fusions (2009)

Table ronde de l’OCDE sur les critères de fond utilisés pour l’évaluation des fusions (2002)

Table ronde de l’OCDE sur l’argument de l’entreprise défaillante (2009)

Table ronde de l’OCDE sur les fusions verticales (2007)

OCDE, Rapport Whish/Wood sur les procédures de contrôle des fusions (1994)
CONTRIBUTIONS
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Australia --

1. Overview of Australia’s merger control regime

1. The legal framework for Australia’s merger control regime is contained in section 50 of the *Competition and Consumer Act 2010* (formerly known as the *Trade Practices Act 1974*) (the CCA). Section 50 prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia. The Australian Competition and Consumer Commission (ACCC) is responsible for administering and enforcing the CCA.

2. Section 50 applies to acquisitions of property\(^1\) within Australia, and acquisitions made outside Australia so long as the purchaser is incorporated in Australia, carries on business in Australia, is an Australian citizen, or is ordinarily resident in Australia.

3. There is no compulsory pre-notification requirement for mergers in Australia. However, the ACCC’s merger guidelines\(^2\) recommend that mergers that may potentially raise competition concerns and are subject to the CCA be voluntarily notified to the ACCC. Merger parties are encouraged to notify the ACCC (well in advance of completing a merger) where the products of the merger parties are either substitutes or complements, and the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market(s). Merger parties are also encouraged to approach the ACCC where the ACCC has indicated to a firm or industry that notification of mergers by that firm or in that industry would be advisable.

4. Merger parties are able to seek an informal view from the ACCC as to whether a merger raises competition concerns under section 50. While the ACCC’s view does not provide parties with protection from legal action, it does provide merger parties with a reliable indication of whether the ACCC would seek an injunction under section 50 to prevent the merger from proceeding. Parties may seek an informal review either on a confidential\(^3\) or public basis. In addition, the ACCC may initiate reviews of mergers that have not been notified to it.

5. When merger parties ask the ACCC to confidentially review a proposal, the ACCC will endeavour to provide, on a confidential basis, an interim view as to whether the proposal is or is not likely

---

\(^{1}\) Including but not limited to shares in Australian companies, domestic businesses, local intellectual property and local plant and equipment.


\(^{3}\) Merger parties can request the ACCC’s indicative view of a proposed acquisition that is confidential—the ACCC will endeavour to provide, on a confidential basis, an interim qualified view as to whether the proposal is or is not likely to raise competition concerns, subject to information that arises when the matter is public and inquiries can be conducted.
to raise competition concerns. This view is necessarily qualified and in some cases no view will be able to be provided until the matter becomes public and market inquiries have been conducted. The advantages to merger parties in seeking a confidential review include:

- the potential for truncation, and occasionally elimination, of the need for any significant subsequent assessment process once the matter becomes public, and
- the pre-emptive identification by the ACCC of key issues and potential competition concerns.

6. The key advantage of the ACCC’s informal merger review process is that it provides flexibility in terms of timeframes, information requirements and confidentiality. Further details about this process are contained in the *Merger Review Process Guidelines 2006*.

7. Alternatively, the formal merger clearance process—introduced through legislation in 2007—provides an acquirer with the opportunity to obtain formal clearance, meaning that section 50 does not prevent the acquisition from proceeding in accordance with the clearance. Unlike the ACCC’s informal merger review process described above, the formal merger clearance process requires payment of a fee, and has mandated timeframes as well as information and transparency requirements. To date, there have been no applications under the formal merger clearance process. Further details about the formal merger clearance process are contained in the *Formal Merger Review Process Guidelines 2008*.

8. Not all mergers that lessen competition are prohibited by section 50; only those that lessen competition ‘substantially’ are prohibited. The term ‘substantial’ has been variously interpreted as meaning real or of substance, not merely discernible but material in a relative sense and meaningful. Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.

9. In assessing whether a merger is likely to result in a significant and sustainable increase in market power, the ACCC must consider the ‘merger factors’—a non-exhaustive list of factors set out in section 50(3). The merger factors provide insight as to the likely competitive pressure the merged firm will face following the merger and consideration of these factors facilitates an assessment of the likely competitive effects of the merger. The factors in section 50(3) are:

- the actual and potential level of import competition in the market
- the height of barriers to entry to the market
- the level of concentration in the market
- the degree of countervailing power in the market

---


• the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins
• the extent to which substitutes are available in the market or are likely to be available in the market
• the dynamic characteristics of the market, including growth, innovation and product differentiation
• the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor
• the nature and extent of vertical integration in the market.

10. The analytical framework applied by the ACCC in assessing mergers under section 50 is explained in the Merger Guidelines 2008\(^{10}\).

11. A third option available to merger parties under Australia’s merger control regime is to seek authorisation from the Australian Competition Tribunal (Tribunal). If a proposed merger is likely to fail the substantial lessening of competition test but the parties consider there are public benefits that outweigh any anti-competitive effects, application may be made for authorisation. The CCA provides that the Tribunal may authorise a proposed merger under section 50 if it is satisfied that the merger would result, or would be likely to result, in such a benefit to the public that the merger should be allowed to occur.\(^ {11}\) Like the formal merger clearance process, applications for merger authorisation must be accompanied by a fee. Once authorisation is granted, neither the ACCC nor any other party may take legal action under section 50 in respect of the merger for the period for which authorisation is granted.

2. Participation in international organisations in the area of merger control

12. Australia participates in a number of international organisations in the area of merger control, including the International Competition Network (ICN) and the Organisation for Economic and Cooperation Development (OECD). Involvement in these forums presents valuable opportunities for Australia to exchange knowledge and experience with counterparts, and to learn from and contribute to the development of international best practice in multijurisdictional merger review.

13. Over the last decade Australia’s merger control regime has undergone some significant changes. These include modifications to the merger review process, the introduction of a formal merger clearance process and the continued evolution of the ACCC’s analytical approach. These changes have been developed in line with international best practice, contemporary views on antitrust analysis and the ACCC’s own experience.

14. In the ICN, the ACCC is an active member of the Merger Working Group. The ACCC is currently involved in both of the Group’s Subgroups which deal with ‘Notifications and Procedures’ and ‘Investigation and Analysis’. The ACCC participates in the Subgroups’ teleconferences, annual Merger Workshops and the preparation of new work products. Some of the work products which the ACCC has drawn upon in developing Australia’s merger regime are the Recommended Practices for Merger Analysis and

---


15. Australia is a long-time member of the OECD and a regular participant in its competition committees, groups and working parties. Like the ICN, OECD work products relating to merger control have assisted in the development of Australia’s merger regime and its approach to multijurisdictional merger review.

3. Cooperation between Australia and other jurisdictions in cross-border merger control

3.1 Framework for cooperation

16. In recent years, cooperation between the ACCC and its counterparts in cross-border merger reviews has increased significantly. This has been due, in part, to the growing number of international merger transactions and associated requests for merger clearance, and to more frequent dialogue and interactions between competition regulators in the area of multijurisdictional merger review.

17. As noted already, the ACCC regularly discusses developments in cross-border merger control with counterparts at international forums organised by groupings such as the ICN and OECD. In addition, the ACCC has entered into a number of bilateral agreements which contain provisions dealing with cooperation and coordination in merger investigations and enforcement.

18. For example, in 2006 the ACCC entered into a Cooperation Protocol for Merger Review with the New Zealand Commerce Commission to help streamline transactions in the trans-Tasman business environment. The Protocol may apply where the regulators are reviewing the same merger transaction or where they exchange information in respect of a specific merger review or in respect of their merger review processes and functions. Objectives of the Protocol include reducing compliance costs for businesses and transaction costs for both regulators, as well as to increase the effectiveness of competition laws.13

19. The ACCC also maintains close relationships with its counterparts through informal bilateral discussions, often by telephone, regarding particular merger reviews. These discussions provide an opportunity to exchange information about current matters (to the extent permitted by confidentiality requirements), including details about the merger parties, the relevant markets, the status of the investigation and analytical approaches to transactions, and about general developments in merger policy.

20. The benefits of cooperation in cross-border merger control are considerable. In the ACCC’s experience, working with counterparts, especially in the early stages of an international merger review, can enhance the efficiency and effectiveness of the review and help to achieve more effective outcomes.

21. For instance, receiving prompt notification of a multijurisdictional transaction from a counterpart may alert the ACCC to transactions earlier than would otherwise have occurred. This is particularly valuable where the focus of the parties is directed towards notifying and responding to the requirements of regulators operating within a compulsory notification framework.

22. The coordination of review timelines and procedural steps may be extremely helpful in cross-border merger reviews. For example, coordinating the timing of information requests between jurisdictions may help to ensure that all relevant information is obtained and provided to regulators in a timely manner. This also has the benefit of reducing transaction and compliance costs for the merger parties.

12 These documents are available from the Merger Working Group webpage on the ICN website: http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx.

13 A copy of the Protocol and the ACCC’s cooperation agreements are available here: http://www.accc.gov.au/content/index.phtml/itemId/564911.
23. Further, the ability to share substantive merger information with counterparts early on in a review may increase other regulators’ knowledge of how particular industries operate and provide insight into how markets have been defined and which markets are likely to raise competition concerns. Sharing such information may also be important throughout a review to help avoid inconsistent outcomes, or the imposition of remedies which could be inconsistent, duplicative or ineffective.

24. The ACCC has been involved in a number of cross-border merger reviews where close cooperation was vital to ensuring all regulators were able to address competition concerns resulting from a merger. This has often been the case in matters where key plant or assets of one of the merger parties is located outside Australia. By liaising with counterparts on proposed remedies and outcomes, the ACCC is able to ascertain whether the other regulators’ proposals are likely to have any adverse competitive effects in Australia, or preclude a satisfactory outcome, before commitments are signed by the parties. Examples of four such cases are set out below (including cases where the ACCC agreed to accept remedies which involve commitments to regulators in other jurisdictions).14

3.2 Case examples of cooperation in cross-border merger control

3.2.1 Scandinavian Tobacco Group A/S - proposed acquisition of Swedish Match AB (2010)

25. On 30 September 2010 the ACCC accepted an undertaking from Swedish Match AB (SM) and Scandinavian Tobacco Group A/S (STG) in relation to the ACCC’s decision not to oppose STG’s proposed acquisition of SM.

26. The undertaking required STG to divest a number of cigar brands to a purchaser approved by the ACCC. The objective of the undertaking was to address the ACCC’s competition concerns by creating or strengthening a viable, effective, stand-alone, independent and long term competitor for the supply of the divested products.

27. The acquisition was considered by a number of international competition agencies and the ACCC consulted closely with the New Zealand Commerce Commission regarding the acquisition and the divestitures occurring at the international level.

3.2.2 Agilent Technologies Inc - proposed acquisition of Varian Inc (2010)

28. On 31 March 2010 the ACCC accepted an undertaking from Agilent Technologies Inc and Agilent Technologies Australia Pty Ltd (together Agilent) in relation to the ACCC’s decision not to oppose Agilent’s proposed acquisition of Varian Inc.

29. The undertaking required Agilent to comply with its commitments to the European Commission to divest a number of businesses.

30. The ACCC liaised closely with other competition regulators in other jurisdictions during the course of its review, in particular the European Commission and the US Federal Trade Commission.

3.2.3 Pfizer Inc - proposed acquisition of Wyeth Corp (2009)

31. On 30 September 2009 the ACCC accepted an undertaking from Pfizer Inc (Pfizer) in relation to Pfizer’s proposed acquisition of Wyeth Corp.

14 A summary of the ACCC’s decision in each matter is available here: http://www.accc.gov.au/content/index.phtml/itemId/501191.
32. The undertaking required Pfizer to divest a companion animal vaccine business in Australia to the approved purchaser Boehringer Ingelheim Vetmedica Inc and to divest a livestock vaccine business in Australia to a purchaser to be approved by the ACCC.

33. In conducting its review the ACCC coordinated closely with agencies in other countries which were also reviewing the transaction, including the European Commission and the US Federal Trade Commission.

3.2.4 WPP Group - proposed acquisition of Taylor Nelson Sofres plc (2008)

34. On 8 October 2008 the ACCC accepted an undertaking from WPP Group plc (WPP) in relation to the ACCC’s decision not to oppose WPP’s proposed acquisition of Taylor Nelson Sofres plc.

35. The previous month, WPP had given an undertaking to the European Commission to resolve competition concerns in Europe.

36. The undertaking to the ACCC required WPP to comply with its obligations under the EU undertaking, and to carry out a number of additional obligations. The ACCC considered that the two undertakings would address the ACCC’s competition concerns.

37. The ACCC conducted market inquiries with a range of industry participants, including competition authorities in other jurisdictions.

3.2.5 Challenges to cooperation in cross-border merger control

38. Although cooperation between the ACCC and its counterparts has become a mainstay of cross-border merger reviews in Australia, some challenges to achieving a fully effective cooperation framework remain.

39. Being a smaller jurisdiction, Australia is often one of the last (if not the last) jurisdictions to receive notification from the parties in cross-border merger matters. Delays in notification make it more difficult for the ACCC to conduct efficient and effective reviews and can increase the risk of inconsistent analyses and remedies across jurisdictions. The ACCC has responded to this challenge by encouraging regular liaison with key counterparts on relevant transactions, and close monitoring of markets to identify new merger activity.

40. Another challenge exists where information is given by a party to a regulator either in confidence or with specific restrictions which limit the regulator’s ability to share the information with other regulators. Restrictions on a particular regulator’s ability to access relevant information may reduce the potential for analytical and procedural convergence between regulators, and increase the risk of inconsistent/ineffective/duplicative outcomes and remedies.

41. Legislative provisions in some countries allow regulators to disclose information obtained in the course of a merger investigation to other competition regulators. For example, in Australia the ACCC is permitted under section 155AAA of the CCA to disclose ‘protected information’ to a foreign government body if it decides that such disclosure will enable or assist the body to perform its functions, or exercise its powers, and if it is considered appropriate to disclose the information in the circumstances.15

42. Information may also be shared between regulators through the use of confidentiality waivers provided by the merger (and other) parties. The ACCC’s practice is to seek waivers from relevant parties to permit the exchange of information that may be of a confidential nature with other regulators. The ACCC’s experience has been that at times, particularly when the parties are not familiar with dealing with the ACCC on such processes, or when waivers are required in relation to multiple jurisdictions, the process of obtaining waivers can be somewhat onerous. To assist in remedying this issue the ACCC has introduced a standard form confidentiality waiver.

4. Conclusion

43. Australia is an active participant and contributor to international organisations in the area of merger control and has benefited from the work undertaken by these organisations. Australia’s merger review processes and the ACCC’s analytical approach to conducting merger reviews are consistent with international best practice.

44. As a small country with a voluntary merger notification regime, Australia faces some practical challenges in cross-border merger reviews. The early notification of merger transactions, cooperation by merger parties during investigations and greater dialogue between competition regulators will continue to assist in helping to address these challenges. Given the prevalence of increasingly globalised transactions, close cooperation between regulators is vital, particularly to ensure that remedies adopted in one jurisdiction are effective and do not adversely affect remedy outcomes in other jurisdictions.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Brazil --

1. Introduction

1. In the past twenty years, a remarkable increase of cross-border mergers, both in number and value, occurred in Brazil. Among several reasons, it resulted from the worldwide economic globalization, the liberalization of the Brazilian economy and the country’s significant economic growth during the past few years. Thus, the increase in international merger activity was a natural consequence. The graphic below demonstrates the evolution of cross-border mergers in Brazil over the last two decades.

![Graph showing number of cross-border M&A in Brazil](image)

Source: UNCTAD cross-border M&A database

2. It is not possible to precisely quantify the number of cross-border mergers that were submitted to the Brazilian competition agencies, since only those that meet Brazilian legal thresholds are subject to mandatory notification. In recent years, important mergers were announced in the banking and telecommunications sectors, giving them an important weight among the major cross-border mergers in Brazil. Examples of these transactions can be found in the international merger between the Brazilian Itaú and the American Bank of Boston, and the one between the Swiss UBS and the Brazilian Pactual – both transactions took place in 2006.

3. This paper intends to provide a summary of cross-border mergers control in Brazil. Firstly, it makes a short overview of the Brazilian Merger Review System. Then, it presents an outline of Brazilian international agreements on cooperation with other competition agencies on merger control. Subsequently,
a few cases were selected to illustrate some recent cross-border mergers analyzed by Brazilian competition agencies. Finally, the paper is completed by a brief conclusion.

2. Overview of the Brazilian Merger Review System

4. The Brazilian Merger Review System is governed by Law nº 8.884 of June 11, 1994. The “Brazilian Competition Policy System” (hereinafter, “BCPS”) is composed of three agencies: the Administrative Council for Economic Defense (“CADE”), the Secretariat of Economic Law (SDE) of the Ministry of Justice, and the Secretariat of Economic Monitoring (SEAE) of the Ministry of Economy. In merger control, CADE has adjudicative authority, while SDE and SEAE are primarily responsible for providing legal and economic opinions. All decisions taken by these agencies may be subject to judicial review in Brazilian courts.

5. Pursuant to the Brazilian legislation, any merger that may limit or otherwise restrain competition must be notified to the BCPS and submitted to CADE for review. The notification is mandatory if any of the merging parties had at least R$ 400 million (approximately € 175 million) in Brazilian revenues in the last fiscal year, or if the market share of the parties, in the relevant market as defined by the parties themselves, is equal to or in excess of 20%. There is no exception to the notification requirement where the thresholds are met. As a result, foreign-to-foreign transactions or transactions that do not involve overlap are subject to these same rules. The Brazilian merger review system may be considered a posteriori because mergers may operate before CADE’s final approval, and even before the notification to competition agencies. Nevertheless, considering the nature of this merger review system, the risk of denying approval and consequently undoing mergers that were already implemented exists, as it was the case with the merger between Nestlé and Garoto in 2002.

3. Co-operation among competition authorities

3.1 Bilateral

6. Nowadays, the BCPS has entered into bilateral agreements with seven foreign agencies, namely with those from Portugal (2010 and 2005), Russia (2009 and 2001), European Union (2009), Canada (2008), Chile (2008), USA (2003) and Argentina (2003). Six of these agreements are applicable to cross-border merger control and five of them have explicit provisions on cooperation and avoidance of conflicts in order to minimize any potentially adverse effects of one country’s competition law enforcement on other countries’ interests in the enforcement of its respective competition laws.

3.2 Regional: MERCOSUR

7. Member States of MERCOSUR have entered an agreement that includes provisions on cross-border merger control. The “Agreement for the Protection of Competition in MERCOSUR” was signed in the City of Fortaleza in Brazil, through the Common Market Counsel’s Decision nº 18/96, of December 17, 1996, and it serves as an umbrella agreement for competition policy in the region. The main purpose of this Agreement is the protection of competition in MERCOSUR. Its regulations are applicable to all practices, originated from either individuals or legal entities (from private or public sectors), that cause or intend to cause harmful effects on the competition of the region and on commerce between Member States.

8. In regard to merger review, three aspects of the Agreement deserve to be highlighted. First, the Agreement compels Member States to establish common rules on merger control but does not determine how such common merger review system should be. Second, it creates a regional Competition Protection Committee in MERCOSUR, composed by the national competition agencies which are parts of the Agreement. Third, it sets forth general procedural rules for the execution of the Agreement, which includes
the general guidelines for cooperation between the MERCOSUR’s institutions and national competition agencies.

9. In 2006, a specific agreement was entered by MERCOSUR’s Member States, namely the “Agreement for Cooperation between Competition Agencies for Regional Merger Review”. It was approved by its Common Market Counsel through the Decision no. 15 of July 20, 2006. The purpose of this agreement is to set out in detail the cooperation mechanisms between national competition agencies on merger review matters. This agreement defines some important key-concepts for the control of regional dimensions mergers. Among other provisions, this Agreement establishes that if one competition agency is notified of a merger that may affect another Member State, it shall inform its homologous counterpart of this merger within fifteen days in order to start the cooperation proceedings (Article II). Furthermore, competition agencies may request at any time the execution of cooperation proceedings if it is believed that a merger taking place in another country’s territory may affect its national market. The competition agency that receives such request is not bound to start cooperation proceedings but it is under a legal obligation to analyze such request, and to send a formal response to the requesting competition agency (Article IV). The Agreement also provides that competition agencies shall contemplate the convenience of coordinating their control procedures while examining the same or connected mergers, and shall take into consideration the goals set by the competition policy of other Member States (Article V).

10. These regional provisions within MERCOSUR do not impede divergent decisions regarding cross-border mergers. However, cooperation mechanisms facilitate exchanges and improve coordination between competition agencies.

3.3 International: ICN, OECD and UNCTAD

11. Brazil holds a strong participation in ICN’s work and activities. Brazilian competition agencies integrate ICN’s Steering Group and co-chair both the Agency Effectiveness Group (namely CADE) and the Cartels Group (namely SDE). Furthermore, Brazil has been recently chosen to host the ICN’s Annual Conference in 2012, to be held in the City of Rio de Janeiro. The Brazilian contributions in the Mergers Group and Unilateral Conducts Group are made mainly through the participation in Annual Conferences, Workshops, and through Non-Governmental Agencies (NGAs) from different backgrounds (academics, lawyers, economists, etc.).

12. In respect to OECD activities, the Peer Review of Competition Law and Policy in Brazil, jointly published by the OECD and the IDB, was launched in São Paulo on 14th May 2010. This is the second Peer Review of Brazil’s Competition Policy System undertaken by OECD in partnership with the IDB. The first Report was issued in 2005 and recommended changes to improve the system, including legislative amendments to Competition Law that would promote and protect competition throughout the Brazilian economy. The 2010 Report describes the considerable progress made since 2005 and highlights further actions that could be done to implement the structural changes envisaged in the proposed amendments and modifications to Brazil’s Competition Law. The analysis and recommendations contained in the Peer Review will hopefully prove useful to this reform process and strengthen Brazil’s competition regime.

13. In regard to UNCTAD, Brazil has naturally played an important role as developing country, in particular as a regional leader in Competition Policy in South America. For instance, CADE participated in the Conference for Competition Protection held in November 2009 in Asunción, Paraguay, side-by-side with UNCTAD and the Chilean competition agency. The main goal of the event was to discuss the importance of the approval of Paraguay’s first Competition Law which waited Congress endorsement. Brazil has also presented the following papers during UNCTAD’s Intergovernmental Meeting held in November 2004 in Geneva, Switzerland: Institutional Advocacy, Antitrust Compliance Programs as
Effective Instruments for Competition Advocacy, and Cooperation and Dispute Mediation Mechanisms in MERCOSUR related to Competition Law and Policy.

4. Case Law

4.1 Borg Warner / Eaton (2006)

14. It concerns the acquisition of the entire shares of Eaton s.a.m, Monaco (“Eaton Monaco”) by Borg Warner Transmission Systems Inc. (“Borg Warner”), a U.S. based company. The cross-border merger took place on September 17, 2006 and it was notified to the BCPS on October 05, 2006. The companies were not based in Brazil and they did not have any direct activity in the Brazilian market. In this case, an important debate was held within BCPS regarding the effects doctrine. While SDE sustained that the merger should not have been notified to BCPS since no direct effects were produced in the Brazilian territory, CADE’s former Commissioner Luis Fernando Schwartz explained in his vote that the enforcement of the Brazilian legislation is justified when it is foreseeable that a proposed merger may have an immediate or potential effect in its territory. In spite of this debate, the merger was unanimously approved with no restrictions because no significant competition concerns were raised in the Brazilians markets.

4.2 DuPont / Chemtura (2008)

15. In this case, CADE analyzed an interesting cross-border merger between two U.S. companies: E.I DuPont de Nemours and Company (“DuPont”) and Chemtura Corporation (“Chemtura”). DuPont is operating in approximately ninety countries and offers a wide range of innovative products and services for markets including agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation, and apparel. Chemtura is a global specialty chemicals company with leading positions in several markets worldwide. DuPont and Chemtura were both 100% U.S.-held companies and operated in Brazil through their Brazilian wholly-owned subsidiaries, particularly Du Pont do Brasil S/A and Chemtura Indústria Química do Brasil Ltda. The merger was notified to the BCPS on February 25, 2008, since it indirectly affected the Brazilian market. After the legal and economic opinions, respectively from SDE and SEAE, the case was submitted to CADE.

16. The first issue to point out is the vote of Commissioner Olavo Chinaglia to justify the Brazilian jurisdiction based on the effects doctrine. Even though the effects doctrine is largely used in competition law worldwide, its provisions and delimitations in national case law enables a better understanding of this important international subject. Another international aspect to point out relates to the BCPS’ territorial limits to enforce its rulings. In his vote, Commissioner Olavo Chinaglia recognized that the merger could have certain adverse effects in the competition environment of a specific Brazilian market (namely, the Brazilian market of “gas HFC 227ea” used in fire extinguishers). This concern was due to the high horizontal concentration found in the Brazilian relevant market (nearly 80%). This product (gas HFC 227ea) is not produced in Brazil and it is only commercialized in Brazilian markets through importations. Commissioner Chinaglia pointed out that, in such cases, the BCPS ability to intervene is significantly reduced for two reasons. First, any structural or behavioural remedies imposed on the U.S. merging companies would surpass the merger’s effects in Brazil. Secondly, any remedy in practice would face a clear enforcement problem. Thus, he concluded that any intervention would exceed the territorial limits of BCPS jurisdiction and, finally, the merger was approved without condition. The U.S. Federal Trade Commission (FTC) was also notified so that any remedy that it eventually found appropriate could be imposed, considering the risk of monopolization of a specific relevant market. However, neither a direct cooperation nor coordination was established between the Brazilian and the U.S. competition authorities in this particular case.

---

1  BCPS Merger file nº 08012.009358/2006-74.
2  BCPS Merger file nº 08012.001312/2008-79.
4.3 Dow / Rohm and Hass (2008)

17. The companies *Dow Brasil S/A* (“Dow”) and *Rohm and Haas Química Ltda.* (“Rohm and Haas”) merged on July 10, 2008 and notified the BCPS on July 31, 2008. These holding companies are based in the U.S. and develop worldwide activities (including Brazil and MERCOSUR) in the chemical and the petrochemical markets. By the time CADE analyzed the merger, it had already been submitted and approved by several other agencies (South Africa, Turkey, Canada, Taiwan, China, Mexico and European Union). This fact enabled BCPS to review this merger taking into consideration decisions from foreign agencies. For instance, SEAE decided not to analyze a particular market based mostly on information and conditions imposed by the FTC in its decision (FTC compelled the Dow Group to sell its productive assets in this particular market to a competitor). CADE also considered the FTC’s decision in its reasoning. In his vote, Commissioner Carlos Emmanuel Joppert Ragazzo justified that a vertical integration analysis of the merger would not be necessary because the conditions imposed by FTC eliminated the Brazilian competition concerns in this regard. Hence, this case seems an example of coordination in cross-border mergers since elements of a foreign decision, in particular certain conditions imposed by the FTC to authorize the merger in the U.S., were taken into consideration in the BCPS merger control analysis.

5. Conclusion

18. The number of cross-border mergers increased considerably in Brazil in the past twenty years. In the international scenario, many improvements have been made in order to solve or at least minimize problems related to this matter. At the bilateral level, Brazilian competition agencies have entered into several international agreements with other competition agencies worldwide, which include provisions of cooperation on cross-border merger control. At the regional level, Brazilian competition agencies have entered into an important agreement within MERCOSUR, which imposes an obligation of cooperation between its Member States. At the multilateral level, Brazilian competition agencies have also effectively participated in various international forums worldwide, such as ICN, OECD and UNCTAD.

---

3 BCPS Merger file nº 08012.007982/2008-07.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Bulgaria --

1. Historical development of merger control regime in Bulgaria

1. A merger control regime was established in Bulgaria with the introduction of the first Law on Protection of Competition (LPC) back in 1991. Since then, the competition rules, including the provisions on merger control, have undergone several major amendments, notably the adoption of new LPC in 1998 (significantly amended in 2003) and the now acting Law on Protection of Competition, which entered into force in December 2008 and repealed the law of 1998.

2. The LPC of 1991 provided as its aim “to create conditions for free entrepreneurship in industry, trade and provision of services, as well as for free setting of prices and protection of the interests of consumers”. In order to guarantee the fulfillment of its aim, the law stated that it would provide “protection against abuses of monopoly position on the market, against unfair competition and other actions, which might lead to restriction of the competition in the country”. As it could be seen, the first Bulgarian Law on Protection of Competition of 1991 was focused on possible abuses of monopoly position and on infringements, constituting unfair competition practices (e.g. misleading advertising, impairing the good name of a competitor, etc.). This focus of the law entailed from the state of the development of Bulgarian economy at that time. The economic changes in Bulgaria, namely the transition to market economy and the emergence of private companies in parallel to the existing state enterprises and monopolies had just started at the time of the adoption of the first competition law.

3. Even though the LPC of 1991 put a major focus in areas other then merger control, the law included special provisions on this matter. First, it was stated that those mergers, leading to the establishment of monopoly position, thus significantly restricting the free competition or the free setting of prices, should be forbidden. Second, a mandatory prior notification regime was established, requiring the parties to the merger to notify the Commission on Protection of Competition and to wait for authorization/non-opposition from the Commission in order to finalize the deal. It should be noted that during period of enforcement (1991-1998) of this first Law on Protection of Competition, merger cases were almost non-existent, which was due to the stage of development of Bulgarian economy.

4. By the end of the period however, significant changes in Bulgarian society began to take place. At the level of economy, the private sector was growing more and more steadily, foreign investors were coming to Bulgaria, the government put a focus on fast and overwhelming privatization of state-owned enterprises. At a political level, Bulgarian government took a steady course toward Bulgaria becoming an EU Member State. In the beginning of 1998, the Council of Ministers adopted a Strategy for Bulgaria’s accession to the EU. Comprehensive legislative amendments, leading to the harmonization of Bulgarian national legislation with the EU acquis communautaire, were one of the major developments in Bulgaria in the following 10 years, leading to the country becoming an EU Member State as of 1 January 2007.

5. In the process of legislative alignment of the national legislation with the EU acquis, the competition law is a good example of following the European and international best practices. In 1998, a
new Law on Protection of Competition was adopted, repealing the LPC of 1991. The LPC of 1998 was a major and big step forward toward the establishment of modern competition law regime in Bulgaria. The LPC of 1998, as structure and with a view of the substantial rules, incorporated all areas of competition law, namely: prohibition of abuse of dominant or monopoly position, of restrictive agreements, decisions and concerted practices, as well as detailed provisions on merger control. The basic notions and the provisions of the LPC of 1998 in the area of anti-trust were based on the Art. 81 and 82 of EC Treaty and the corresponding EU regulations, directives, etc. As regards the merger control regime, the basic provisions of the LPC of 1998 were harmonized with the then acting EU Merger Regulation (EEC) No 4064 of 21 December 1989.

6. In particular, the new merger control regime under the LPC of 1998 included:
   
   • Detailed definition of the deals, which fall within the scope of merger control;
   
   • Obligation for prior notification of the concentration for the parties to the deal;
   
   • Threshold of 15 million BGN (EUR ~ 7.5 million) for the total turnover of the merging parties in order for the deal to be subject to merger control;
   
   • Detailed information on the data to be included in the notification form;
   
   • Set deadlines for the CPC to issue decision – 1 month for mergers, which do not raise competition concerns, and additional 3 months for mergers, going to second stage investigation;
   
   • Possibility for the CPC to impose remedies on the parties as condition for the authorization of the deal;
   
   • Imposition of sanctions in case of failure to notify a merger before the CPC;
   
   • Prohibition for the parties to the merger to perform any actions related to the deal before the CPC decision.

7. The law provided that a merger might be authorized if it did not lead to establishment or to strengthening of dominant position, which in turn might hinder the effective competition on the relevant market. At the same time, the law contained a provision for 35% market share of the relevant market as a threshold, pointing to the potential existence of dominant position.

8. The LPC of 1998 previewed also the possibility for the CPC to authorize mergers, for which the benefits (modernization of the production or of the economy as a whole, improvement of the market structures, attraction of investments, increase of the competitiveness on external markets, creation of new jobs, better satisfying the interests of the consumers) outweighed the negative impact on competition on the relevant market (creation or strengthening of a dominant position). The law stipulated that the appraisal of the merger should take into account considerations of: the position of the undertakings on the relevant market before and after the concentration, their economic and financial power, access to supply of and markets for the respective goods and services, the legal or other barriers to entry to the markets.

---

1 Law on Protection of Competition of 1998, amended in 2003 (repealed)-Art. 17. (1) The position of an undertaking which, in view of its market share, financial resources, possibilities for access to the market, level of technology and economic relations with other undertakings may hinder competition in the relevant market, since it is independent of its competitors, suppliers or purchasers shall be dominant. (2) An undertaking shall be considered to have a dominant position if it has a market share higher than 35 per cent of the relevant market, unless the conditions under paragraph 1 are satisfied.
2. Current national legislative framework in the area of merger control

9. In December 2008 a new Law on Protection of Competition entered into force. This law introduced major amendments to Bulgarian competition legislation following Bulgaria’s accession to the European Union as of 01.01.2007. Even though the most significant amendments to the law, compared with the repealed LPC of 1998 (amended in 2003) relate to the procedural provisions, most of the very few amended substantial provisions refer to merger control regime.

10. In the area of merger control the new LPC took into account the provisions of Council Regulation (EC) No. 139/2004, as well as the recommendations and best practices from international organizations like International Competition Network (ICN).

11. Mergers, which fall within the scope of Article 1 of Council Regulation (EC) No. 139/2004 have a Community dimension and the EC has the exclusive competence of appraising them. The concentrations that do not have a Community dimension could fall within the jurisdiction of the respective Member States and shall be reviewed in accordance with the national law and the legislation on the control on concentrations. Therefore the LPC merger control regime applies and the CPC powers are confined to concentrations, which are of national dimension.

12. The law provides that mergers shall be subject to mandatory prior notification to the CPC where the aggregate combined turnover of all undertakings participating in the concentration in the territory of the Republic of Bulgaria in the preceding year exceeds the threshold of BGN 25 million and the turnover of each of at least two of the undertakings participating in the concentration or the turnover of the undertaking – subject to acquisition in the territory of the Republic of Bulgaria during the preceding fiscal year exceeds BGN 3 million.

13. As it could be seen, the new LPC increased significantly the merger notification threshold from BGN 15 million to BGN 25 million. In addition to the turnover threshold, the local nexus criterion was added as second cumulative criterion, namely the requirement each of at least two of the undertakings participating in the concentration or the undertaking – subject to acquisition in the territory of the Republic of Bulgaria to have operated on Bulgarian market (turnover exceeding BGN 3 million during the preceding fiscal year).

14. These important amendments were introduced following a detailed analysis of the CPC enforcement practice in the area of merger control under the LPC of 1998 (amended in 2003). This analysis revealed that the majority of the merger cases assessed by the CPC in the period 2003-2007 were not of the scale to seriously impede competition or concerned undertakings, which were not active on Bulgarian market. Due to these reasons, the turnover thresholds were increased and the local nexus criterion was added. Such an approach was based on ICN Recommended Practices for Merger control.

15. Another major amendment of substantial provisions of the LPC, which has an impact on merger control regime, was the abolition of the 35% threshold for the existence of dominant position.

16. In the new LPC the test of dominant position in assessing a merger has been preserved by virtue of which the CPC shall authorize a merger provided that it does not lead to the creation or strengthening of a dominant position, as a result of which effective competition in the relevant market might be significantly distorted. The law contains a provision according to which after the completion of the in-depth investigation the CPC may authorize a merger that leads to creating or strengthening of a dominant position but its overall positive effect outweighs the negative impact on competition in the relevant market.
17. Even though the possibility for imposing remedies (structural or behavioral) to the merging parties existed in the LPC of 1998 (amended in 2003), the new LPC of 2008 introduced more detailed provisions in this respect, including the possibility for the parties to propose remedies to the CPC, which did not existed in the LPC of 1998.

18. With respect to procedure for assessment of mergers, the LPC clarifies that the first phase (so called preliminary investigation) shall be completed within 25 working days starting from the working day following the initiation of proceedings. Suspension of the time limits (“stop the clock”) is provided for where additional information is needed until it is furnished by the notifying parties.

19. The Law on Protection of Competition specifically provides for that the rules on merger control apply for those concentrations which have national dimension. The notified mergers are assessed therefore for their impact on the competition on the territory of Bulgaria.

20. As already mentioned under p.11, mergers with Community dimension, do not fall within the scope of the LPC, and the law refers for these mergers to Council Regulation (EC) No. 139/2004 and to the European Commission, which has the exclusive competence of assessing them.

21. In mergers, assessed under the national competition rules, but with multinational impact where CPC considers that sharing of confidential information between competition authorities might have been beneficial to a case, there is a possibility to use a confidentiality waiver – a declaration which is provided from notifying party where it agrees to reveal to third party some „commercial sensitive information”, which is part of the notification. In 2010 the CPC has adopted a template for confidentiality waiver, based on the ICN’s Model Waiver. Such a waiver has already been required for the purposes of successful cooperation with Romanian Competition Authority in relation with a merger investigation on a case ², referred for assessment to the Bulgarian Commission on Protection of Competition and to the Romanian Competition Council by the European Commission under the provisions of Council Regulation (EC) No. 139/2004.

---

² COMP/M.5790 – LIDL/Plus Trei Romania/Plus Trei.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Chile --

1. Chile’s merger control regime

1.1 Legal framework

1. Chilean Competition Act (“the Act”)¹ does not address mergers or acquisitions directly. However, several sections of the Act provide the substantive basis for merger control by both the Fiscalía Nacional Económica (“FNE” ²) and the Competition Tribunal (“TDLC” ³) under two alternative procedures.

2. The first procedure is voluntary and non-adversarial⁴. There is no general pre-merger notification of the proposed merger to the FNE⁵. But either the merging parties or the FNE may request the TDLC to review the transaction. Mergers that may raise antitrust concerns are increasingly being voluntarily submitted to the TDLC by the parties involved⁶. In this case, the FNE’s role is to submit a report with its opinion. The report is not binding for the TDLC, but is considered an important antecedent. The transaction can be cleared, blocked or subject to conditions for approval. The merger cannot be completed before the approval. The TDLC’s final decision may be challenged before the Supreme Court. The Court generally acts with deference, mainly reviewing the measures and conditions imposed by the TDLC.

²  FNE stands for Fiscalía Nacional Económica (Competition Agency), an administrative and autonomous body in charge of competition law enforcement (investigation, and litigation) and competition advocacy. The FNE also acts as an independent technical body on competition law issues (drafting technical reports).
³  TDLC stands for Tribunal de Defensa de la Libre Competencia. TDLC is a judicial body with specific jurisdiction on competition law issues.
⁴  DL 211, articles 3, 18 N°2 and 31. The TDLC has issued instructions aimed at regulating the procedure in case of conflicting proceedings (adversarial and non-adversarial) regarding the same issue (Auto Acordado N° 5/2004) and about the information that parties must provided in these proceedings (Auto Acordado N° 12/2009).
⁵  Mandatory pre-merger notification to the competition institutions is required only for transactions involving television and radio. Banks and some other financial institutions must notify the Bank Superintendency before merging, and the Superintendency could ask the competition institutions to review a matter. Transactions in certain industries, such as media, banking, and electricity require approval by other governmental agencies. The TDLC has ordered mandatory pre-merger consultation for certain firms and markets, as remedies following its decisions about anticompetitive restraints (e.g. in the supermarket industry).
⁶  The voluntary procedure do not consider submission fee. Since 2004, the TDLC has decided 7 transactions voluntary submitted.
3. The preliminary review procedure has several advantages. If the transaction is approved or the merging parties comply with the conditions, there is no further liability with respect to the specific transaction. Also, after a non-adversarial proceeding has begun, the FNE or other third parties with legal standing to act in the case cannot initiate an adversarial procedure (e.g. seeking an injunction to suspend the transaction).

4. The second procedure is adversarial: under Art. 3 of the Act, a merger or acquisition (pending or completed) may be considered an infringement if it prevents, restricts or hinders “free competition” or tends to produce such effects.

5. Arguably, the adversarial procedure is less likely to be used in the future, after an amendment to the Act allowed the FNE to request the TDLC the review of future mergers. This faculty, however, largely depends on the FNE’s available resources.

1.2 FNE’s Guidelines for Horizontal Merger Review

6. The FNE has provided guidance on merger analysis by issuing its Internal Guidelines for the Analysis of Horizontal Concentration Operations (2006) (“Merger Guidelines”). Although the Merger Guidelines is a non-binding document, the FNE conducts its analysis following the procedure established in them as much as possible.

7. The Merger Guidelines state that merger analysis aims at preventing increased concentration in the relevant market as result of the merger. Among the anticompetitive risks identified in the guidelines are unilateral behaviour by the merging company and post-merger coordination in the market. The Merger Guidelines balance these and other risks against pro-competitive efficiencies. In this sense, the substantive test is shaped as a risk-effect test similar to the Substantial Lessing of Competition (SLC) test rather than a structural test such as the dominance test.

8. The Merger Guidelines presume that if the market after the merger has an HHI lower than 1000 points, the merger is unlikely to entail potential anticompetitive effects. Markets with HHI between 1000 and 1800 points are considered moderately concentrated. Finally, post-merger HHI higher than 1800 points are regarded as potentially harmful and require further review. In this case, the FNE opens a formal investigation and may decide to initiate a review process before the TDLC if the parties to the transaction do not bring the operation to the TDLC for review.

9. Entry barriers and entry conditions receive an in-depth treatment in the Guidelines. Entry barriers are defined as “an impediment to competitor’s entry or cost advantages that an incumbent has over a firm

---

7 “Free competition” is the wording used by Chilean law when referring to competition law.
8 Art. 3 of the Act: “Whoever executes or enters into any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalized with the measures indicated in Article 26 hereof, notwithstanding any preventive, corrective or restrictive measures that could be ordered in each case, with regard to said acts, agreements or conventions.”
9 Before Act No° 20.361/2009, only the parties were able to request the review of future transactions. The FNE had only the power to request the review of completed transactions. The amendment aimed at broadening the FNE’s powers.
10 Available at http://www.fne.gob.cl/?content=guia_concentracion
11 Merger Guidelines, p. 5.
12 Merger Guidelines, pp. 14-15
wishing to entry”. Legal barriers and sunk costs are addressed in detail. The analysis of entry conditions aims to assess the actual likelihood, timeliness and sufficiency of entry. This means that not only entry barriers are assessed, but also any circumstance affecting entry conditions. For instance, the guidelines deal specifically with strategic behaviour.

10. The Merger Guidelines also deal with failing firm situations and the analysis of overseas mergers with impact on the Chilean market. Regarding the latter, the Merger Guidelines give *prima facie* lenient treatment to mergers between undertakings located abroad that affect the ownership structure of subsidiary companies in Chile. However, the FNE considers the potential risks for competition arising from such transaction. This provision is the only specific reference to cross-border effects of mergers in Chilean legislation.

11. The Merger Guidelines represented an important first step in the standardization of competition rules for merger control to increase certainty and transparency. In the coming months the FNE aims to issue a new version, after a period of review initiated in 2009. The new draft may incorporate developments on cross-border mergers.

2. Merger cases with cross-border elements in Chile

12. The selection criterion of the following cases has been broad: all merger cases reviewed by the TDLC since 2004 where a relevant “cross-border element” is present have been included.

2.1 Cases reviewed by the TDLC

2.1.1 Telefónica Móviles takeover on BellSouth

13. In 2005, the TDLC reviewed a takeover by the Spanish company *Telefónica Móviles S.A.* (“TM”) of the Chilean companies *BellSouth Comunicaciones S.A.* and *BellSouth Inversiones S.A.* (the latter, the parent and controller company of *BellSouth Chile S.A.*, an actor in the international and domestic long-distance telecommunications industry). The acquisition was part of a broader purchase agreement between TM and the U.S. company *BellSouth Corporation* (“BS”) dated March 2004. Pursuant the agreement, BS agreed to sell to TM a number of business units operating in the telecommunication industry in several countries of Central and South America.

14. The transnational dimension of the transaction was not considered in the market definition. The market was locally defined as the analogue and digital mobile services supplied under radio electric spectrum concessions within Chilean geographic borders. International interconnection or roaming services, as a broader element for market definition, was discarded in the TDLC’s decision and considered not significant the calls traffic taken into account in the analysis.

15. During the preparation of its report, the FNE requested the merging parties to inform on the stage of the merger control proceedings carried out in other jurisdictions, with the aim to avoid potential

---

13 Merger Guidelines p. 15.
14 Merger Guidelines p. 18
15 A cross-border merger is “a merger between organizations in different countries” (Longman Business English Dictionary: http://lexicon.ft.com/Term?term=cross_border-merger)
16 By the transaction TM agreed to acquire from BS directly or indirectly 100% of BS subsidiaries in Argentina, Chile, Peru, Venezuela, Colombia, Ecuador, Uruguay, Guatemala, Nicaragua and Panama.
17 TDLC, Decision N° 2/2005, p.59
conflicts. Merging parties reported that in Chile the proceedings were more advanced and formal. In the TDLC’s decision none of the remedies imposed to the transaction was determined taking into account the eventual transnational dimension.

2.1.2 Acquisition of Iberoamerican Radio Chile by a Spanish media group

16. In 2007, the TDLC reviewed the acquisition of Iberoamerican Radio Chile S.A. by the Spanish media group Prisa (through its Chilean subsidiary GLR Chile Ltda). Prisa was also acquiring shares in several other radio broadcasting companies. The seller was Claxson Chile S.A.

17. Competition authorities were involved in the case because a specific legal provision requires that changes in ownership or control of media businesses must be communicated to the TDLC within 30 days after agreement. In cases of media needing a “concession” to operate (i.e. a special permission from the authority), the legal provision ordered the parties to pre-notify the merger to the competition authorities and the TDLC to issue a report.

18. The TDLC’s review and report was aimed at assessing the impact of the transaction in the “media” market (mercado informativo). In the actual case, the discussion was centred on whether the provision mandated the TDLC to protect the “public interest” (i.e. pluralism in the media) as well as competition, or whether the test was based purely on competitive risk or effects. In this regard, the TDLC held:

“...[C]onsidering the aims of the law, the interest at stake is that the social, cultural and political content communicated through a mass media firm could be verified, compared or contrasted with other media. In this sense, the provision does not require to vary the analysis from the one performed regarding any other merger under the competition law provisions, however, it orders for the analysis to take into account the additional consideration of the effects a merger in the media industry can have with respect to pluralism in the media and freedom of speech” (Gr. 8°).

19. According to the TDLC, the legislator considered competition as merely one of the appropriate means to reach, indirectly, a reasonable degree of pluralism and information diversity (Gr. 9°, 80°).

20. The relevant product market was defined as “spaces in AM and FM radio stations for publicity dissemination” (Gr. 29°), and the relevant geographical market was defined as “all the national territory with some particular local considerations for certain zones” (Gr. 37°). The TDLC imposed remedies based on both competitive analysis (e.g., it reduced the length of non-compete covenants in order to increase market contestability (Gr. 66°)) and the protection of pluralism in media content (e.g., it ordered the divestiture of radio spectrum concessions in certain areas (Gr. 87°)).

21. An additional extra-competition argument was raised against the merger. According to independent radio broadcasters, the transaction violated a legal provision in media regulations that ordered the verification of “conditions of reciprocity” before the approval of acquisitions of radio-spectrum

19  This scheme was subsequently changed. Following a 2009 amendment to the media law, the FNE is the issuer of the report. If the report is not favorable, both the FNE’s report and the investigation files are referred to the TDLC for merger review.
20  Following the 2009 amendment to the media law, the FNE’s assessment only concerns the effects on competition.
21  Art. 9 Act N° 19.733.
concessions by legal entities with more than 10% of foreign capital – i.e., the provision ordered to check
whether in the country where the investor is based, Chilean investors have the same rights and duties as
foreign persons have in Chile. The TDLC dismissed the argument on the grounds of lack of competence, and
referred the point to the telecommunications regulator (the competent body on this issue) (Grs. 88° - 91°).

22. The TDLC’s approved the merger with mitigating remedies. The dissenting vote used mainly
“non-competition” arguments (i.e. pluralism and ownership reciprocity) to block the merger. The Supreme
Court upheld the TDLC’s decision, indicating:

“[T]he imposed remedies seem appropriate and sufficient in order to protect competition hence
ensuring media pluralism and by this mean freedom of speech and information diversity” (Gr. 6°).

2.1.3 ING AFP Santa María and Bansander Merger

23. The merger between ING AFP Santa María S.A. and Bansander AFP S.A., in 2007,
was a
consequence of a transnational agreement between the foreign companies ING Insurance B.V. (“ING”),
from The Netherlands, and Banco Santander Central Hispano S.A. (“Santander”), from Spain. The parties
agreed that Santander would sell to ING the entire capital of legal entities ING held in pension funds in
Colombia, Uruguay, Mexico and Chile.

24. When the TDLC reviewed the transaction in 2008, regulations and the particularities of the
private pension funds industry justified a very narrow and domestic definition of the market. Also, the
frame agreement between the parent companies was only submitted to the TDLC a few days before the
final hearing. Arguably for these reasons, no transnational consideration was part of the TDLC’s reasoning.

2.2 Pending cases

25. The FNE is currently preparing reports on three mergers with significant cross-border elements.
In two of them, the merging parties submitted a consultation to the TDLC for merger analysis under a non-
adversarial procedure. Since the three cases have not yet been decided, only a general outline and some
potential cross-border elements are described.

2.2.1 Chilean Copec’s acquisition of Colombian Terpel

26. In June 2010, Compañía de Petróleos de Chile Copec S.A. (“Copec”), a leading Chilean gas
distributor, notified the TDLC the acquisition of significant capital interests in the Colombian gas group
Organización Terpel S.A. (“Terpel”). The transaction aimed at expanding the participation of the Chilean
group in the Colombian market. According to Copec’s submission, its rival in the Chilean gas distribution
industry, Terpel Chile, subsidiary of Terpel, was not an essential part of the transaction.

27. From a structural point of view, the merger may be considered a cross-border merger. The
merger would generate risks in the Chilean market. During certain period of time (i.e. the period in which
Copec will indirectly have an interest in its rival in Chile) the transaction may be framed as a horizontal
merger, which consequence would be to reduce the market structure from four to three players.

28. Copec proposed a structural remedy: the complete divestiture of assets in Terpel Chile. However,
since the divestiture could take about two years, Copec also proposed a number of behavioural remedies
(“Chinese walls”) to regulate Terpel’s corporate governance, prevent any influence of the Colombian
parent company in Terpel Chile, and avoid any exchange of sensitive information between both firms.

29. If the remedies are accepted, monitoring them will represent a significant challenge for Chilean
competition authorities, since most of the behavioural remedies must be abided by a Colombian legal
entity. It is likely there will be a need for cooperation with the Colombian competition authorities for the implementation and monitoring of such remedies.

2.2.2 Integration of Lan and Tam airlines

30. In August 2010, the FNE launched an investigation on the merger between two airlines: the Chilean Lan and the Brazilian Tam. Pursuant the agreement, Lan acquires 100% of Tam’s shares, whose shareholders receive shares in Lan in exchange. In order to comply with Brazilian regulations regarding caps to foreign capital in airlines ownership, Lan acquires only a 20% of voting rights in Tam, leaving the remaining 80% in hands of current Tam’s controllers. Once the merger is completed Lan will become “Latam”. Both Lan and Tam’s controllers will have sits in Latam’s board. A shareholder agreement between Latam and Tam’s controllers will regulate the corporate governance of the merging entity.

31. Being both public companies, the parties had already reported the planned transaction to the securities regulators in Chile, Brazil and U.S. before the FNE launched its investigation. The parties also submitted the transaction for merger review to the Brazilian competition authorities in October 2010.

32. In its public statement for opening the investigation\textsuperscript{22}, the FNE identified very high concentration levels in three air flight frequencies (which are the relevant market to consider in this industry): Santiago-Sao Paulo, Santiago-Rio de Janeiro and Santiago-Asunción. In the first two frequencies, Lan and Tam jointly serve over 90% of the traffic in passengers and freight.

33. This merger case is certainly a good case-study. Chilean and Brazilian authorities are facing a cross-border merger and undertaking parallel reviews regarding a unique transaction. In order to explore the possibility of coordination with the aim of implementing and monitoring potential remedies, the competition authorities of both countries have had informal exchanges under the frame of a bilateral cooperation agreement in force since 2008.

2.2.3 Nestlé and Fonterra Joint Venture

34. In November 2010 foreign groups Nestlé and Fonterra submitted to the TDLC a transaction aimed at implementing in Chile their 2002 “Alliance Agreement” (also known as “Dairy Partner America”), aimed at developing in America (excluding U.S. and Canada) an alliance for joint production and marketing of certain dairy products. The transaction consists of a Joint Venture implemented by the acquisition by Nestlé group of the 50% of one of Fonterra’s subsidiaries, Soprole S.A., changing the name of the latter to Dairy Partner America Chile S.A.

35. According to the own submission of the merging entities, different markets in Chile may be affected by the transaction. Downstream, different dairy products were identified as separate markets. Parties argued that potential price increases on dairy products could be disciplined by imports. National industry exports (around 20% of the total product in the last 3 years) are also mentioned in the submission. However, so far competition authorities have not inquired into the potential risks for foreign markets. Improvements in consumer’s health and increases in sales of dairy products of better quality are some of the benefits of the transaction claimed by the parties in addition to the synergies on productive efficiency.

36. Politicians and agricultural interest groups have raised concerns about the transaction’s possible effects on the upstream market of primary product (particularly milk). The concerns include topics such as jobs cuts and sunk investments made by milk producers. In 2004 the TDLC issued a ruling in the milk market which the merging parties are now citing as an important protection of fair market conditions that

\textsuperscript{22} Available at: http://www.fne.gob.cl/?content=notes&db=jurispru&view=9a004077ac7ed70c8425733c005df334
complements the mitigation commitments they propose. The parties also suggest commitments regarding corporate governance and ring-fence conditions aimed at reducing the risks of coordination between parent companies in the markets involved. However, there are no explicit references to potential risks for competition in the foreign markets of Chilean exports, nor to the risks of coordination of the foreign parent companies abroad that might influence the behaviour of the Alliance Agreement in Chile.

37. The parties highlighted the Alliance Agreement has already been implemented in several jurisdictions such as Argentina, Brazil, Colombia, Venezuela and Ecuador. They also adjoined to their submission the approvals by the European Union’s and Brazil’s competition authorities. The FNE may request information from these and other competition authorities.

3. Cooperation among competition authorities, jurisdictional issues and remedies

3.1 Cooperation

38. Chile has signed several free trade agreements (FTAs) as part of its general trade policy. However, the country is not part of any regional organization with jurisdiction on competition matters. FTAs contain provisions regarding competition laws and policy of each party and a general frame for cooperation between national authorities. Chile is associated to the regional organization Mercosur

23 under an Economic Complementation Agreement which also contains provisions aimed at developing cooperation between national competition authorities. The competition provisions of the FTAs are not subject to the dispute resolution mechanisms of the treaties.

39. The FNE has signed several cooperation agreements and memorandums of understanding with foreign competition authorities

24. The content of these documents reveal part of the efforts aimed at implementing the OECD and ICN recommendations for cooperation and coordination between authorities from different jurisdictions specially in merger review. These instruments have not been used in its whole dimension in merger analysis and it is hard to conclude that they have been used as an instrument to address cross-border issues that a merger under review may involve.

40. The FNE cannot report so far cases of conflict with foreign competition authorities regarding a merger review. Such a conflict would be solved by direct consultations between authorities. The fact that our legal framework and the assessments of the Chilean competition authorities do not consider other public interests different than competition in the markets -whether it comes from a domestic or foreign undertaking or interested party- should be considered by other jurisdictions to prevent any such conflict.

3.2 Jurisdictional issues

41. Chilean competition authorities may request information from outside their jurisdiction either through the merging parties or through cooperation with foreign competition authorities.

42. Actions or decisions of foreign competition authorities regarding cross-border mergers are certainly taken into account. However, their influence in national decisions may be limited, depending on the structure of the relevant market.

23 Integrated by Argentina, Brazil, Paraguay and Uruguay.

24 These agreements are available at: http://www.fne.gob.cl/?content=notes&db=actualidad&view=2c41b664d320a0eb8425733f0054c768
3. Institutional arrangements ensure very high degrees of autonomy and independency of both the FNE and the TDLC. Competition authorities focus their actions and decisions on concerns about competition in markets and try to avoid integrating in their assessment other public interest considerations.

3.3 Remedies

44. The FNE cannot yet report examples of merger remedies with transnational dimensions or aimed at mitigating cross-border issues. Considering the reported cases, however, the FNE needs to take into account international recommended practices. They suggest working closely with the corresponding foreign authority from an early stage of the case, in order to exchange preliminary opinions (especially when the insights of the foreign competition authority may be relevant in the implementation and monitoring of the remedies).

4. Concluding remarks

45. Chilean competition authorities have increased their involvement in reviewing transactions with cross-border elements in the last few years. It is likely that this trend will continue in the next years. The roundtable presents a great opportunity for the FNE to analyse the topic ahead of the next review of its Merger Guidelines.
ISSUES ON REMEDIES TO TRANSNATIONAL MERGERS WITHIN THE MERGER CONTROL REGIME OF AML IN CHINA

-- China 1 --

1. Since the Anti-Monopoly Law of the People’s Republic of China (hereinafter referred to as “PRC AML”) became effective on August 1, 2008, the concentrations including transnational mergers have been included in the scope of antitrust review, 2 and meanwhile the regime for the conditional clearance of certain concentrations has been established (hereinafter referred to as “merger remedies”), 3 which should also be applied to the transnational mergers within the jurisdiction of China. The relevant issues including the classification of the merger remedies, the process of negotiation thereon as well as the supervision and implementation thereof will be further discussed in this Article.

1. The preliminary establishment of the system for merger remedies in China

2. It is stipulated in Article 29 of the PRC AML that, “to the concentrations that will not be prohibited, the anti-monopoly authorities under the State Council may decide to attach restrictive conditions that will reduce the negative effects of the concentration in terms of competition.” This Article is the basic legal basis of the merger remedies in China, and an important basis, on which such remedy system should be established. On such a basis, the Ministry of Commerce of China (hereinafter referred to as “MOFCOM”) as the authority responsible for the review of concentrations under the PRC AML, promulgated the Measures on the Review of Concentrations, in which the classification of remedies, the proposal of remedies, the amendment of remedies as well as the supervision of the implementation thereof are stipulated in general in Articles 11-15. Besides, in order to further the implementation of the decisions attached with restrictive conditions on the divestiture of assets or businesses, MOFCOM promulgated the Interim Regulations on the Implementation of the Divestiture of Assets or Businesses in Concentration of Operators. The system for merger remedies is certainly in its infancy in China, and the development and consummation of the relevant legal systems will be based on the summarization of the practical experiences in the future.

2. The main content of the system for merger remedies in China

3. The system for merger remedies in China involves multiple issues including the definition and classification of remedies, the negotiation and determination on remedies and the implementation and supervision of remedies.

1 The author of this article, Mr. Shufeng Cui, is an official from the Ministry of Commerce of the People’s Republic of China.

2 The “concentration of operators” as stipulated in the PRC AML includes the mergers of companies as well as the transactions through which the control or decisive influence on other companies can be obtained.

3 The “clearance of concentration with restrictive conditions” as stipulated in the PRC AML should be corresponding to the “merger remedies” as mentioned in the EU competition law and the antitrust law of the United States of America.
2.1  **The definition and classification of remedies**

4.  As mentioned above, it is clearly stipulated in Article 29 of the *PRC AML* that the purpose of remedies for merger control is to reduce the negative effect of a concentration in terms of competition; and remedies have been further elaborated in Article 11 of the *Measures on the Review of Concentrations* as the restrictive conditions to adjust the schemes of the transaction of concentration in question. Meanwhile, it is stipulated in Article 11 (2) of the *Measures on the Review of Concentrations* that, depending on the detailed situations of the transactions of concentration, the restrictive conditions should be classified as follows: firstly, structural conditions such as the divestiture of part of the assets or businesses of the operators participating the concentration; secondly, behavioral conditions such as for the operators participating the concentration to open fundamental facilities such as networks or platforms, license key techniques (including patent, know how and other intellectual properties), terminate exclusive agreements, etc.; thirdly, comprehensive conditions including both structural conditions and behavioral conditions.

2.2  **The negotiation and determination on remedies**

5.  According to the *Measures on the Review of Concentrations*, the suggestions on remedies for merger control should be proposed by the operators participating in the concentration. After such proposals have been made, both MOFCOM and the operators participating in the concentration may bring forward comments and suggestions on the revision of the restrictive conditions. Where MOFCOM and the operators participating in the concentration have reached an agreement on the content of the remedies, MOFCOM will clear the transaction of concentration on such basis and the content of the remedies will be included in the final clearance decision as restrictive conditions.

2.3  **The implementation and supervision of remedies**

6.  It is provided in Article 15 of the *Measures on the Review of Concentrations* that MOFCOM should supervise and examine the behaviors of the operators participating the concentration to implement the restrictive conditions, and such operators should report to MOFCOM on the situation of implementation according to the designated timeframe. Where the operators participating in the concentration fail to fulfill their obligations according to the restrictive conditions, MOFCOM may order for correction, and where the operators participating in the concentration fail to correct the situation within the specified timeframe, MOFCOM may take actions according to the relevant stipulations of the AML. Considering the importance of the structural conditions mainly including the divestiture of assets or businesses (hereinafter referred to as “divestiture”), MOFCOM specifically promulgated the *Interim Regulations on the Implementation of the Divestiture of Assets or Businesses in Concentration of Operators*, in which the procedural rules involved in all the steps of the divestiture as well as substantive rules such as the duties and responsibilities of the relevant parties have been provided in details.  

3.  **The situation of the implementation of the system for merger remedies in China**

7.  Since the AML became effective, MOFCOM has applied remedies in six transnational mergers so far, including: the acquisition of AB (ANHEUSER-BUSCH COMPANIES INC.) by INBEV N.V./S.A., the acquisition of Lucite International by the Japanese Mitsubishi kunstsilke Co, Ltd, the acquisition of the American Delphi Corporation by the American General Motors Co., the acquisition of the American Wyeth Co. by the American Pfizer Co., the acquisition between two Japanese companies Panasonic  

---

Co. Ltd and SANYO Electric Co., Ltd., and the acquisition of Alcon Co. by Novartis AG. Among the restrictive conditions attached to the decisions of the above six cases, there are structural conditions, behavioral conditions and comprehensive conditions. MOFCOM has supervised the behaviors of the relevant parties to implement the restrictive conditions according to law, through which the effectiveness of such implementation has been ensured.

For the decision of the above mentioned cases, please refer to the official website of MOFCOM at http://fldj.mofcom.gov.cn/static/ztzx/ztzx.html?1906094989=3304667947.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Colombia --

1. Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

1.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

1. In Colombia, mergers and acquisitions are defined by law as "business integrations" which includes any act of concentration, merger or consolidation between two or more economic agents engaged in the same productive, distribution, supply or consumer activity. Any integration that exceeds a certain threshold must be notified to the authorities for a prior review.

2. After the Law 1340 of 2009, the “Superintendencia de Industria y Comercio (hereinafter SIC)” was established as the single competition authority for prior review of integrations in all sectors, except for mergers in the financial and aeronautical sectors, where SIC must provide a concept about the competition effects of the merger and may suggest remedies or conditions.

3. Since 2006, the SIC established that integrations between firms with combined annual operating revenues or total assets of more than 100,000 legal minimum monthly wages (US $26 million) have to be notified to the SIC, in order to perform an analysis and decide whether to grant an authorization for the integration in case it does not reach concentration levels that would restrict competition in the markets. However, taking into account that markets are dynamic, the SIC updates such thresholds annually in order to have an objective and current criteria for reviewing business integrations that indeed deserve to be reported according with their impact on the national markets.

4. For that reason, with Resolution 69901 of 2009, the SIC established a new threshold for prior review of integrations during 2010, of f 150,000 legal minimum monthly wages (US $ 42 million).

1.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

5. In Colombia, cross-border mergers are understood as integration processes in which a foreign undertaking, who operates directly or indirectly (through distributors) in Colombian territory, merges or acquires a Colombian company. It is also considered a cross-border merger when two firms that merge outside the country sell their products in the Colombian market, and have presence in Colombia (through subsidiaries or controlled companies). Therefore, if the SIC requires information from the parties involved in a concentration process, will obtain it from the Colombian controlled or subsidiaries companies, since they are located within the Colombian territory. Thus, no attempts to obtain information from parties
located outside Colombia have been made, because the information has always been obtained from the location in Colombia of the parties.

1.3 To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

6. All SIC’s integration decisions are taken based on internal analyses and the decisions are reached independently. However, SIC does study extensively the decisions taken by foreign authorities regarding particular mergers, but views them as doctrinal developments that have no binding power.

7. Recently, regarding the merger between Coltabaco, a cigarette producer company owned by Phillip Morris International and Protabaco, a locally owned cigarette producer, SIC reviewed decisions undertaken by the EC commission regarding mergers of cigarette producers that could be somehow similar to the studied merger, as well as decisions taken by other Latin American authorities. Although the SIC’s final decision took into account the different arguments presented in the reviewed decisions, it has also been conscious that the definitions of relevant markets and other consideration vary greatly among contexts. The SIC rejected the merger in the terms it was originally proposed, and after a special petition (allowed by administrative law), determined that the proposed merger could only proceed if very demanding conditions were met.

8. Moreover, private practitioners generally invoke decisions of foreign authorities that support the outcome that best suits the interests of the merging parties. In this sense, it has become a common practice to use comparative competition law as part of the arguments presented during merger and other competition law proceedings.

1.4 Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

9. Political intervention is not possible at any merger control process in Colombia. The SIC is autonomous and bases its decisions only on economic and legal assessments made within the institution.

1.5 Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

10. The SIC has proceeded under the understanding that, although some mergers may produce effects that can be undesirable from different perspectives, its sole concern has been maintaining competition in the relevant markets. Law 1340 of 2009 states in its article 3 that the administrative proceedings it undergoes have to be guided by consumer welfare, efficiency, and maintaining free market participation. These three purposes determine how competition analysis proceeds in merger review, as well as in monopolization, abuse of dominance and other restrictive practices that are considered illegal.

11. In the aforementioned proceeding of the merger between Coltabaco and Protabaco, the SIC studied the likely effects that the merger would have on the tobacco – growing community, since the merging parties were the only buyers of tobacco leaf in the country. This was not done because competition laws orders it to be so explicitly, but because it was realized that the eventual merger would produce undesirable effects in upstream and downstream markets, which also fell under the scope of the analysis. In particular, the study of the market of tobacco leaf was done in order to determine the effects of this merger on the welfare of tobacco growers.
1.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

12. It’s been realized of lately that it is necessary to enhance SIC’s capacity to deal with cross-border mergers. In this sense, it has become important to take into account the effects on competition of current negotiations of competition chapters in free-trade treaties with different countries and the project to implement a supranational regime within the Andean Community. For those reasons, efforts in this direction should be pursued by, for example developing, bilateral co-operation agreements with other competition authorities.

2. Remedies (types, consultation, monitoring and enforcement)

2.1 Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

13. The SIC, in order to offset any possible harmful effects on competition brought by a merger, conducts an economic analysis and if necessary imposes remedies or conditions (structural and behavioral) that must be fulfilled to authorize the transaction. These conditions may include transfer of assets, maintaining separate business units, providing competitors with open access to logistics and production facilities, terminating customer loyalty schemes, transferring technology, price and cost surveillance, maintenance of separate trademarks, and disclosure of commercial information.

14. There have been many cases in which the SIC has imposed conditions (structural and behavioral) in order to grant an authorization for a merger. For example, very recently, both structural and behavioral conditions took place in the merger between the two major tobacco companies in Colombia, Coltabaco (Philip Morris) and Protabaco. Here, the SIC imposed the condition of selling to a third party one of Protabaco’s’ assets (the brand Premier) and behavioral obligations concerning mainly the relationship with the tobacco leaf growers. Other examples include the merger between the companies Televisa and Editora Cinco, where the parties were obliged to sell to a third party one of their assets, the magazine "Tu hijo y tu", and the merger between two of the largest retailers chains (Exitó and Cafam), where likewise, the parties had to sell seven outlets.

15. At this point, it is important to recall some of the merger decisions involving foreign undertakings that had the most significant impact in Colombian economy.

- In 2007, even though it was approved in the rest of the world, the SIC objected the merger between the two Colombian subsidiaries of Linde AG and The Boc Group PLC (Aga Fano and Cryogas S.A.), world leaders gas companies which turned into the "The Linde Group".

- The SIC objected the sale of the Fab detergent owned by Colgate Palmolive to Procter and Gamble (P&G), because P&G owned already the Ariel detergent, one of the most powerful on the market, because of the risks it represented regarding unilateral effects.

- The SIC approved the acquisition of Bavaria (Colombian company which controlled the beer business in Colombia, Peru, Ecuador and Panama), by the British-South African multinational SabMiller, which agreed to pay $7.8bn for the whole Bavaria Group.

16. Data about mergers procedures in Colombia is presented in Table 1, which sets out the statistics of business integrations notified to the Superintendencia de Industria y Comercio between 1998 and 2010. It can be seen from this table that between 1998 and 2010 in only 29 cases the SIC imposed conditions in order to grant the authorization.
Business Integrations Notified to the Superintendencia de Industria y Comercio between 1998 and 2010

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Objected</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breach of a condition or obligations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not objected</td>
<td>132</td>
<td>118</td>
<td>123</td>
<td>93</td>
<td>72</td>
<td>58</td>
<td>89</td>
<td>97</td>
<td>91</td>
<td>64</td>
<td>74</td>
<td>78</td>
<td>78</td>
</tr>
<tr>
<td>Jurisdiction of other Colombian authority</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not a merger</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>8</td>
<td>11</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No duty to inform</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of notified cases</td>
<td>132</td>
<td>118</td>
<td>126</td>
<td>120</td>
<td>104</td>
<td>62</td>
<td>95</td>
<td>103</td>
<td>105</td>
<td>80</td>
<td>81</td>
<td>78</td>
<td>80</td>
</tr>
</tbody>
</table>

Table 1. SIC merger Information since 1998.

2.2 If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioral remedies be applied? Please provide examples where appropriate.

17. As stated before, the SIC can impose structural remedies. Historically, these have been the divestiture of important assets, ranging from brands to production facilities to third parties in order to carry through the proposed merger. The recent decision regarding the merger between Coltabaco and Protabaco is an example of such remedies.

2.3 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

18. Although the SIC tries not to negotiate its decisions with the merging parties, when imposing structural remedies there has always been certain reluctance regarding the adequate scope of the divested assets. As can be expected, the merging parties dislike these structural remedies because it implies a diminishment of their capital and is viewed as increasing the price of the merger itself. However, in the end, the SIC has prevailed and has been able to ensure that, if the merger is to take place, the divestiture of the assets considered necessary in order to guarantee that competition continues to take place has taken place.

2.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

19. In the event that an integration operation is approved under conditions, the SIC has the obligation to regularly monitor the compliance of such conditions. Any default will give rise to the sanctions provided by the law, including penalties and order to divest. However, no assistance with other countries has taken place.
2.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

20. Until now, there has not been any co-ordination with other national competition authorities on this specific matter.

1 (i) ETERNIT – COLOMBIT (By Decision number 14002 of 2002 the SIC prohibited the merger. It was confirmed by Decision number 28828 of 2002 and by Decision number 34712 of 2003, the SIC revoked and imposed conditions in order to grant the authorization).

2 (i) EXXON MOBIL – CARBOQUÍMICA (By Decision number 4933 of 2004 the SIC prohibited the merger. (ii) POSTOBÓN – QUÁKER (By Decision number 16453 of 2004 the SIC prohibited the merger and by Decision number 27920 of 2004 it was confirmed). (iii) PROCTER & GAMBLE – COLGATE (By Decision number 28037 of 2004 the SIC prohibited the merger. It was confirmed by Decision number 29807 of 2004).

3 (i) COCRETOS DE OCCIDENTE – HOLCIM (By Decision number 35516 of 2005 the SIC prohibited the merger. It was confirmed by Decision number 14493 of 2006).

4 (i) DUPONT DE COLOMBIA – PLASTILINE S.A. (By Decision number 923 of 2006 the SIC prohibited the merger. By Decision number 14493 of 2006 it was confirmed).

5 (i) CLOROX COMPANY – COLGATE PALMOLIVE (By Decision number 24374 of 2007 the SIC prohibited the merger. (ii) AGA-FANO – FÁBRICA NACIONAL DE OXIGÉNOS – CRYOGAS (By Decision number 7805 of 2007 the SIC prohibited the merger and by Decision number 14811 of 2007 it was confirmed).

6 (i) PELDAR – CONALVIDRIOS (Decision number 99077445 of 2000). (ii) BAVARIA – LEONA (Decision number 0038295 0023 of 2000 and Decision number 25583 of 2003).

7 (i) GUINNESS UDV – ATLAS COMERCIAL SEAGRAM (Decision number 1046179 of 2001). (ii) IBM – INFORMIX SOFTWARE (Decision number 1043208 of 2001). (iii) MÓNOMEROS – CARGILL (By Decision number 43636 of 2001 the SIC prohibited the merger and by Decision number 13076 of 2002 the SIC revoked and imposed conditions in order to grant the authorization).

8 (i) LADRILLERAS SANTA FE (Decision number 2009661 of 2002). (ii) HEWLETT PACKARD – COMPAQ (Decision number 2015377 of 2002). (iii) INDUSTRIAS ESTRA – CAJAS PLÁSTICAS (Decision number 2022479 of 2002); (iv) QUAKER – PROMASA (Decision number 2049509 of 2002); (v) AVIATUR S.A. – VIAJES DELTA (Decision number 2064738 of 2002); (vi) AVIATUR S.A. – KOREAN WORLD (Decision number 2066483 of 2002); (vii) PINTUCO – INDUSTRIAS PERMAPINT (By Decision number 02002439-06 of 2002 the SIC imposed conditions in order to grant the authorization and by decision number 17723 of 2002 the SIC changed the conditions). (viii) NOEL – SUIZO (By decision number 1110475 of 2002 the SIC imposed conditions in order to grant the authorization and by decision number 19313 of 2002 the SIC changed the conditions). (ix) ROBIN HOOD S.A - MEALS MERCADEO DE ALIMENTOS DE COLOMBIA S.A (By decision number 2061593 of 2002 the SIC imposed conditions in order to grant the authorization).

9 (i) COMCEL – OCCEL Y CELCARIBE (Decision number 2114190 of 2003). (ii) ETERNIT - COLOMBIA (By Decision number 7390 of 2003 the SIC prohibited the merger and by Decision number 19110 of 2003 the SIC imposed conditions in order to grant the authorization. (iii) DSM N.V. – ROCHE VITAMINAS (By Decision number 22866 of 2003 the SIC imposed conditions in order to grant the authorization and by decision number 25550 of 2003 the SIC changed the conditions).

10 (i) AMANCO (PAVCO) - AMERO (RALCO) (By decision number 4861 of 2004 the SIC imposed conditions in order to grant the authorization and by decision number 5013 of 2004 changed the conditions). (ii) CARVAJAL S.A - PROPAL S.A. (By Decision number 25012 of 2004 the SIC imposed conditions in order to grant the authorization).
11 (i) **ROBIN HOOD – MEALS** (By decision number 5487 of 2005 the SIC imposed conditions in order to grant the authorization and by decision number 11665 of 2005 it was conformed). (ii) **VALORES SIMESA Y OTROS** (Decision number 29661 of 2005); y (iii) **TELEVISIÓN – EDITORA CINCO** (Decision number 33268 of 2005).

12 (i) **FENOCO S.A. VS CARBONES OFCARIBE S.A., CONSORCIO MINERO UNIDO S.A., CARBONES DE LOS ANDES S.A., COMPAÑÍA CARBONES OFCESAR S.A., DRUMMOND COAL MINING LLC., C.I. PRODÉCO S.A. - CARBONES DE THEJAGUA S.A.** (By decision number 6027462 of 2006 the SIC imposed conditions in order to grant the authorization). (ii) **CEMENTOS OFCARIBE S.A., METROCONCRETO S.A., CONCRETOS DE OCCIDENTE S.A., AGRECÓN, LOGITRANS S.A. EMPRESAS INTEGRANTES OFGRUPO ARGOS - CEMENTOS ANDINO S.A. - CONCRECEM S.A.** (By decision number 13544 of 2006 the SIC imposed conditions in order to grant the authorization); (iii) **EXITO – CARULLA** (By decision number 34904 of 2006 the SIC imposed conditions in order to grant the authorization). (iv) **GRUPO GERDAU – ACERIAS PAZ OFRIÓ S.A.** (By decision number 5379 of 2006 the SIC prohibited the merger and by decision number 2489 of 2007 the SIC revoked and imposed conditions in order to grant the authorization).

13 (I) **MEXICHEM COLOMBIA S.A. - PAVCO S.A.** (By decision number 21345 of 2007 the SIC prohibited the merger and by decision number 29154 of 2007 the SIC revoked and imposed conditions in order to grant the authorization). (ii) **BAVARIA, LATIN DEVELOPMENT CORPORATION, CERVEcería UNIÓN, MALTERÍA TROPICAL, CERVEcería LEONA - GASEOSAS POSADA TOBÓN** (By decision number 9192 of 2007 the SIC imposed conditions in order to grant the authorization and by decision number 25489 of 2007 the SIC changed the conditions).

14 (I) **INDUSTRIAS ARFEL S.A. - ALUMINIO REYNOLDS SANTO DOMINGO S.A.** (By decision number 5886 of 2008 the SIC prohibited the merger and by decision number 19729 of 2008 the SIC revoked and imposed conditions in order to grant the authorization). (II) **MEXICHEM - PRODESAL** (By decision number 23541 of 2008 the SIC prohibited the merger and by decision number 34452 of 2008 the SIC revoked and imposed conditions in order to grant the authorization).

15 (I) **COLTABACO – PROTABACO** (By decision number 29937 of 2010 the SIC prohibited the merger and by decision number 54253 of 2010 imposed conditions in order to grant the authorization).

16 (I) **CAFAM – ÉXITO** (By decision number 38171 of 2010 the SIC imposed conditions in order to grant the authorization).
ASPECTS OF INTERNATIONAL COOPERATION IN CROSS-BORDER MERGER CONTROL CASES: EXAMPLES FROM THE CROATIAN COMPETITION AGENCY

-- Croatia --

1. Introduction

1. A concept of a concentration in the newly reviewed Croatian Competition Law (2009), (hereinafter referred as the: Competition Act; CA), is defined in a way that a concentration between undertakings shall be deemed to arise where a change of control occurred, on a lasting basis, and if it results from: (1) a merger association of two or more independent undertakings or parts thereof; or (2) acquiring control or decisive influence of one or more undertakings over one or more other undertakings, or of one or more undertakings or a part of an undertaking, or parts of other undertakings, in particular by: (i) an acquisition of the majority of shares or share capital, or (ii) obtaining the majority of voting rights, or (iii) in any other way in compliance with the provisions of the Company Law of the Republic of Croatia and other legal prescriptions. 1

2. The Law also establishes that a concentration of undertakings which would significantly impede effective competition in the market, in particular where such a concentration creates or strengthens a dominant position of the undertakings parties to the concentration shall be deemed incompatible with competition rules and therefore prohibited 2.

2. Rules applicable to merger control

3. An acquisition of control occurs through transfer of rights, based on contracts between undertakings, or by other means, by which one or more undertakings, either separately or jointly, taking into consideration all legal and factual circumstances, acquire the possibility to exercise decisive influence over one or more other undertakings on a lasting basis 3. Furthermore, a concentration is constituted by a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity, but a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity which leads to the coordination of the competitive behavior of undertakings that remain independent thereby significantly impeding competition shall not be considered as a concentration and shall therefore be assessed as an agreement among undertakings 4.

4. A concentration shall not be deemed to arise in following cases: (1) when credit institutions or other financial institutions or investment funds or insurance companies, the normal activities of which

---

1 Author. Dr. Sc. Mirna Pavletic-Zupic, Member of the Croatian Competition Council. Art 15, Par. 1 of the Competition Act; CA.
2 Art. 16 of the CA.
3 Art. 15, Par. 2 of the CA.
4 Art. 15, Par 3 and 6 of the CA.
include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis (not longer than 12 months) securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behavior of that undertaking, whereas the 12 month period may be extended in cases where such institutions or companies can show that the disposal was not reasonably possible within the period set; (2) when the acquisition of shares or interest results from internal structural changes in either the controlled or controlling undertaking (such as merger, acquisition, transfer of legal title etc.); and (3) when the control is acquired by an office-holder or administration officer – relating to bankruptcy, liquidation or winding up – according to the Bankruptcy Law and the Companies Act of the Republic of Croatia.

3. **The notion of obligatory notification**

5. The Competition Law also prescribes the conditions that should be met in order to implement the rules for obligatory notification of a concentration, along with the turnover thresholds. Namely, in order to assess the compatibility of concentration, the parties to the concentration are obliged to notify any proposed concentration to the Competition Agency if the following criteria are cumulatively met:

- the total turnover (consolidated aggregate annual turnover) of all the undertakings - parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and

- the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements.

6. In relation to the calculating of the parties’ turnover it should be mentioned that in the cases where the concentration involves association or merger of a part or parts of one or more undertakings, irrespective of whether or not those parts are constituted as legal entities, the calculation of the shall only include the relevant turnover of the parts which are subject to the concentration.

7. However, two or more transactions which take place within a two-year-period shall be considered to constitute one concentration, arising on the day of the last transaction. Finally, the turnover for banks and other financial institutions, including insurance companies and re-insurance organizations as parties to concentrations, is calculated on the basis of the total turnover from their normal business operations in the financial year preceding the concentration, in a way that for the banks and other institutions which provide financial services, after deduction of direct taxes related to them, the sum of the following points of income shall be taken: (i) income from interest rates and similar income; (ii) income from securities (i.e. shares and

---

5  Art. 15, Par 5. of the CA.

6  Art. 17, Par 1 of the CA; where the parties to the concentration are unable to deliver financial statements at the time of the notification of concentration, the last year for which the parties to the concentration have concluded their financial statements shall be taken as the relevant year in the assessment procedure; also the intra-group turnover realized by the sale of goods and/or services by undertakings within a group shall not be taken into account when calculating the total turnover referred to under the conditions prescribed in the Law.

7  Art. 17, Par. 4 and 5 of the CA.
other variable yield securities, interests in other economic entities, shares in affiliated economic entities); (iii) commissions receivable; (iv) net profit on financial operations; and (v) other operating income.

4. The criteria for pre-notification

8. The Law prescribes the obligation for the prior notification of concentration. Namely, any concentration between undertakings shall be pre-notified from the side of the parties to concentration, subject to the following criteria: (i) in the case where control or decisive influence is acquired over a whole or parts of one or more undertakings by another undertaking, the prior notification of concentration shall be submitted by the controlling undertaking. In all other cases, all undertakings parties to the concentration shall agree on the submittal of one joint notification; and (ii) the prior notification of concentration shall be submitted to the Competition Agency for assessment before the implementation of the concentration in question, following the conclusion of the contract on the basis of which control or decisive influence has been acquired by the controlling undertaking, or following the publication of the invitation to tender.

9. When notifying the concentration the parties shall provide to the Competition Agency the following documentation: (i) the original or a certified copy of the document, or a certified translation, showing the legal grounds for the concentration if the original official text is not originally written in Croatian; (ii) annual financial statements of the parties to the concentration for the financial year preceding the concentration; and (iii) other documents and data necessary for the evaluation of a merger in question.

10. The notifying party shall state in the notification if it intends to submit the request for appraisal of concentration to another competent authority in charge of assessment of concentrations outside the territory of the Republic of Croatia. If the notifying party has already submitted such a request, it shall provide the Agency with the decision of the relevant body, where the relevant decision has already been adopted.

---

8 Art. 18, Par. 1 and 2 of the CA; For insurance companies and companies that perform re-insurance activities, the value of gross premiums which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including also re-insurance premiums, after the deduction of taxes and parafiscal contributions charged by reference to amounts of individual premiums or in relation to total premium volume.

9 Art. 19 of the CA.

10 Namely, by way of derogation from this rule, the parties to the concentration may submit the prior notification of concentration to the Competition Agency even before the conclusion of the contract or publication of the invitation to tender, if they, bona fide, provide evidence of the proposed conclusion of the contract or announce the invitation to tender; furthermore, the implementation of a notified concentration shall be permitted only after the expiry of the time period of 30 days, namely after the receipt of the final decision of the Competition Agency on compatibility or conditional compatibility of concentration in question. Finally, the Competition Agency can in particularly justified cases, upon the request of a party to the concentration, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the time prescribed period of time, and in deciding on such, the Competition Agency would ordinarily take into account all circumstances of the relevant case, particularly the nature and gravity of the damages which might be posed on the parties to the concentration or on third parties, and the effects of the implementation of the concentration concerned on competition.

11 Art. 20 of the CA; Upon the request of the parties to the concentration, the Competition Agency may in particularly justified cases revoke the obligation as referred above, where it finds that the information in question is not necessary for the assessment of the concentration concerned.
11. The Law also allows for the submission of a short-form notification of the concentration, which is used for the purpose of notifying concentrations under a simplified procedure treatment.

12. Such a short-form notification and the so called simplified procedure may be used where, in particular, one of the following conditions apply: (i) none of the parties to the concentration is engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship); (ii) two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationship), provided that their combined market share is less than 15 %, and/or when one or more of the parties to the concentration are engaged in business activities in a relevant product market which is upstream or downstream of a product market in which any party to the concentration is engaged (vertical relationship), provided that none of their individual or combined market shares at either level is 25 % or more; and (iii) a party to the concentration is to acquire sole control of an undertaking over which it already has joint control; or in the case where two or more undertakings acquire control over a joint venture, where the joint venture has no, or negligible, actual or foreseen activities within the Republic of Croatia12.

5. The assessment of compatibility of mergers

13. In relation to the assessment of compatibility of a concentration, the Competition Agency would initiate a proceeding immediately upon the receipt of the complete documentation necessary for the notification, and in a course of a proceeding it should always take into account the effects on competition and possible limitations on market access, particularly where the proposed concentration creates or strengthens a dominant position of the undertakings concerned13.

14. In conducting the proceeding on the assessment of a merger, the Agency can ask for any data and documents which it might find necessary for the establishment of the facts in the case, and the notifying party or the undertakings which are parties to the concentration may submit to the Agency any data and documents which they find relevant for the assessment of the concentration concerned because the burden of proof in terms of positive effects of the concentration lies on the undertakings concerned.

---

12 Art. 20, Par. 4 and 5 of the CA; By way of derogation from obligations stated afore, the Competition Agency may require a full notification of a concentration to be made, in cases where it finds that there are substantial indications of significant impediment of effective competition by the concentration concerned and where consequently, no simplified procedure treatment is applicable; furthermore, the day on which the Competition Agency has received all the data and documents requested, shall be considered as the date of the receipt of the complete notification of a concentration, and the Competition Agency shall issue a receipt thereon to the notifying party.

13 Art. 21. of the CA; In the course of assessment of a concentration the Agency shall in particularly define as follows: (1) the structure of the relevant market, actual and potential future competitors in the relevant market within the territory of the Republic of Croatia or outside this territory, supply and demand structure in the relevant market and its trends, costs, risks, economic, legal and other barriers to entry to or withdrawal from the market; (2) the position in the market and the market share, economic and financial power of the undertakings in the relevant market, the level of competitiveness of the undertakings and possible changes in the business operations of the parties to the concentration and alternative sources of supply for the buyers resulting from the implementation of the concentration concerned; and (3) the effects of the concentration on other undertakings, and especially relating to the consumer benefit, such as: decrease in prices of goods and/or services, shorter distribution courses, lowering of transportation, distribution and other costs, specialization in production, technological innovation and other benefits directly deriving from the implementation of the concentration in question.
15. Then, following the receipt of a complete notification of concentration, the Agency would publish on its web site a request for information aimed at all interested parties who may respond to this request in writing, giving their opinions and submitting the data at their disposal relating to the concentration concerned which would then provide the Agency with better understanding of the players and the relevant markets concerned.

6. Decisions from the side of the Croatian Competition Agency

16. In relation to the ways of possible decisions which the Competition Agency is going to take after the proceeding, and within three months following the adoption of a procedural order on initiation of the proceedings, the Law distinguishes three categories of possible decisions: (1) a decision by which the concentration concerned is rendered compatible; or (2) a decision by which the concentration concerned is declared conditionally compatible, provided that certain measures are observed and conditions met, within the time limits set by the Agency; (3) or by which the concentration concerned is assessed incompatible and therefore prohibited.

---

14 Art. 21, Par. 6 and 7 of the CA; The request for information particularly contains the following data: (i) business activities performed by the parties to the concentration in the territory of the Republic of Croatia; (ii) the markets in the Republic of Croatia that may be affected through the implementation of the concentration concerned; (iii) a request containing the invitation to all undertakings who operate in affected markets, undertakings who perform their activities on other markets in which the proposed concentration may have effects on competition (upstream, downstream, neighboring markets), associations of undertakings, associations of employers, consumers associations and other parties who are not parties to the proceedings or competing undertakings of the parties to the concentration, but who may be reasonably assumed to have knowledge on the relevant markets concerned, to submit their comments, standpoints and opinions on possible significant effects which the concentration in question may produce on their operation as well as possible appreciable effects of the concentration concerned on effective competition in the markets concerned, and (iv) the deadline for submittal of the relevant comments which may not be shorter than 8 or longer than 15 days; furthermore, should in the course of the assessment of a concentration, the Agency receive one or more new notifications of concentration where control or decisive influence is acquired by one and the same undertaking who submitted the original notification of a concentration, than the Agency may decide to conduct a joint assessment proceedings and take one decision if it finds it reasonable and efficient; in this case the time limit for the assessment of a concentration shall begin to run when the notifying party is issued the receipt confirming the complete notification of concentration which was last notified to the Agency.

15 Art. 22, Par. 7 of the CA; Where the Agency, on the basis of valid data and documents submitted together with the notification of a concentration, or on the basis of other available information and findings, establishes beyond dispute that it is reasonable to suppose that the implementation of the proposed concentration is not prohibited and unless it takes a procedural order on the initiation of the assessment proceedings within 30 days following the receipt of the complete notification of concentration, it can issue a special notice where would be confirmed that the subjected merger is deemed to be compatible with the market. Otherwise, where the Agency, based on the evidence submitted together with the notification of a proposed concentration, or on the basis of other available information and findings finds that the implementation of the concentration concerned could significantly impede effective competition in the relevant market, in particular as a result of the creation or strengthening of a dominant position of the undertakings concerned, it shall take a procedural order on the initiation of the proceedings for the assessment of compatibility of the concentration concerned. Finally, if in the course of the assessment proceedings the Agency finds that the concentration in question may be declared compatible only after necessary obligations and conditions are fulfilled, it shall without delay inform the notifying party thereof, and the notifying party shall than in the time period which may not exceed 30 days from the day of the receipt of this notice propose adequate commitments (whether behavioral and/or structural measures) and other conditions in order to remove the negative effects of the concentration concerned. It is important to mention that the commitments may be proposed by the notifying party as early as in the prior notification.
17. However, the Agency may, ex officio or upon request of a party to the concentration, withdraw the decision on concentration in the following cases: (1) if the decision has been made on the basis of incorrect or false information that has been essential for the decision making; and/or (2) if any of the parties to the concentration have not fulfilled the conditions and obligations determined by the decision of the Agency.

18. Such decision on the basis of which the declaring the concentration was declared as conditionally compatible if being revoked, shall render the concentration incompatible and therefore prohibited within the meaning of the Law, and parallel set the conditions and obligations and deadlines to restore effective competition and impose the fine prescribed for the committed infringements.

19. As well, the Agency could, ex officio, or upon request of a party to the concentration, amend its decision where the parties to the concentration cannot fulfill any of the proposed conditions or observe the set deadlines, owing to unpredictable circumstances beyond their control.

20. Such an amended decision of the Agency may contain new obligations, conditions and deadlines for their implementation aimed at restoring effective competition. In other cases, the concentration could also be suspended. Namely, the Agency would, ex officio, by means of a separate decision, propose all necessary measures, whether behavioral or structural, aimed at restoring efficient competition in the relevant market, and set the deadlines for their adoption in the following cases: (i) where the concentration concerned has been implemented contrary to the decision of the Agency by which the concentration has been assessed as incompatible and therefore prohibited; (ii) or where the concentration concerned has been implemented without the obligatory prior notification of concentration based on the Law.

21. Following this, on the basis of a decision referred above, the Agency may, in particular: (1) order for the shares or interest acquired to be transferred or divested; (2) prohibit or restrict the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, and order the joint venture or any other form of control by which a prohibited concentration has been put into effect to be removed, whereas the decision may also contain the imposition of a fine prescribed for the committed infringements.

---

16 Art. 23 of the CA.

17 Art. 24 of the CA.
7. **CCA’s experience; Merger between Merck & Co. (USA) and Sanofi – Aventis (France)**

22. The most recent case which was subject for the review from the side of the Croatian Competition Agency was the merger involving the entrepreneurs Merck & Co., Inc, One Merck Drive, Whitehouse Station, New Jersey, USA and Sanofi – Aventis S.A., 174 Avenue de France, Paris, France, which was brought on the 46 session of the Croatian Competition Council held on 15 July 2010.

23. The merger was in a form of a joint venture, which was established outside the territory of the Republic of Croatia, but the merger was reviewed because of its possible effects on the Croatian Market. The said concentration was cleared to be compatible with the Croatian market and no measures were imposed.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Czech Republic--

1. This contribution deals with some of the issues related to the treatment of cross-border concentrations of undertakings. In the general part, a description of the Czech merger control regime is provided. In the following part, specific issues are discussed.

1. General points

2. In the Czech Republic, merger control regime is set out in the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts, as amended (hereinafter referred to as “the Competition Act”).

3. In order to qualify as a concentration of undertakings notifiable to the Czech Competition Authority, a transaction must take the form of:

- a merger of one or more undertakings previously independently operating in the market, or
- an acquisition of an enterprise of another undertaking or a part thereof on the basis of a contract, auction or by other means, or
- obtaining the possibility to control an undertaking by another undertaking, or
- a creation of joint venture performing on a lasting basis all the functions of an autonomous economic entity.

4. In contrast, a concentration of undertakings does not occur in the following two situations:

- a qualified stake held by a bank in a legal entity by virtue of payment of the issue price of shares by a set-off of the bank’s receivables from such legal entity, where such qualified stake is held for the duration of the rescue operation or financial restructuring of such legal entity for a maximum of one year;
- delegation of certain powers of the statutory bodies of undertakings to persons engaged in activities pursuant to special legal regulations, e.g. a liquidator or an insolvency trustee.

5. A concentration of undertakings must be notified to the Czech Competition Authority (and is subject to approval by the Czech Competition Authority), if

- the total net turnover of all undertakings concerned achieved in the last accounting period in the market of the Czech Republic exceeds CZK 1.5 billion and each of at least two of the undertakings concerned achieved in the market of the Czech Republic in the last accounting period a net turnover exceeding CZK 250 million, or
• the net turnover achieved in the last accounting period in the market of the Czech Republic
  − in the case of a merger at least by one of the parties to the merger,
  − in the case of an acquisition of an enterprise by the acquired enterprise or a substantial part thereof,
  − in the case of an acquisition of control by the acquired undertaking, or
  − in the case of a creation of joint venture by at least one of the undertakings establishing a joint venture
  is higher than CZK 1 500 000 000 and at the same time the worldwide net turnover achieved in the last accounting period by another undertaking concerned exceeds CZK 1 500 000 000.

1.1 **Who must notify**

6. A concentration which is in the form of a merger must be notified jointly by all the parties to the merger. In case of acquisition of an enterprise and acquisition of control, it is the acquiring undertaking which must notify. A joint notification by the undertakings establishing a joint venture is required where a concentration takes the form of creation of a joint venture.

1.2 **Suspension of implementation**

7. It is important to note that a concentration of undertakings must not be implemented before the approval by the Czech Competition Authority.

1.3 **Notification of a concentration of undertakings**

8. A concentration notification must contain substantiation, documents certifying the facts decisive for the concentration and the requisites set out in the implementing legal regulation (the Decree of the Czech Competition Authority No. 252/2009 Coll., stipulating details of a concentration notification). The requirements of a concentration notification are:

  • duly and completely filled Form for the approval of a concentration;
  • receipt of administrative fee payment (a concentration notification is subject to an administrative fee that amounts to CZK 100 000);
  • written authorizations granted to the representatives of all notifying parties, if the parties are represented in the concentration approval proceeding,
  • extracts from the Commercial Register or other similar register, concerning all the undertakings concerned;
  • documents establishing the concentration or documents certifying the existence of the concentration;
  • annual reports including the audit of yearly financial statements for the last finished accounting period of all the undertakings concerned;
• consolidated financial statements for the last finished accounting period of all the undertakings concerned;

• the scheme and method of turnover calculation, the amount of which substantiates the submission of a concentration notification; and

• analyses, reports, studies, surveys, and any comparable documents prepared for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to competitive conditions, undertakings (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions.

1.4 Deadlines - procedure

9. The Czech Competition Authority has to decide upon a concentration of undertakings within 30 days from the initiation of proceedings if the concentration does not result in a substantial distortion of competition (approval of a concentration of undertakings in the first phase). In the first phase, however, a concentration may also be cleared subject to the commitments proposed by the notifying parties if the concentration raises competition concerns. If a concentration raises serious concerns as to a significant impediment to competition, the Czech Competition usually launches second phase in-depth investigation. In such a case the Czech Competition Authority must adopt a decision within 5 months from the initiation of proceedings.

10. The above deadlines are suspended if the Czech Competition Authority asks the notifying parties to provide additional information necessary for the assessment of the concentration of undertakings.

1.5 Simplified procedure

11. The notifying undertakings may enjoy benefits of a simplified procedure (short form requiring less information than full form; deadline of 20 days for the Czech Competition Authority to decide upon a case) if:

• none of the undertakings involved is operating in the same relevant market, or their combined share in such a market is below 15%, and at the same time none of the undertakings concerned is operating in the market vertically connected to the relevant market in which another undertaking operates, or their share in every such market is below 25%, or

• the undertaking acquires exclusive control over the joint venture in which it has participated in joint control so far.

1.6 Substantive test

12. Substantive test is used to assess concentrations of undertakings (a significant impediment to competition test) - covers both non-coordinated and coordinated effects that may stem from a concentration.

13. In our jurisdiction, there are no special rules which would apply to cross-border concentrations of undertakings.
2. Specific questions

2.1 Cooperation among competition authorities

14. In our jurisdiction, a model waiver of confidentiality has been introduced. If such a waiver is granted by the undertakings, the Czech Competition Authority may exchange confidential information relating to the particular case of a concentration with other competition authorities (note that only non-confidential information may be exchanged without a waiver).

15. In cases where we asked merging undertakings for a waiver, which was later granted, we discussed with the competition authorities of Slovakia and Austria whether the particular concentrations were also notifiable in these two jurisdictions, as well as the issue of the relevant market definition. Given the fact that none of these concentrations raised competition concerns in any of these jurisdictions, there was no need for a detailed exchange of information.

16. When assessing individual cases of cross-border concentrations of undertakings that fall within the jurisdiction of the Czech Republic, the Czech Competition Authority pursues only the primary goal of its powers in the field of merger control, which is the protection of effective competition on relevant markets. Competition rules of the Czech Republic are silent on the issue whether the Czech Competition Authority may take into consideration foreign interests when assessing a cross-border concentration of undertakings. So far, in our decision-making practice there has not been a case that would require dealing with this issue.

2.1.1 International cooperation

17. The Czech Competition Authority is involved in activities and discussions within the ICN and is, to a large extent, familiar with principles and recommendations set out in its key documents in the field of merger control. Moreover, many of these principles, recommendations and procedures are used by the Czech Competition Authority when assessing concentrations of undertakings.

2.1.2 Regional cooperation

18. The Czech Competition Authority is also a part of regional cooperation within the area of mergers. To illustrate this, the participation of the Czech Competition Authority in the initiative presented at the Marchfeld Competition Forum could be mentioned. This initiative, aiming to strengthen regional cooperation and coordination between European countries (with a focus on Central and Eastern Europe) has resulted in creating a database for cross-border merger cases focusing on mergers notifiable in countries of Central and Eastern Europe (e.g. Czech Republic, Slovakia, Latvia or Bulgaria, but also in Austria and Switzerland).

2.2 Jurisdictional issues (notification, information exchange, enforcement, extra-territoriality)

2.2.1 Suitability of notification turnover thresholds

19. We believe that the current notification turnover thresholds set out in the Competition Act are capable of capturing a huge majority of concentrations of undertakings that could have an impact on relevant markets within the territory of the Czech Republic. To this end, a local nexus has been introduced in 2004 in the Competition Act meaning that as from 2004 only transactions where the parties achieve substantial turnover in the Czech Republic are subject to approval by the Czech Competition Authority.
2.2.2 Relying on actions and decisions taken by foreign competition authorities

20. It has to be pointed out that if a merger meets notification criteria set out in the Competition Act, it must be notified to the Czech Competition Authority, which has no other option than investigate the merger and adopt a decision on the merger.

2.3 Remedies (types, consultation, monitoring, enforcement)

21. In the past, the Czech Competition Authority cooperated with other competition authorities in one case of concentration of undertakings that had raised serious competition concerns which needed to be solved by remedies.

22. It is the merger case of Zentiva/Slovakofarma which took place in the pharmaceutical industry; the Czech Competition Authority and the Slovak Competition Authority contacted each other to discuss on an informal level the relevant market definition, possible impact of this concentration on their respective jurisdictions as well as the issue of suitable remedies to remove the identified competition concerns.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- European Union --

1. Merger control in the European Union

1.1 Cross-jurisdictional cooperation within the European Union

1. Merger control in the European Union (EU) is based on a sophisticated system for inter-jurisdictional co-operation. On the one hand, EU Member States have national legislation for merger control and on the other hand there is a supra-national system for mergers affecting more than one Member State.1 Since the first Merger Regulation was adopted in 1989, EU merger control has evolved into a system which combines a clear and foreseeable allocation of jurisdiction while allowing sufficient flexibility for efficient work sharing between the supra-national level and national jurisdictions.2

2. The key to make such an intricate system work is deciding which jurisdiction should apply to mergers scrutinised in the EU. The primary guiding principle of the EU system is the "one-stop-shop", i.e. each merger should be handled exclusively by one jurisdiction. The allocation of jurisdiction is determined in the Merger Regulation. Mergers with "EU dimension" are examined at supra-national level by the European Commission (the Commission). Mergers that do not have EU dimension are examined by one or several of the national competition authorities (NCAs) within the EU, provided that these mergers are of a sufficient size to fall under national merger rules.

3. Mergers with EU dimension must be notified to the Commission beforehand. Whether or not a particular merger has EU dimension is regulated in the Merger Regulation.3

4. The Merger Regulation's main jurisdictional test stipulates that a merger has EU dimension where:

   • the combined worldwide turnover of all the undertakings concerned exceeds EUR 5,000 million and
   • the aggregate turnover of each of at least two of the of the undertakings concerned exceeds EUR 250 million, unless
   • each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.4

---

1 Council Regulation (EC) No 139/2004 (the Merger Regulation). The Merger Regulation applies to "concentrations". For the purposes of this paper the term "merger" is used.
2 The most important review of the EU merger rules resulted in the adoption of the 2004 Merger Regulation, which replaced Council Regulation (EEC) No 4064/89.
3 Article 1(1), paragraphs 2 and 3 of the Merger Regulation.
4 Article (1)(1), paragraph 2.
5. The main test has three components, each of them designed to target as precisely as possible mergers where the Commission is best-placed to scrutinise a merger. The first threshold should ensure that only mergers of a sufficient size fall under the Merger Regulation. The second threshold aims to avoid that mergers involving small target companies fall within the scope of the Merger Regulation. The so-called "two-thirds rule" works as a corrective mechanism ensuring that a merger having its nexus in one Member State falls within the scope of that Member State's merger rules. In such cases it is presumed that the NCA in the Member State concerned is best-placed to deal with the merger.

6. One problem identified during reviews of the Merger Regulation is multiple filings in different jurisdictions. Certain mergers not sufficiently large to fall under the Merger Regulation but large enough to be caught by national jurisdictions may have to be notified to a number of NCAs. Multiple filings increase the regulatory burden of the merging parties and make the process less transparent, less predictable and more time-consuming.

7. To reduce the number of multiple filings under national jurisdictions, the Merger Regulation includes a subsidiary jurisdictional test. Mergers which do not meet the thresholds of the main test may still have EU dimension where:

- the combined worldwide turnover of all the undertakings concerned exceeds EUR 2,000 million;
- the combined turnover of all the undertakings concerned exceeds EUR 100 million in each of at least three Member States;
- the combined turnover of each of at least two of the undertakings concerned exceeds EUR 25 million in each of the same three Member States, and
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million, unless
- each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.\(^5\)

8. It should be noted that under the EU system, the notification thresholds in the Merger Regulation do not only determine whether a merger is caught by the merger rules as such but also whether a merger will be examined at the supra-national EU level or at national Member State level. The Merger Regulation is therefore a principal instrument for allocation of jurisdiction.

9. In addition to the "one-stop-shop" principle, allocation of jurisdiction is based on the "best-placed" principle, i.e. a merger should be allocated to the jurisdiction best-placed to handle the case. Even under the assumption that the turnover thresholds enumerated above are set at an appropriate level, it must be recognised that allocation of jurisdiction based on the merging parties' turnover does not always capture transactions with cross border impact and "EU relevance". To increase the flexibility of the system, to take full advantage of the "one stop shop" and to increase the possibilities to allocate a merger to the best-placed jurisdiction(s), the Merger Regulation contains rules for referral of cases to and from the Commission. Such referrals can take place either prior to the notification of a merger (pre-notification referrals) or after (post-notification referrals). For transparency reasons and to create consensus about possible referrals, the EU merger rules include an obligation for the Commission and the NCAs to consult each other. Experience so far indicates that in the vast majority of cases the Commission and the NCAs reach agreement when referrals are appropriate.

---

\(^5\) Article 1(1) paragraph 3 of the Merger Regulation.
1.1.1 Pre-notification referral at the request of the notifying parties

10. Prior to formal notification, the notifying parties may request that the examination of a planned merger should be referred from the Commission to a Member State or from a Member State to the Commission.

11. By means of a reasoned submission, the notifying parties may inform the Commission that a merger may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market should be examined – in whole or in part – by that Member State. The Member State referred to in the submission must express its agreement or disagreement with taking over the case within 15 working days. If the Member State in question agrees to take over the case and the Commission agrees with the notifying parties' view about the existence of a distinct national market, the Commission may refer the case to that Member State. The Commission must decide whether or not to refer the case within 25 working days.

12. The notifying parties may inform the Commission by means of a reasoned submission that a planned merger - which does not have a EU dimension and which is capable of being reviewed under national law in at least three Member States - should be examined by the Commission. If at least one of the Member States competent to examine the merger disagrees with the proposed referral, the case may not be referred.

1.1.2 Post-notification referral at the request of the Commission or Member States

13. Planned mergers may be referred from the Commission to the Member State concerned after the formal notification has been filed with the Commission. A Member State may inform the Commission within 15 working days that:

- a merger threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market, or;
- a merger affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the internal market.

14. If the Commission considers that there is such a distinct market and that such a threat exists, it shall either:

- deal with the case itself; or
- refer the whole or part of the case to the NCA so that it may be examined under national competition law.

15. The Commission must decide whether to refer or not refer a case within 35 working days of notification and within 65 days of notification if the Commission has initiated proceedings to go into

---

6 Reasoned submissions must be forwarded to the NCAs "without delay".
7 Article 4(4) of the Merger Regulation.
8 Article 4(5) of the Merger Regulation.
9 All merger notifications filed with the Commission are directly forwarded to the NCAs.
10 Article 9(2) of the Merger Regulation.
11 Article 9(3) of the Merger Regulation.
"second phase" of its investigation. Once a case is referred to the NCA, it shall decide on the case without undue delay and the NCA must inform the notifying parties of the result of its preliminary investigation.\(^{12}\)

16. Moreover, one or more Member States may request the Commission to examine a merger that does not have EU dimension, provided that the merger affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or Member States making the request. The request must be done within 15 working days after notification. Any Member State may join the initial request within 15 working days of being informed of the initial request. The Commission must decide whether or not to take over the case within 25 working days.\(^{13}\)

17. In a report to the Council in 2009, the Commission concluded that the 2004 Merger Regulation contributes to more efficient merger control within the EU.\(^{14}\) While there are possible areas for improvements, the system of "work sharing" between the national authorities and the Commission works well. According to the report, the turnover thresholds are in most cases effective in distinguishing between cases of EU relevance from those with a primarily national focus. The application of the two-thirds rule, has also achieved this objective in the majority of cases. The system for referrals allows the Commission and the NCAs to re-allocate cases in a more efficient manner for the benefit of the authorities and for businesses.

18. The referral system is beneficial also for businesses because it allows them to take full advantage of the "one-stop-shop" assessment and ensures that their cases are handled by the best-placed authority. The "one-stop-shop" assessment contributes to reducing firms’ regulatory burden.

19. Finally, it should be noted that the Commission and NCAs cooperate within the confines of the European Competition Network (ECN). The ECN is a forum for discussion and cooperation between the Commission and the NCAs. The purpose of the ECN is to facilitate an efficient division of work and an effective and consistent application of the EU competition rules.\(^{15}\) For merger cases there are no formal ECN rules for consultation and cooperation, as opposed to anti-trust cases under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Nevertheless, the ECN provides a forum for the Commission and the NCAs to meet and exchange information on a more informal basis also relating to merger issues.

1.2 Cooperation between the European Union and extra-European jurisdictions

20. The ongoing globalisation of the world economy and the ensuing increase in the number of mergers having an impact on competition in several of the world's main markets makes it increasingly important for competition authorities to coordinate merger cases investigated in parallel across jurisdictions. The Commission cooperates with a number of competition authorities outside the EU. To this end, the Commission has entered into bilateral agreements and Memorandums of Understanding for cooperation in competition cases with a number of jurisdictions such as Brazil, Canada, China, Japan, South Korea and the United States. While such codifications of cooperation facilitates provides a

---

\(^{12}\) Article 9(4) of the Merger Regulation.

\(^{13}\) Article 22 of the Merger Regulation.

\(^{14}\) Communication from the Commission to the Council – Report on the functioning of Regulation No 139/2004, 18.06.2009. When preparing the report, the Commission asked stakeholders to submit their views about the Merger Regulation. Businesses, business associations, law firms, lawyer’s associations and representatives of academia submitted their views. NCAs were consulted and provided detailed input for the report.

framework for cooperation, the absence of such arrangements does not prevent the Commission from cooperating with other jurisdictions in merger cases. In the past, the Commission has cooperated with a large number of competition authorities in ongoing merger investigations.

21. While competition authorities can always discuss parallel merger investigations in more general terms, confidentiality issues may sometimes make the exchange of case-specific information more difficult. However, in most cases cooperation between competition authorities simultaneously examining proposed mergers is in the notifying parties' interest because it may avoid delays and divergent outcomes. To allow competition authorities to exchange confidential information related to their respective merger reviews, the notifying parties therefore often agree to waive their confidentiality rights in affected jurisdictions.

22. Cooperation between competition authorities in ongoing merger investigations is mutually beneficial because it allows them to test e.g. market definitions, theories of harm and the feasibility of remedies with their peers in other agencies. Such an exchange of views may be useful not only between mature competition authorities but also between mature authorities and less experienced authorities from jurisdictions with recently adopted merger control regimes. Cooperation facilitates knowledge transfer allowing the less experienced authority to benefit from the mature authority's knowledge and experience of conducting merger investigations.

23. A crucial aspect of proposed mergers being examined by several jurisdictions is the timing of the merger reviews. While it may not be possible – due to divergent rules and notification requirements – to completely synchronise the investigations in different jurisdictions, merger investigations should nevertheless be carried out simultaneously to the extent possible. Experience shows that time-lags – for instance cases where one jurisdiction clears a merger while another has hardly started its review – may have unfortunate effects making the authority still investigating the case susceptible to interference and undue pressure to come to the same conclusion as the authority that already finished its investigation. For this purpose, the Commission regularly advises the merging parties to time their notifications in different jurisdictions with the aim of having decisions adopted as closely as possible to each other time wise.

24. The Commission cooperates most frequently with the federal competition authorities of the United States (the Federal Trade Commission and the Department of Justice). To facilitate this cooperation, an EU-US Merger Working Group published the document "Best Practices on Cooperation in Merger Investigations" in 2002. In the document best practices were established concerning inter alia coordination on timing, collection and evaluation of evidence and remedies.

25. The EU-US experience shows that despite divergent legal frameworks (substantially as well as procedurally), "hands on" cooperation and exchange of views between investigative teams is very fruitful, in particular as regards market definition and - in later stages of investigations - remedy design. Coordination in the latter respect is becoming increasingly important as firms internationalise and production facilities cater to demand across the world. For example, the sale of a production facility in the EU to remedy a competitive concern in the EU may have repercussions also in the US and vice versa.

26. In 2010, the Commission cooperated with competition authorities outside the EU in a number of merger cases. Notable examples are Microsoft's acquisition of Yahoo's search business (cooperation with the United States), Stanley Works' acquisition of Black & Decker (in this case the Commission liaised with competition authorities in four jurisdictions, namely Canada, Chile, Mexico and the United States). Cooperation with the Competition Bureau of Canada took place in the Teva/Ratiopharm merger and the Commission coordinated its review of Nokia Siemens Networks' acquisition of Motorola's mobile network business with the authorities in Switzerland and the United States.
2. Implications for developing and emerging economies

27. The EU system for cross-jurisdictional cooperation in merger control may serve as an example for other regions in the world considering setting up supra-national merger control regimes. However, it should be noted that the EU system does not exist in isolation but goes hand in hand with far-reaching economic integration, in particular the rules underpinning the EU internal market. Moreover, the EU has a longstanding supra-national judiciary to settle merger cases. It ought to also be remembered that the Member States negotiated for almost 20 years before the first Merger Regulation was adopted in 1989. In subsequent years the EU merger regime has been revised and fine-tuned (in particular as regards jurisdictional and cooperation issues as described above).

28. The "one-stop-shop" is primordial to any supra-national system for merger review. It is also important that the parameters defining whether or not a merger is subject to *ex ante* regulatory review are based on objective, transparent and foreseeable criteria.

29. Setting appropriate notification thresholds is a difficult exercise. Setting appropriate notification thresholds is a difficult exercise. In merger regimes with supra-national and national reviews such as the EU, the thresholds ought to be designed in a manner which allocates mergers to the jurisdiction where the nexus of the transaction is situated. In a "single-jurisdiction" setting, notification thresholds should ideally be set in such a manner that all mergers with potentially adverse effects on competition must be notified to the regulator while all "harmless" mergers fall outside the scope of the merger rules. Designing such a perfect system is impossible in practice. For practical reasons, notification thresholds only serve as a rather crude proxy for identifying potentially harmful mergers and making them subject to merger review. Setting notification thresholds also has strong resource implications. If notification thresholds are set at a sufficiently low level, all anti-competitive mergers would be "caught" by the merger rules but the competition authority would risk being overwhelmed with harmless merger notifications which must be processed as well. Investigating and clearing large numbers of mergers having no adverse effect on competition is extremely resource-consuming. These activities may prevent the regulator from allocating sufficient resources to anti-trust enforcement. Threshold design is therefore a difficult balancing act where the lawmaker aims to "catch" as many potentially anti-competitive mergers as possible while not overburdening the regulator with notifications of mergers which do not affect competition.

30. Basing the obligation to notify a merger on the merging parties' market shares in markets affected by the transaction is a possible alternative to notification based on turnover. At first sight, using the merging parties' market shares seems like an attractive proposition since this measure would allow the regulator to easily identify mergers leading to problematic market shares which merit closer scrutiny. However, a notification system based on market shares is problematic in practice because the obligation to notify would not be based on objective and verifiable criteria. The definition of the relevant market (on which market shares are calculated) is not always a straightforward exercise. In many industries defining the relevant market - in particular the relevant product market – involves complex economic analysis. In most cases, alternative market definitions are (more or less) feasible and may be subject to discussion. Leaving it to the merging parties to define the relevant markets (and thus the market shares) gives the parties an opportunity to circumvent regulatory review by defining artificially wide markets where market shares would seem unproblematic. Due to the ambiguities of market definition also merging parties that wish to fulfil their regulatory obligations find it difficult to determine whether their merger should be notified or not. Using market shares as notification thresholds therefore leads to uncertainty whether or not a proposed merger is subject to merger review and may lead to protracted discussions between the regulator and the merging parties. Merger notification based on market shares is therefore somewhat arbitrary, is likely to be resource-consuming and risks leading to delays.

32. Basing the obligation to notify on the merging parties' annual turnover is admittedly a rather blunt instrument for measuring the potential impact of a proposed merger. The main advantage of this approach is the fact that the thresholds are based on verifiable and objective data (audited accounts), which reduces the likelihood of disputes whether or not a merger is subject to merger review. The logic behind this type of notification threshold is the presumption that mergers involving larger companies are more likely to have an impact on competition in affected markets and therefore also more likely to adversely affect competition. While this is far from true in all cases, it nevertheless serves as a useful "rule of thumb" allowing the regulator to target mergers appropriate for review.

33. Which type of turnover to be included in the thresholds must be specified in detail. While the Commission has opted to use worldwide turnover for its first threshold (the combined turnover of all companies concerned), smaller jurisdictions may possibly consider whether it would be more appropriate to use national turnover for this threshold because it may allow "catching" to a greater degree those transactions that have their nexus in the country in question.

34. Turnover threshold levels should not only be determined in relation to the size of a country's economy, the sectors with particular preponderance in that economy and the size of its firms, but also in relation to how large proportion of planned mergers the lawmaker wishes to be "caught" by the merger rules. Setting the turnover thresholds too low means that the competition authority must examine a large number of mergers with minimal impact on competition. Setting the turnover thresholds too high would mean that some mergers that have an adverse impact on competition risk "slipping through the net".

35. One way of alleviating this dilemma – i.e. setting the turnover thresholds low enough to "catch" most potentially problematic mergers while avoiding to spend a disproportionate amount of resources on processing non-problematic mergers – is to introduce a simplified notification procedure for mergers that are above the merger thresholds but unlikely to cause competitive problems. Under the EU system, mergers fulfilling certain additional criteria may benefit from a simplified notification procedure. 17 In such cases, the Commission's investigation is very limited and the Commission publishes a "short form" decision of less than one page.

36. When establishing a new competition regime it may be advisable to err on the low side as regards turnover threshold values. Although this approach may increase firms' regulatory burden, it is certain that the competition authority will be able to review most potentially anticompetitive mergers. Once the competition authority gains experience and is able to find the right policy balance, the turnover thresholds may be adjusted upwards to a more appropriate level, thereby reducing regulatory costs. For political reasons, it may also be easier for stakeholders to accept reducing the scope of the regulation by increasing the thresholds rather than lowering them.

---

17 Merging parties may submit a short form notification in the following cases: (i.) for joint ventures (JVs) where the turnover of the JV and/or the turnover of the contributed activities are less than EUR 100 million in the European Economic Area (EEA) and the total value of the assets transferred to the JV is less than EUR 100 million in the EEA.; (ii.) when none of the merging parties are engaged in the same relevant markets (no horizontal overlap) or engaged in markets upstream or downstream from markets where another merging party is active (no vertical relationship); (iii.) when the merging parties are engaged in the same relevant market but their combined market share is less than 15% and/or the merging parties are engaged in markets upstream or downstream of each other but none of their individual or combined market shares at either level are 25% or more and (iv.) when a party acquires sole control over a company over which it already has joint control. Anticipating the potential arbitrariness of market share thresholds discussed above, the Regulation states that the Commission may require a full form notification inter alia in cases where it is difficult to define the relevant markets (e.g. in emerging markets or markets where there is no established case practice). [Annex II to Commission Regulation (EC) No 802/2004 of 21 April 2004, OJ L 133, 30.4.2004, p.1.]
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Finland --

1. General points

1. The Finnish Competition Authority (FCA) is responsible for competition law enforcement in Finland. The FCA investigates competition restraints and controls mergers.1 The other main bodies responsible for competition law enforcement are the Market Court and the Supreme Administrative Court.

2. The Competition Act entered into force in September 1992 and has subsequently been amended. Merger control provisions were included in the Competition Act in 1998. Finland is currently in the process of amending the Competition Act. In 2007, the Ministry of Employment and the Economy appointed a working group to assess the need to amend the Competition Act. In 2009, the group submitted its report proposing new competition legislation. The Government Bill was brought before the Parliament in 2010. If the law proposal is approved, the legislation will become effective in 2011.

3. The above-mentioned proposals also foresee some changes in merger control. One proposal includes a change from the currently used dominance test to the SIEC test. Accordingly, intervening in a merger would no longer require the establishment or strengthening of dominance. A merger could be prohibited or the FCA could attach conditions on its implementation if it significantly impedes effective competition in Finland. Applying the same test as the European Commission would facilitate case allocation and cooperation among the authorities. Further proposals include the elimination of the deadline set for compulsory notifications and the possibility to extend processing time limits.

4. A concentration shall be notified to the FCA if the combined aggregate worldwide turnover of the parties exceeds EUR 350 million and the turnover of a minimum of two parties derived from Finland exceeds EUR 20 million. Notification is mandatory and shall be made by using a Notification Form.2 Information required in the Notification Form is similar to that requested by the European Commission in the Form CO. The FCA will accept the simplified notification when companies, to which turnover derives from Finland, set up a joint venture or obtain joint control in a company which has no connection to the Finnish markets. The FCA does not impose fees for filing of notifications.

5. The concentration shall not be implemented prior to the FCA’s decision in the matter. The primary method to eliminate any harmful effects of a merger is to impose conditions upon it. If harmful effects cannot be addressed by conditions, the FCA shall make a proposal to the Market Court to prohibit the merger.

---

1 Information about the FCA and its activities is available on the FCA’s web pages at www.kilpailuvirasto.fi/english. The web pages contain, for example, the English press releases of all the major cases of international interest, an English version of the FCA's Yearbook and the brochure entitled “Efficiency through Competition”, which also provides information about the FCA's tasks and activities.

2 Decision by the Ministry of Trade and Industry (currently Ministry of Employment and Industry) on the Obligation to Notify a Concentration.
6. The provisions on merger control in the Competition Act as well as the procedures of the FCA are applied in a uniform and objective manner, regardless of the nationality of the parties to the merger. The same standards apply to both Finnish and foreign undertakings.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

2.1.1 Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

7. There have not been any instances of conflict.

2.1.2 Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

8. The FCA has a cooperation agreement with the Russian Federal Antimonopoly Service (FAS). The concrete form of the cooperation is the reciprocal visit of officers.

2.1.3 If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?

9. The Competition Act is silent about foreign interests. Informal contacts, however, are common between the competition authorities and ensure non-conflicting outcomes and consistent remedies.

2.1.4 Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?

10. The FCA is actively involved in the work and deliberation of international organisations. The FCA participates in the work of the OECD Competition Committee and its subcommittees Working Party 2 and Working Party 3. The FCA also participates in the work of the ICN and its various working groups, such as Merger Working Group.

11. With regard to the implementation of recommendations by the these organisations, the ICN Recommended Practices for Merger Notification and Review Procedures led to the reassessment of the nexus when the Competition Act was amended in 2004. The work products of the OECD and ICN are also used by case handlers in the course of merger investigation and in legislative procedure as background information.

12. The FCA is also actively involved in the European Competition Authorities (ECA) network. The cooperation in the ECA e.g. consists of the exchange of information and the experience between the competition authorities. When an agency part of the network receives a notification of a merger which exceeds the notification threshold in several ECA countries, it conveys the information on the merger and the contact information of the relevant case-handler(s) to the other members. The case-handlers in the different countries may then exchange non-confidential information on the case with each other. The exchange of confidential information is only possible if the national and EU-provisions allow it.
13. The FCA also receives information about mergers which exceed notification thresholds in other jurisdictions in the Notification Form.

2.1.5 Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

14. The FCA does not belong to any regional organisation in the field of competition law. The FCA actively participates in cooperation between other Nordic competition authorities. The cooperation includes an annual meeting. Finland, however, is not a party to the Nordic cooperation agreement between Denmark, Iceland, Norway and Sweden which allows the exchange of confidential information between the respective competition authorities.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extraterritoriality)

2.2.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

15. The FCA considers that the current notification thresholds are appropriate to catch mergers which have an impact in Finland. In addition to the thresholds that concern the combined aggregate worldwide turnover, the turnover of a minimum of two of the parties derived from Finland must exceed EUR 20 million.

2.2.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

16. The FCA has requested information from parties involved in cross-border mergers who are located outside Finland. The FCA has not encountered any major problems in obtaining the information. Foreign parties to a merger usually use a legal representative who is established in Finland and through whom the requests for information are in practice submitted.

17. The case-handlers of the FCA also regularly exchange views on pending merger cases with other competition authorities reviewing the same merger. The exchanged views consist of the views on market definition and general views of the market positions of the merging parties. In general, without permission from the parties, the FCA can only exchange non-confidential information. This concerns the exchange of information between the FCA and the EU Member States' competition authorities as well as between the FCA and other competition authorities. The confidential information between the Commission and the EU Member States' national authorities will be exchanged according to Council Regulation No 139/2004.

18. In one case, the FCA and another national competition authority exchanged Notification Forms. Before the exchange, all confidential information was deleted from the Notification Forms. The exchange provided both authorities e.g. with information about the scope of the markets subject to notification obligations.
2.2.3 To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

19. The FCA exchanges information about the current phase of the proceedings and the planned next steps with other competition authorities. The FCA is thus aware of actions taken by other competition authorities. The exchange of information may also concern the public versions of the draft remedies which the competition authority will market test. The FCA considers that these contacts have been sufficient to ensure non-conflicting outcomes and consistent remedies.

20. The FCA may also verify the parties' claims about the competitive conditions with another competition authority who investigates the same merger. In one case, discussions with another competition authority revealed that the parties' claims about the similarities of the competitive conditions in different geographic markets were not accurate. The fact that the competitive conditions were different affected the design of remedies in Finland.

2.2.4 Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

21. Political intervention is not possible in the area of merger control. This concerns both national and cross-border mergers.

2.2.5 Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

22. The Competition Act does not provide for non-competition considerations.

2.2.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

23. The FCA considers that cross-border mergers do not provide any challenges that are unique to the Finnish merger control. The potential challenges of cross-border mergers, i.e. the timing of notifications and avoiding conflicting outcomes and inconsistent remedies, are common to all jurisdictions.

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

24. The FCA has imposed remedies on cross-border mergers. The types of remedies are similar in national and cross-border mergers and have consisted, for example, of divestments and supply or sales terms.

2.3.2 If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.

25. The FCA favours structural remedies. However, in some cases the FCA has also applied behavioural remedies. Behavioural remedies have concerned, for example, sales terms.
26. In 2008, the FCA conditionally approved a transaction in which the television company owned by the Swedish Bonnier media group acquired control in C More Group AB, a company that offers pay TV channels under the Canal+ brand. The competition concerns related to the pay TV services market. The remedies e.g. consisted of the removal of restrictions on the separate sales of certain channels and the commitment to sell certain broadcasting rights to competitors. The aim of the remedies was to secure a versatile consumer supply and the possibilities of other companies to pose a competitive constraint on the merged entity.

27. The FCA has also applied behavioural remedies in two earlier cross-border mergers as follows.

28. In 1999, the FCA conditionally approved a transaction in which the Danish Danisco A/S acquired majority control in Cultor. Cultor is Finland's and Danisco Denmark's and Sweden's sole sugar producer. Although Danisco had not previously operated in the Finnish sugar market, it was Cultor’s significant potential competitor. The merger would have strengthened the monopoly in the Finnish sugar market. The remedies related to the non-competition clauses between Cultor and Lännen Tehtaat, which the companies had set while combining their sugar production in 1990. Danisco committed to remove the provisions, which prevented Lännen Tehtaat from purchasing sugar from other parties than Cultor. The aim of the remedies was to increase potential import competition.

29. In 1999, the FCA conditionally approved a transaction where the American York International Corporation acquired the stock capital of the Danish Sabroe A/S. The merger would have strengthened Sabroe's leading position in the industrial refrigeration market. As a result of the merger, the three commonest ammonia compression brands would have been owned by the merged entity. York committed to use its control in Sabroe Finland e.g. to elicit Sabroe Finland to sell products of the York Group to all third contractors operating in Finland on non-discriminating terms. The aim of the remedies was to secure the availability of the commonest ammonia compressors in Finland and their spare parts to third contractors.

2.3.3 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

30. The FCA has encountered some difficulties in the implementation of remedies in cross-border mergers. In one case where a subsequent merger occurred, the acquiring company in the second merger found that due to certain changes in the distribution channels the conditions imposed on the previous owner were no longer valid and refused to implement them accordingly. The case is pending at the FCA.

2.3.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

31. The FCA usually applies a trustee to monitor the implementation of remedies. The appointment of trustee has not required assistance from other competition authorities.

2.3.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

32. The FCA has discussed, for example, the types of appropriate remedies with other competition authorities. The discussions have concerned remedies proposed to the FCA and/or remedies proposed to other competition authorities. So far, the FCA has not designed any common remedy package with other competition authorities.
33. In one case, the notifying party sent a remedy proposal already sent to the FCA to another competition authority who was reviewing the same merger. The competition authorities discussed the remedies but as the other agency did not impose remedies there was no need to design a common remedy package.

34. In one case, the remedies proposed to another competition authority provided the FCA with further assurance that the merger would not result in competition concerns. The merger, which was approved by the FCA without conditions, was subject to conditions in another jurisdiction. The FCA approved the merger mainly due to the fact that the relevant geographic markets were wider than national, thus enabling the FCA to conclude that high market shares in Finland did not reflect the market position of the merged entity in the wider geographic markets.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Japan --

1. Focus of the regulations against business combinations in Japan

1. The Antimonopoly Act (hereinafter referred to as the “AMA”) prohibits business combinations such as shareholdings, interlocking officers, mergers, splits, joint share transfers, acceptance of assignment of business, etc., if the effects of such business combinations may be substantially to restrain competition in any particular field of trade.

1.1 Notification system and its thresholds

2. The AMA prescribes a prior notification system against business combinations such as share acquisitions and mergers, etc. Accordingly, the AMA sets the thresholds for notification such as follows: share acquisitions should be notified when the total amount of domestic sales of the share acquiring company as coupled with the domestic sales of companies, etc., other than the said company in a combined group of companies to which the acquiring company belongs exceeds 20 billion JPY in case of the total amount of domestic sales of a share issuing company and its subsidiaries exceeds 5 billion JPY. (See ICN Merger Template’ 4-A for details).

3. No filing fee is charged for the notification.

1.2 Substantive test

4. As the “substantive test” for merger review, any business combinations such as mergers, shareholdings, or other transactions are prohibited if “the effect may be substantially to restrain competition in a particular field of trade.” [Article 10, 13, 14, 15, 15-2, 15-3 and 16 of the AMA]

5. The Japan Fair Trade Commission (JFTC) has published the “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination” (hereinafter referred to as the “Merger Guidelines”). The Merger Guidelines prescribe, upon determination of any particular field of trade, as follows: “determined, in principle, in terms of substitutability for users” and “when necessary, substitutability for suppliers is also considered.” In addition, when it comes to the interpretation of the geographical range of the scope of a particular field of trade, the Merger Guidelines also prescribe as follows: “If users inside and outside a territory usually purchase a certain product irrespective of whether the geographic location of suppliers is inside or outside the territory…In this situation, the geographic range (of the scope of a particular field of trade) is defined as crossing national borders.”

---

3. An example of the case where a geographic range of a particular field of trade was defined as crossing national borders is “Establishment of joint venture for iron ore production by BHP Billiton and Rio Tinto.” (A summary of this case is explained in our contribution).
6. When it comes to the interpretation of “the effect may be substantially to restrain competition,” the Merger Guidelines prescribe as follows: “if the market structure is altered in a non-competitive way by the business combination, and if conditions are likely to emerge that would allow the company a certain latitude to manipulate price, quality, volume, and other conditions by acting unilaterally or coordinately with other companies.”

2. Review of notification system for business combination to ensure international consistency

7. Before the amendments to the AMA in 2009 (effective in January 2010), unlike merger regulations in major foreign countries, share acquisitions were only notified ex-post in Japan. This had impeded international cooperation, due to the differences in timing for notification between Japan and other countries, although cooperation in merger investigations and, as a result, coordination on potential competitive concerns among several competition authorities should bring merits for both competition authorities and the companies subject to the review on business combination, with the developments of globalization of the economy and the increase of the cases where several competition authorities investigate the same business combination simultaneously. Also, there existed the risk that the JFTC would impose some sort of cease and desist orders against the parties after other competition authorities had completed the examination of the business combination. For these reasons, a prior notification system similar to those for other business combinations such as mergers, etc., was introduced regarding share acquisitions through the amendments to the AMA in 2009.

8. In addition, since the notification thresholds for foreign companies were different from those applied to domestic companies in the system before the amendment of the AMA in 2009, there were some cases where the business combinations concerning foreign companies were not subject to notification, etc., although they should have been notified in light of their effects on the market in Japan. To address this problem, the same notification thresholds as applied to domestic companies have been applied to foreign companies since the amendments to the AMA in 2009.

9. Note: Other than the revisions described above, revisions, including simplification of percentage thresholds regarding voting rights with regard to acquisitions of shares, a raise in the amount of notification thresholds, etc., were also implemented pursuant to the amendments.

3. Cooperation in merger reviews with foreign competition authorities

3.1 Cooperation agreements or the like in the area of competition law

10. With regard to cooperation agreements related to the competition law, Japan has concluded bilateral agreements, such as the “Agreement between the Government of Japan and the Government of the United States of America concerning cooperation on anti-competitive activities (effective in 1999),” “Agreement between the Government of Japan and the Government of the European Community concerning cooperation on anti-competitive activities (effective in 2003)” and “Agreement between the Government of Japan and the Government of Canada concerning cooperation on anti-competitive activities (effective in 2005).” In addition, among the bilateral economic partnership agreements already signed and in force in Japan, the agreements with Singapore, Mexico, Malaysia, the Philippines, Chile, Thailand, Indonesia, Vietnam, and Switzerland contain chapters prescribing cooperation in the area of competition law. In these antimonopoly cooperation agreements and the chapters regarding competition in the economic partnership agreements, notification, cooperation in enforcement, coordination in enforcement, request of enforcement activity, consideration of important interests for the government of the other country, and so on are prescribed as their specific contents of cooperation applied to cases including business combinations. The JFTC, the competition authority in Japan, has actively engaged in cooperation with foreign competition authorities with regard to business combination cases across borders, based on the
antimonopoly cooperation agreements and the chapters regarding competition in the economic partnership agreements with the above-mentioned countries and based on the 1995 Council Recommendation of the OECD with the OECD member countries.

3.2 Examples of cooperation with foreign competition authorities in merger review

11. The chart below shows the recent cases in which the JFTC conducted reviews on business combinations in cooperation with the other competition authorities.

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Cooperating agencies</th>
<th>Results of reviews</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>European Commission</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>European Commission</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>Share Acquisition of Sanyo Electric Co., Ltd., by Panasonic Corporation.</td>
<td>US Federal Trade Commission</td>
<td>Accepted on the condition of transfer of business</td>
</tr>
<tr>
<td></td>
<td></td>
<td>European Commission</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>Share Acquisition of Varian, Inc., by Agilent Technologies, Inc.^5</td>
<td>US Federal Trade Commission</td>
<td>Accepted on the condition of transfer of business</td>
</tr>
<tr>
<td>2010</td>
<td>Joint venture establishment between BHP Billiton and Rio Tinto</td>
<td>Australian Competition and Consumer Commission</td>
<td>The parties announced they would abandon the plan of the joint venture</td>
</tr>
<tr>
<td></td>
<td>for producing iron ore[^6]</td>
<td>European Commission</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>German Federal Cartel Office</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Korea Fair Trade Commission</td>
<td></td>
</tr>
</tbody>
</table>

12. The outline of the share acquisition of Varian, Inc., by Agilent Technologies and the outline of the establishment of a joint venture for producing iron ore by BHP Billiton and Rio Tinto are explained as follows.

3.2.1 Share acquisition of Varian, Inc., by Agilent Technologies

13. Pursuant to the amendments to the AMA in 2009, a prior-notification system similar to that for other business combinations such as mergers, etc., was introduced regarding share acquisitions and the same notification thresholds as applied to domestic companies in Japan were to be applied to foreign companies. Against this background, this case is where a prior notification regarding a share acquisition was submitted to the JFTC based on the amended AMA and where the JFTC carried out a review of the business combination by exchanging information with the US Federal Trade Commission (USFTC).

- Outline of the case

In this case, Agilent Technologies, Inc., which manufactures and distributes analytical instruments, etc.,[^7], planned to acquire 100% ownership of Varian, Inc., which also operates a similar business. Both companies have their HQs in the US, operating sales of analytical instruments all over the world, and they also sell their products in Japan through their Japanese affiliates, etc.

[^7]: Analytical instruments are the machines, apparatuses, or devices which qualitatively and quantitatively measure various factors of substance such as composition, nature, structure, state, etc., mainly used in industries such as oil, gas, pharmaceutical, food, semi-conductor, environment, etc.
• Conclusion of the JFTC

The JFTC analyzed the effects of the share acquisition on the analytical instruments market in Japan by investigating actual statuses of distribution, new entries, competing goods, trade with users for 3 competitive products such as Micro/Portable GC\(^8\), etc., because the share acquisition might have a significant impact on the competition of these products. This case was also subject to similar investigations by other competition authorities such as the USFTC and the European Commission (EC).

Regarding the particular fields of trade which the JFTC mainly investigated, concerns of serious harm to the competition, etc., were raised during the reviews by the USFTC and the EC. In response, the companies to the business combination proposed a remedy to the USFTC and the EC where they would transfer the business for these products to a third party which was expected to be a competitor to the concerned companies after the transfer. This remedy was also proposed to the JFTC and the JFTC concluded, based on the proposed remedy, that the share acquisition in this case would not substantially restrain competition.

3.2.2 Establishment of a joint venture for iron ore production by BHP Billiton and Rio Tinto

14. The JFTC, upon receiving a request for prior consultation from BHP Billiton and Rio Tinto (“the parties”), which operate businesses involving mining and sales of iron ore etc., on January 20, 2010, had undertaken a review of the proposed joint venture between the parties for iron ore production in west Australia.

15. In reviewing the business combination case, the JTFC received the submission of materials, etc., from the parties and conducted questionnaire surveys, etc., for overseas competitors to the parties in question and for domestic and overseas users (steel manufacturers) or the like. In addition to the JFTC, the Australian Competition and Consumer Commission, the European Commission, the German Federal Cartel Office, and the Korea Fair Trade Commission conducted reviews on the case respectively. The JFTC proceeded with its prior consultation review by exchanging information with these competition authorities.

16. On September 27, 2010, the JFTC made a notice of its concerns to the parties by noting that the proposed joint venture would substantially restrain competition in the field of the production and sale of (lumps and fines of) iron ores in the worldwide seaborne market. Since BHP Billiton and Rio Tinto made a press release on October 18, 2010, indicating they would abandon the proposed joint venture, the JFTC closed its prior consultation review on the proposed joint venture on the same day.

---

\(^8\) GC refers to gas chromatograph, which is a device that separates volatile specimens into individual components for analyzing the existence of specific substances.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Korea --

1. Overview of merger control regime

1. The Monopoly Regulation and Fair Trade Act (MRFTA), Korea’s competition law, provides in Article 7 (1) that anyone shall not conduct a merger that substantially lessen competition in a particular business area. Also, Article 12 of the MRFTA stipulates that a merger transaction where turnover or total asset of merging firms falls under certain criteria should be notified to the Korea Fair Trade Commission. In the case where a company that is required to make notification does not notify, fails to notify within the designated time or makes a false notification, it shall face administrative fines under Article 69-2 of the MRFTA. And there is no need to pay notification fee when making notification.

2. When one of the merging firms has total asset or turnover of KRW 200 billion (about $200 million) or more and the other company’s total asset or turnover is KRW 20 billion (about $20 million) or more, the acquiring company is required to notify the KFTC of the transaction. When both of the merging firms are based in foreign countries, notification on the transaction is required to be made only when each company’s turnover in the Korean market is KRW 20 billion ($ 20 million) or more.

3. Merger notification can be made either before or after a merger deal depending on the size of merging companies. If one of the merging firms is classified into a large company, i.e. a company having total asset or turnover of KRW 2 trillion (about $2 billion), the merging parties are subject to pre-merger notification and shall not complete the deal before the KFTC’s review is finished. When neither of the merging firms is a large company, the merger can be notified after the transaction is completed.

2. Cooperation with other competition authorities


5. However, there have not been many cases so far where the KFTC sought cooperation based on those bilateral agreements in the review process of a cross-border merger. But it has actively notified other competition authorities on its merger enforcement based on the agreements. The cooperation agreements commit the signatories to give notice to each other when they prolong a review period or produce an Examination Report on a merger that is relevant to their counterparts’ jurisdiction. Accordingly, when a foreign company is under a merger review by the KFTC or a Korean company’s merger goes through a review by a foreign authority, and the transaction raises anticompetitive concerns, the authority reviewing the transaction informs the other on the fact. Such cooperation based on the bilateral agreements was shown when the KFTC handled a merger between Rio Tinto and BHP Billiton which intended to establish joint venture for co-production of iron ore in the Western Australia. The KFTC gave notice to competition
authorities of Australia and EU immediately after delivering the merging firms an Examination Report\(^1\) which concluded that the proposed deal would cause anticompetitive effect.

6. Competition agencies give notice on their merger enforcement even where there is no bilateral agreement in place. Particularly, OECD member countries have been actively giving such enforcement notice following the 1995 OECD recommendation\(^2\). Competition authorities of the U.S. and EU inform other OECD member countries in many cases when their law enforcement including merger review targets companies within the jurisdiction of those countries. In line with this, the KFTC also has received notice from them. For example, when the EU DG Comp announced its initiation of in-depth review on acquisition of Aker Yards by STX, a Korean shipbuilding company in December 2007, the KFTC received notification by the EU DG Comp at the same time.

7. When it comes to a merger case which is under concurrent review by several competition authorities, the KFTC has rarely engaged in substantial cooperation with its foreign counterparts in the manner of, for example, exchanging opinions on potential anticompetitive effect of the deal. Exceptionally for the Rio Tinto-BHP Billiton joint venture, however, it actively shared information and opinions throughout the review process through e-mails and face-to-face meetings with other competition authorities including the Japan Fair Trade Commission (JFTC) and the EU DG Comp.

8. The KFTC actively participates in discussion on merger regulations of international organizations like OECD and ICN with strong commitment to following best practices or recommendations developed as a result of the discussion. For instance, the KFTC introduced local nexus thresholds in 2003 based on the ICN Recommended Practices for Merger Notification Procedures\(^3\), under which a merger between foreign companies was required to be notified when each company’s turnover in the Korean market was KRW 3 billion ($3 million) or more. The threshold was revised upward to KRW 20 billion ($20 million) or more to satisfy materiality requirement imposed by the ICN Recommended Practices. In 2009, it once again tried to harmonize its merger control regime with the ICN recommended practices by abolishing pre-merger notification time limit\(^4\). As a result, pre-merger notification, which had to be made within 30 days after the date of contract, can now be made at any time before the deal is completed.

3. Experience of reviewing cross-border mergers

9. Since 2004, the KFTC has been reviewing at least 50 mergers between foreign companies every year. In several cases, the KFTC imposed administrative fines on foreign companies for failing to meet the notification requirements. However there have been just a few cases where it has imposed remedies for cross-border mergers on the grounds of potential anticompetitive effect. Here are two merger transactions of foreign companies on which the KFTC practically imposed remedies.

---

\(^1\) According to the Regulation on Operation of KFTC Meetings and Case-handling Procedures, an Examiner produces an Examination Report based on results of an investigation into a case. Once the Examination Report is submitted to the Committee, the commissioners make a final decision through deliberation.

\(^2\) Recommendation of the Council of the OECD Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, as revised July 1995

\(^3\) Section 1-B of the ICN Recommended Practices for Merger Notification Procedures states that "merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification."

\(^4\) ICN Recommended Practices for Merger Notification Procedures Section III-B states that "jurisdictions should not impose deadlines for pre-merger notification."
10. In 2007, the KFTC conducted a review on Owens Corning’s acquisition of Saint-Gobain Vetrotex glass fiber reinforcements business (the U.S and French companies, respectively) and ordered the target company to divest its Korean production facilities of glass fiber reinforcements. As in this case, where production facility operates within the jurisdiction of a competition agency and the relevant geographic market is clearly defined to include the domestic market, there is little need to cooperate or coordinate review results with other competition authorities in the course of the review process. As both of the merging parties had production facilities in the Korean market, the KFTC was able to receive necessary documents or secure compliance with the imposed remedies without any particular difficulties.

11. But the BHP Billiton-Rio Tinto merger case reviewed by the KFTC in 2010 was different. The two companies entered into an agreement to set up a joint venture to combine their Western Australian iron ore operations. The problem here was that neither of the merging firms had a sales branch or assets in Korea. In this situation, even if the KFTC decides that the concerned transaction would cause anticompetitive effect, it would not be easy to draw up effective remedies or ensure implementation of the imposed remedies. To resolve this problem, the KFTC engaged in close coordination with competition authorities in other jurisdictions like Japan and EU which shared similar interests. The KFTC actively exchanged opinions with them through e-mails and, when necessary, face-to-face meetings. During the process, the KFTC realized that other competition officials had similar views on the proposed transaction. Based on the strong cooperation with its counterparts, the KFTC produced an Examination Report which concluded that the proposed joint venture would significantly lessen competition in the global market for seaborne iron ore, and served it to the merging parties on October 1, 2010. As in this case, where production facility operates within the jurisdiction of a competition agency and the relevant geographic market is clearly defined to include the domestic market, there is little need to cooperate or coordinate review results with other competition authorities in the course of the review process. As both of the merging parties had production facilities in the Korean market, the KFTC was able to receive necessary documents or secure compliance with the imposed remedies without any particular difficulties.

12. When reviewing an M&A of foreign companies which have no sales office in the domestic market, obtaining documents from merging firms or collecting opinions of interested parties is often found to be difficult. In the review on the BHP Billiton-Rio Tinto merger, the KFTC experienced such difficulties in several occasions, but the review proceeded without serious disruption as a whole, since the companies hired a Korean law firm as their legal representative and offered full cooperation by submitting necessary documents throughout the process. The KFTC requested other iron ore suppliers and buyers to present opinions on the proposed joint venture, considering that the deal would have far-reaching impact on the global market. As the request was based entirely on voluntary cooperation of those companies, collecting their opinions was not an easy task. Many of the companies responded to the request and sent opinions, but, for some, it took a very long time to present opinions, and some did not even respond at all.

4. Challenges for developing and emerging economies

13. The KFTC has 30-year-history of M&A enforcement, but it was not until the late 1990s that it started to control anticompetitive M&As actively. In particular, it has been just a few years since it conducted review on M&As of foreign companies in earnest which affect the domestic market. The KFTC will strengthen enforcement capacity for cross-border M&As which have impact on domestic market, and ensure effectiveness of law enforcement by increasing the number of staffs with enhanced M&A enforcement skills and expanding cooperation with foreign competition agencies down the road.

---

5 However, in 2008, as the merging firm failed to divest the production facility, the KFTC imposed behavioral remedies instead.

6 The JFTC expressed concerns on potential anticompetitive effect and requested the merging companies to submit plans to address potential anti-competitiveness at a similar time to the KFTC. And after the mid October, it was known through media coverage that the EC DG Comp was preparing a Statement of Objection for the transaction.
14. Review of global M&A cases requires more resources than domestic cases. The KFTC has yet to secure abundant M&A enforcement experience and human resources specialized in international M&A cases. It is believed that most developing countries and young authorities are currently experiencing or will encounter such problems down the road. It is highly likely, therefore, that these countries cannot adequately control international M&As that adversely affect the domestic markets. As for now, only a few large jurisdictions like U.S. or EU have full control over large scale international M&As. However, because such large competition authorities tend to impose remedies focused on anticompetitive effect on their own domestic markets, adverse impact developing countries might suffer is not adequately controlled.

15. Nevertheless, each authority’s separate effort to strengthen its own cross-border merger control cannot be a good solution. Such way is also unrealistic in that it takes a very long time for all the young authorities to individually enhance their capacity to the level required for international M&A enforcement. If all the competition authorities try to control international M&As, it could create a problem of excessive enforcement. In this sense, a better solution would be encouraging competition authorities of developing economies to actively participate in international organizations including the GFC and the ICN so that they can improve their enforcement capacity based on technical support provided by advanced authorities.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Lithuania --

1. General points

1. The first legislation establishing merger control in Lithuania was the 1992 Law on Competition. By the amendment of 15 of April 2004, which entered into force on 1 May 2004, the Law on Competition has brought the merger regime, found in section III (Articles 10 to 15), closer to the EC model. A more detailed regulation of concentrations is provided in Resolution No.45 of 27 April 2000 of the Competition Council on the approval of the procedure for submission and examination of notification on concentration and of calculation of aggregate turnover (the Merger Regulation).

2. The authority responsible both for implementing the Law on Competition and for overall competition policy is the Competition Council (the Council). The Council undertakes control of concentrations, conducts investigations into concentration cases and can prohibit or permit concentrations. The Council’s resolutions in merger cases may be challenged before the Vilnius Regional Administrative Court.

3. Under the provisions of the Law on Competition, the Council must be informed of the intended market concentration and its permission must be obtained when the combined aggregate turnover of the undertakings concerned is more than 30 million litas in the last financial year prior to concentration, and the aggregate turnover of each of at least two undertakings concerned is more than 5 million litas in the last financial year prior to concentration.

4. The Council has the right control concentrations that fall below the above - indicated turnover thresholds. The Council may, within 12 months after implementation of a concentration, request merging parties to file a notification if it is likely that a concentration falling below the jurisdictional thresholds will create or strengthen a dominant position, or result in a significant impediment to competition in the relevant market. This alternative was designed to address competition concerns in ‘small markets’, where turnover figures of firms with significant market power are below the level that would allow the competition authority to claim control over concentrations under the thresholds mentioned above. The Council uses this right on average for one to two cases per year.

5. Article 2(2) of the Law on Competition expressly states that the Law on Competition shall also apply to the activities of undertakings registered beyond the territory of Lithuania if such activities restrict competition in the internal market of Lithuania. Accordingly, Lithuanian merger control rules apply to all concentrations that fall within the turnover criteria described above, irrespective of where a concentration takes place and whether the parties concerned have any subsidiaries or activities in Lithuania. Notably, however, if a party to a concentration is an undertaking of a foreign country, its aggregate turnover is calculated as the sum of income received from the sale of its products in the Lithuanian market.

6. All concentrations of undertakings exceeding the turnover thresholds defined above must be notified to and receive approval from the Council. The law on Competition requires that concentrations
falling within the turnover thresholds be notified to the Council prior to their implementation and following
the presentation of an offer to conclude an agreement or acquire shares or assets; authorization to conclude an
agreement; conclusion of an agreement; or the acquisition of ownership rights or to dispose of certain assets.

7. A concentration subject to notification cannot be implemented before it is cleared by the Council. Any
implementing transactions and actions performed by the undertakings and controlling persons that are
constituted as implementing the concentration are considered to be invalid with no legal force and effect.
At the request of the undertakings participating in concentration or of the controlling person, the Council
may permit individual actions of concentration until the adoption of a final decision, taking into account
the consequences of suspension of concentration to the persons concerned, as well as a foreseeable
influence on competition. Such permission may be subject to certain conditions and obligations.

8. The Council has four months in total to examine the notification of concentration submitted in
accordance with the established requirements. If the commitments are offered the examination period may
be extended for one month at the request of the notifying parties. The time limit begins on the next day
after receipt of a notification that complies with these requirements. Article 11 of the Law on Competition
provides general filing requirements, while the Merger Regulation establishes detailed rules for filing
according to a standard notification form. Besides the formal requirements set down in the law (such as
registration information of the undertakings participating in the concentration; a description of the method
of concentration and a description of transaction; an information about associated undertakings; a
description of activities of each of the undertakings participating in the concentration and evaluation of
their market share in a relevant market), the standard notification form requires more detailed and
sophisticated analysis of the relevant markets that might be affected as a result of concentrations
performed. On the other hand, by agreement with the Council, it is possible to reduce the scope of the
notification in most transactions that create no significant competition issues. Although the Law on
Competition establishes two phases of examination of the concentration, which may take up four month (or
five month on the request of merging parties), the Council usually clears most mergers within one month.

9. The Law on Competition requires payment of a filing fee. The Government has set the filing fee
at 4,600 litas.

10. Having completed its examination of a notification, the Council will make one of the following
decisions:

- to permit the concentration as indicated in the notification;
- to permit the concentration by establishing conditions and obligations regarding the concentration
  on the undertakings or controlling persons participating in the concentration to prevent the
  creation or strengthening of a dominant position; or
- to refuse to grant permission to effect the concentration by imposing obligations for the
  undertakings or controlling persons concerned to undertake actions to restore the previous
  situation or remove the consequences of the concentration.

11. The Lithuanian substantive test for clearance prohibits any concentrations that create or
strengthen a dominant position; or result in a significant impediment of competition in the relevant market.
As to the dominant criterion, Lithuanian competition rules define ‘dominant position’ as a position of one
or more undertakings in the relevant market in which the undertaking does not directly face competition, or
that enables the undertaking to exercise a unilateral decisive influence in the relevant market by effectively
restricting competition. The Law on Competition contains a presumption of market domination based upon
high market share. Thus, unless proved otherwise, an undertaking with a market share of not less than 40
per cent (for retail trade market - 30 per cent) shall be considered to have a dominant position in the
relevant market. Moreover, unless proved otherwise, each of a group of three, or a smaller number of undertakings with largest share of the relevant market, jointly holding 70 per cent or more of the relevant market (for retail trade market – 55 per cent), shall be considered to enjoy a (collective) dominant position. The Guidelines on the Establishment of a Dominant Position provide an open-ended list of concerns that may be addressed by the competition authority. Pursuant to Guidelines, the Council is supposed to assess sole and collective market dominance (the later implies assessment of coordinated effects) and unilateral effects. Analysis of these competition-related concerns is described in greater detail. Besides, the Guidelines contain a general statement allowing the Council to take into account any other factor that may be relevant in assessing the probability of a significant impediment to competition, such as the possibility to invoke conglomerate effects or vertical foreclosure. In practice, the Council usually invokes the market dominance test. Thus, this test might be regarded as the centre of gravity of the Council’s analysis. In cases of vertical concentrations, the Council also used to assess possible foreclosure of upstream or downstream markets.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

12. There are two bilateral agreements:

- Agreement between the Competition Council of the Republic of Lithuania and the Agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) concerning cooperation in the area of competition policy and law (dated 02-08-2010);

13. It should be noted that these agreements haven’t been used in practice in any cross-border merger case.

14. There are no specific statutory provisions on the cooperation of the Council with other competition authorities. Outside the remit of national competition rules, the Council’s cooperation with other competition authorities is defined by EC law, including the EC Merger regulation and the Commission Notice on case referral in respect of concentration. Besides, the Council is involved in participating in EU Ad Hoc Merger Working Group. The basic document for enforcing cooperation among the national competition authorities of the EU and the EEA in the review of mergers which are notified to more than one authority (‘Draft/ Best practices on cooperation in merger review’) is now under consideration.

15. The Council most intensively cooperates with the European Commission and national competition authorities within the European Competition Network and ECA (European Competition Authorities). The Council participates in cross-border mergers information exchange process. This information is very useful for possibility to use provided information to contact the case-handlers directly responsible for the case. All participants of ECA are provided with key information: the date of received notification and provisional deadline for decision; the parties involved in anticipated transaction; the relevant economic sectors/ markets; the other member States concerned.

16. The Council also actively participates in developing competition policy in international forums, such as OECD and ICN (International Competition Network). The Council participates in OECD Competition Committee, Working Party No.2 ‘Competition and Regulation’ and Working Party No. 3 ‘Co-operation and Enforcement’ as an observer since 2001. The Council participates in the activity of ICN since 2002 and respectively in ICN Merger Working Group. The main activities in this area are participation in Merger Workshops, and submission of responses to the ICN Questionnaires and ICN Merger Templates& Related Materials.
17. A number of significant changes to better align the Concentration control with the best practices are implemented:

- Increased flexibility in timing of notification by removing the former deadline for notification of one week after the conclusion of a binding agreement and by introducing the possibility of notification before conclusion of a binding agreement;
- Increased flexibility of investigatory timeframe by providing, at the parties request, an additional month triggered on the submission of a remedy offer;
- Enhancement of the substantive test of dominance by the application of test of significant impediment of competition;
- Inclusion of the consideration of efficiencies in merger review analysis;
- Publication of the Procedure for the Submission and Examination of Notification on Concentration and of Calculation of Aggregate Turnover;
- Publication of The Guidelines on the Establishment of a Dominant position with the latest amendments on the notion of joint dominance and significant impediment of competition in concentration cases.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extraterritoriality)

18. As mentioned above, the Law on Competition shall also apply to the activities of undertakings registered beyond the territory of Lithuania if such activities restrict competition in the internal market of Lithuania. Accordingly, Lithuanian merger control rules apply to all concentrations that fall within the turnover criteria described above, irrespective of where a concentration takes place and whether the parties concerned have any subsidiaries or activities in Lithuania. Notably, however, if a party to a concentration is an undertaking of a foreign country, its aggregate turnover is calculated as the sum of income received from the sale of its products in the Lithuanian market.

19. It was one case in banks merger in question which could possibly in some extent rely on the actions and decisions taken by foreign competition authorities.

20. In 2001, the Council received a request from Estonian bank AS Hansapank to permit the acquisition of more than 90 percent of the shares of the stock company Lietuvos taupomasis bankas (Lithuanian Savings Bank) which was owned by the state and offered for privatization. This was a horizontal concentration in the market of financial services but by itself it did not threaten to create a dominant position. However, almost at the same time when the Council was reviewing the merger the announcement was made by Forenings Sparbanken AS (Swedbank) and Skandinaviska Enskilda Banken AB (SEB) about their intention to merger. Swedbank was a strategic shareholder of AS Hansapank and SEB was a strategic shareholder of Vilniaus bankas. The sum of market shares of the two largest Lithuanian banks exceeded 40 percent market share’s threshold for several key financial services. Thus, it was very likely that the latter merger of Swedish banks would have created a dominant position in Lithuania. Nevertheless, the intended merger of Swedish banks was not even notified to the EU Commission at that time. Therefore, the Council only communicated its view to the relevant parties and governmental institutions in Lithuania that the only possible solution if both mergers took place would have been divestiture of one of the banks in Lithuania, but before the beginning of implementation of the merger of Swedish banks there was no ground to block the acquisition of Lietuvos taupomasis bankas by AS Hansapank. The Council also contacted the European Commission and the Swedish Competition Authority.
21. Later the Council received a letter from the SEB and Swedbank confirming that the merging parties agreed with the divestiture of one of the banks in Lithuania in case their merger was allowed to proceed. However, having received the statement of objections from the European Commission the SEB and Swedbank abandoned their intentions to merge.

2.3 Remedies (types, monitoring and enforcement)

22. The Council may permit concentration by establishing conditions and obligations relating to the concentration for the undertakings or controlling persons participating in the concentration to prevent the creation or strengthening of a dominant position. Such conditions and obligations may be both of a behavioural and structural nature. The most common structural remedy imposed by the Council is the divestiture of an undertaking. However, in practice, the Council has also imposed behavioural remedies such as, a requirement of transparent pricing and arm’s length dealing with related undertakings, a prohibition on applying discriminatory prices and imposing exclusive purchase obligations, as well as requirement to provide the possibility of unilateral termination of a contract.

23. The Council applied both structural and behavioural remedies to resolve competition-related concerns resulting from foreign-to-foreign mergers. However, the remedies were imposed only in situations where merging non-Lithuanian companies had significant presence on Lithuanian markets through their local subsidiaries or related companies. In practice, under the common legal power to use obligations and conditions the Council can use the trustee institution (both divestiture and monitoring) in more complicated cases where it is required to ensure compliance with obligations. As a rule, the parties involved in concentration are obliged to provide regular information on adequate compliance with obligations and conditions.

24. As practice shows, the risk of a foreign-to-foreign merger being blocked is rather low, but it can be expected that if question of dominance or significant restrict of competition arose, the Council might make clearance subject to either behavioural or structural remedies, including a ‘hold separate arrangement’. There are provided below two instances of foreign-to-foreign mergers with applied structural and behavioural remedies.

2.3.1 A merger of breweries

25. In 2000, Carlsberg A/S and Orkla ASA announced their plans to create Carlsberg Breweries A/S. The new company was supposed to be owned 60 percent by Carlsberg A/S and 40 percent by Orkla ASA. Despite the fact that foreign companies were involved in this merger it did threaten competition in Lithuania. All three largest Lithuanian breweries (Kalnapilis, Utenos alus and Svyturys) were directly or indirectly controlled by the merging foreign companies. The sum of pre-merger market shares of the aforementioned Lithuanian breweries was approximately 60 percent, however, they had more than 90 percent in the premium beer segment. The Council came to the conclusion that intended concentration would have strengthened a dominant position in the relevant market (Kalnapilis and Utenos alus were already controlled by the same parent company) and therefore would have significantly restricted competition. The Council informed representatives of the merging parties and started negotiations concerning adequate remedies. Since all three Lithuanian breweries directly affected by the merger were approximately of equal size, the Council insisted that the only adequate remedy was to sell one of the breweries in a time period prescribed by the Council. Thus, the final decision contained the following conditions and obligations. First at all, Carlsberg A/S (parent company of Svyturys) and/or BBH (parent company of Utenos alus and Kalnapilis) were obliged to sell an unspecified brewery (either Svyturys or Kalnapilis or Utenos alus) within prescribed time limit. Secondly, until the divestiture Carlsberg A/S was obligated to maintain viability of the aforementioned breweries. Later the Council approved Kalnapilis to be sold and BBH proposed the candidacy of divestiture trustee. Besides
aforementioned, the final decision contained described procedure of providing regular trustee’s reports and information to Council on compliance with obligations. And finally, Kalnapilis was sold and a buyer Danish Brewery Group was approved.

2.3.2 A merger in telecommunications and information technologies services

26. In 2005, the Council examined the notification of acquiring a 100 per cent shareholding of Microlink AS by one of the largest Estonian telecommunications and information technologies service provider Elion Etevõtted AS. Microlink AS was Internet and data transmission services provider in Lithuania, Latvia and Estonia. Upon the implementation of the transaction in Lithuania AB Lietuvos telekomas was supposed to acquire subsidiaries of Microlink AS operating in Lithuania. AB Lietuvos telekomas and Elion Etevõtted AS were controlled by the TeliaSonera AB. The Council assessed the concentration deal under consideration as vertical and horizontal in the retail Lithuanian market of broadband access. At that time AB Lietuvos telekomas was a sole wholesale broadband access provider in Lithuania, operating a well-developed fixed telecommunications line network and the infrastructure; furthermore, the company held a dominant position in the leased lines market, and, in additional to quite a number of other advantages was in the process developing alternative internet access and data transmission technologies. The Council concluded that following the concentration through the acquisition of its competitor AB Lietuvos telekomas would strengthen its market position. Although UAB MicroLink Lietuva’s market share was insignificant, it was nevertheless one of the major Internet and data transmission services provider in Lithuania. Due to the concentration transaction AB Lietuvos telekomas would strengthen its position in the market and in connection with other related undertakings could restrict competition in the relevant Lithuanian retail market for broadband access. Meanwhile its competitors managing networks of much lower penetration rate had less possibility to increase their market shares. Thus, the Council authorized Elion Etevõtted AS to implement concentration with following conditions and obligations. First at all, AB Lietuvos telekomas was obliged to sell UAB MicroLink Lietuva within an established time limit. Secondly, until the divestiture AB Lietuvos telekomas was obliged to maintain viability of the acquired entity, accordingly maintain its competitiveness, trade marks and other acquired rights related with the image of the entity. Besides aforementioned, the Council imposed an obligation to ensure the continuity of the contracts concluded with the business partners and customers, AB Lietuvos telekomas was obliged to ensure non-discriminating terms in the provision of the broadband access to all recipients of the service. The decision also contained prescribed procedure for providing regular information of AB Lietuvos telekomas to the Council on compliance with obligations. The latter company was disposed of prior to the established term and later in 2006 UAB MicroLink Lietuva offered to the market a fixed telecommunications service ‘Metro Tel’ thus entering into competition with TEO LT, AB (former AB Lietuvos telekomas).

27. During the investigation procedure, the Council communicated to the Latvian Competition Council and the Estonian Competition Authority. As Internet and broadband access markets were defined as national markets, so it wasn’t the possible referral case to the European Commission. The situation in Lithuanian market slightly differed from the certain situation in Latvia and Estonia, as UAB Microlink Lietuva didn’t own the network for providing Internet and data transmission services. It used network based on leased lines from AB Lietuvos telekomas, besides the leasehold time was coming to an end. However, Microlink AS entities in Latvia and Estonia owned networks for providing aforementioned services. Therefore, the Latvian Competition Council and the Estonian Competition Authority adopted decisions contained the obligation to divestiture the part of business asset (network). Notably, that the first decision was made by the Latvian Competition Council, the second – by the Lithuanian Competition Council, and the latest – by the Estonian Competition Authority.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Mexico --

1. General points: Merger control regime

1.1 Please provide a brief overview of your merger control regime

1.1.1 Legal powers

1. The Federal Law of Economic Competition (FLEC) was enacted in 1993. Since then, there has been a fully-functioning merger control regime.

2. The FLEC defines concentrations as the merger, acquisition of control, or any other action whereby an economic agent acquires assets, stock holding, equity interests, trusts, or assets in general from other economic agent.

3. The Mexican Federal Competition Commission (hereinafter Commission or CFC for its acronym in Spanish) has the power to challenge and impose fines on any transaction whose aim or effect is to reduce, lessen or prevent competition and free market access of products and services that are equal, similar or substantially related.

1.1.2 Substantive test used

4. Article 17 of the FLEC states that the CFC may consider the following criteria for challenging a concentration: i) that the transaction grants or may grant to the merging parties unilateral power to set prices or restraint supply in the relevant market and competitors are not able to counteract this power; ii) that the transaction has the purpose of unduly displace competitors or impede entry to the relevant market; and iii) that the new agent obtains or strengthens its power to incur in monopolistic practices.

5. Article 18 of the FLEC defines the elements that are necessary to decide if the merger may be challenged or sanctioned. First, the article establishes the basis of an analysis following the principles of a dominance test. The analysis begins with the definition of the relevant market, according to a procedure that is defined in the FLEC and its Regulations. Second, the Commission identifies the economic agents that participate in the market, defines their market shares, analyzes their market power and estimates the degree of concentration. To do this, the Commission uses the Herfindahl-Hirschman Index (HHI), and the Dominance Index (DI). The use of concentration indexes is regulated by a ruling by the Commission’s Plenum.¹

¹ The ruling is called “Resolución por la que se da a conocer el método para el cálculo de los índices para determinar el grado de concentración que exista en el mercado relevante y los criterios para su aplicación” and was published in the Official Gazette (Diario Oficial de la Federación) on July 24th, 1998. The dominance index, used as a complement of the HHI, has the characteristic that it diminishes when the
6. In addition, article 18 defines other elements that open the possibility of an analysis similar to the Substantial Lessening of Competition Test (SLC). Particularly, this article considers the examination of the effects of the concentration on other related markets, as well as efficiency arguments presented by the parties that are involved in the transaction.

7. In the evaluation of efficiencies, article 16 of the FLEC’s Regulations considers that a concentration can improve efficiency in the market and can have a positive impact in the process of competition and free market access if the parties show that there are permanent benefits for consumers that exceed the anti-competitive effects of the concentration. The kind of efficiencies that could be accepted in an efficiency defense is related to permanent cost reductions, technology transfers, improvement of infrastructure and distribution networks.

8. In addition to article 18, the Plenum’s ruling that defines the methodology to estimate concentration indexes stipulates that even in the case that indexes are below the risk thresholds, the Commission may conclude that a transaction could reduce, damage or impede competition and free market access, when: i) the involved parties have participated in previous transactions in the same relevant market; ii) the parties are related with another agent and from this relationship the parties can obtain a privileged access to any essential input or advantages in distribution, marketing or advertising in the relevant market; iii) the parties can obtain market power in related markets; or iv) any other element that could represent or lead the parties to obtain market power that is not reflected in the market shares before the transaction occurs.

1.1.3 Mandatory regime

9. When the monetary thresholds established in the FLEC are met, it is compulsory to notify mergers and acquisitions prior to their completion.

10. Since January 1st 2011, the notification fee will be eliminated.

11. There are not special requirements for merger notification. The parties have to submit information on the parties involved in the concentration; documents which certify the representative’s legal capacity; the companies’ constitutional documents; financial statements; description of capital stock structure of the economic agents participating, both before and after the concentration; description of the transaction, its objectives, kind of transaction and non-compete clauses; mention if the economic agents involved in the transaction participate in other firms that produce or sell similar or substantially related goods to those supplied by the parties; description of the goods and services supplied by the parties, and information about their use in the relevant market; information about market shares of the parties and their competitors in the relevant markets; information about placement of factories and distribution centers owned by the parties; and another elements that could be helpful for the analysis of the transaction.
1.1.4 Monetary thresholds

12. The FLEC establishes that the following concentrations have to be notified to the CFC:

- When the transaction or series of transactions giving rise to the concentration, regardless of the place where they take place, have a value in Mexico, directly or indirectly, exceeding the equivalent of 18 million times the general minimum wage (MW) for the Federal District;

- When the transaction or series of transactions giving rise to the concentration involve the accumulation of 35 per cent or more of the assets or shares of stock of an economic agent, whose assets or annual sales in Mexico exceed the equivalent to 18 million times the MW; or

- When the transaction or series of transactions giving rise to the concentration involve the accumulation in Mexico of assets or capital stock in excess of the equivalent to 8.4 million times the MW and two or more economic agents take part in the concentration whose assets or volume of annual sales, jointly or individually, exceed an amount equivalent to 48 million times the MW.

13. It is not necessary that control is acquired over the Mexican economic agent. A notification could be triggered if the thresholds are met even if the transaction involves only the acquisition of non-voting shares.

1.1.5 Exemptions or special provisions for cross-border mergers

14. The FLEC states that whenever the acquired party in a merger has interests (assets, stock or sales) in Mexico, the transaction has to be notified – this obligation stands even if the acquirer has no prior interests in Mexico.

15. The analysis carried out by the Commission in the case of cross-border mergers is not different from that when the parties are national companies.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

2.1.1 Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

16. No, there has not been such a case in México. Most instances related to cross-border mergers focused on: i) the exchange of information; and ii) the request by other authorities to sign waivers from companies situated in México which may have interests in their jurisdictions.

2.1.2 Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

17. Yes, currently the Mexican Government and the CFC have signed agreements with other agencies and governments (jurisdictions) in the field of competition policy enforcement and advocacy. Particularly, in merger cases the agreements require the authorities to notify each other whenever there is a transaction in which the economic agents involved are established and/or located in the territories of the corresponding authorities.
18. The agreements which have been signed by the Mexican Government or the CFC are the following:

- Agreement between the government of the United States of America and the government of the United Mexican States regarding the application of their competition laws.
- Agreement between the government of the Canada and the government of the United Mexico States regarding the application of their competition laws.
- Arrangement between the Fair Trade commission of the Republic of Korea and the Federal Competition Commission of the United Mexican States regarding the application of their competition laws.
- Annex XV of the Free Trade Agreement between the European Union and Mexico.

2.1.3 If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?

19. Most of the agreements signed by the Mexican government and the CFC relating to the enforcement of competition law are non-binding in nature; however, the Commission has always been willing to comply with the commitments contemplated in the agreements regarding cross-border mergers and acquisitions.

2.1.4 Does your regime have an active involvement in the work and deliberation of international organizations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organizations?

20. The CFC has been a very active participant in the OECD and ICN in the area of merger control. As a member of the OECD, the Commission has taken part in a number of roundtables where merger control has been addressed. As part of the Global Forum on Competition in January 22, 2009, the CFC answered a Questionnaire on the Challenges Facing Young Competition Authorities and participated in the related discussion. During this Forum the CFC explained merger control rules in Mexico, as stated in the Federal Law of Economic Competition. The CFC also wrote about the challenges it faces while implementing the merger control regime, such as streamlining the analysis so that human resources can concentrate on the handling of complicated cases.

21. Regarding its participation in the ICN, the CFC has been actively involved in the development of the Merger Working Group products (such as Recommended Practices; Guidelines Workbook; Handbooks; Reports and Templates). In addition to this, these products have served as useful guidance and international benchmark to reform the FLEC. For example, in 2006 the FLEC was amended to allow the CFC to impose structural remedies and to strengthen and simplify procedures related to the presentation of
efficiency gains arguments. Currently, the Mexican Congress analyzes a second generation of reforms to ease the enforcement of the merger control regime. Among other things, the reform proposal contemplates exempting from the obligation to notify certain type of mergers that clearly pose no risk to competition.

2.1.5 Does your regime belong to a regional organization in the field of competition law? Does this organization have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

22. The provisions included in the FLEC and its regulations do not belong or are subordinated in any way to a regional regime or an international organization.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

2.2.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

23. To determine if a merger needs to be notified, the FLEC considers the use of monetary thresholds. These were updated in 2006, when the FLEC was reformed. At that time the thresholds were increased more than 50% on average, in order to improve the agency’s capability to analyze mergers that have a significant impact in Mexico. In the reform package currently under discussion, changes to the notification thresholds are not contemplated.

2.2.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

24. The FLEC considers that the merger has to be notified by the different parties involved in the transaction (buyer, seller and the target). The parties are obligated to provide the information that is considered necessary by the CFC to carry out the analysis, even if one of the parties is placed in other country. If the parties do not provide the requested information, the Commission can close the file, without issuing a decision. Normally, the CFC does not have major difficulties in obtaining the information and so far it has not asked official help from other competition authorities.

2.2.3 To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

25. In cross-border mergers it is important for the Commission to take into consideration the analysis of other agencies, particularly those of Canada and the USA - Mexico’s commercial partners in NAFTA -. The CFC verifies if conditions imposed in other jurisdictions could affect the degree of concentration in Mexican markets or affect supply conditions.

26. In some merger cases that are cleared with remedies in other jurisdictions, it is often not necessary to impose remedies in Mexico, because the action taken by other agencies is normally enough to solve the competition concerns in Mexico.
2.2.4 Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

27. The Law employs technical elements to define relevant markets and to assess the competitive effects of mergers. The decisions are made by a collegiate body and it is not necessary to obtain the approval of other agencies or ministries. The executive power is not allowed to modify or to block a Commission’s decision, in any kind of merger.

2.2.5 Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

28. The objective of the FLEC is the protection of competition and free entry into the markets as a means to improve efficiency and to create better conditions for consumers. The FLEC does not consider public interest objectives, such as the protection of employment or protection of national companies.

2.2.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

29. The Commission has not identified any particular aspect in which it is necessary to work in order to improve enforcement actions in the case of cross-border mergers.

30. The Commission has a good relationship with agencies of Canada and USA, Mexico’s main trade partners.

31. For the CFC, it is important to maintain cooperation with these countries because many of cross-border mergers that affect Mexico’s economy involve companies placed in Canada or USA.

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

32. The CFC has imposed remedies on cross-border mergers only in cases in which the markets have a national dimension, so the remedies have only affected Mexican markets.

33. Typical cases are those involving pharmaceuticals, in which is possible to divest assets on a national basis.

2.3.2 If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioral remedies be applied? Please provide examples where appropriate.

34. According to the FLEC, it is possible to impose remedies that may alleviate competitive effects of mergers, when remedies are justified in magnitude and are focused on concerns in the relevant markets that could be affected by the merger.

35. The FLEC does not limit the kind of remedies that could be imposed, so the Commission can adopt behavioral or structural remedies.

36. According to its experience, the Commission prefers the use of structural remedies, because they are more effective and simpler to enforce.
37. The Commission employs behavioral remedies only when it is not possible to impose structural remedies or as a complement of the latter. In the adoption of this kind of remedies, the Commission analyses their effectiveness to protect competition and the cost of implementation.

2.3.3 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

38. Once a merger is approved, the parties may have incentives to avoid the adoption of remedies. Thus, the CFC has decided not to approve certain mergers until the parties have fulfilled a program of remedies. If the parties demonstrate that they have satisfied the program, then the Commission approves the merger.

39. There are some cases in which it is not possible to proceed as mentioned above. For example, in cross-border mergers the Commission has considered that is not necessary to affect the closing of the merger in other jurisdictions. Because of that, sometimes the CFC approves the merger conditioned to a strict program to fulfill the remedies. The Commission is empowered to reverse an approval when the parties do not satisfy the program.

40. In Mexico, the rules of the game in place do not provide much flexibility for negotiating remedies. Particularly, the review period is relatively short and the procedure does not consider the possibility to stop it in order to open a period to discuss remedies with the parties.

2.3.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

41. In general, the parties have to accept the remedies imposed by the agency and have to present a program that considers actions, dates and reports.

42. Because the imposed remedies are normally focused on the attention of competition concerns that arise in Mexican markets, the Commission rarely informs others agencies or requests their assistance.

2.3.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

43. The Commission has discussed remedies with other national agencies within the framework of existing cooperation agreements. For this, it has been necessary to exchange information on the basis of confidentiality and the consent of the parties.

44. The discussions have focused on informing the other national authority about the possibility of a remedy that could have cross-border effects. There are no experiences of discussions to impose joint or coordinated remedies.
MERGER AND ACQUISITION CONTROL IN MONGOLIA

-- Mongolia --

1. Unlike contractual restraints of competition where the participating enterprises remain legally independent, concentrations or mergers between enterprises are characterized by the fact that, through the acquisition of shares or assets, formerly independent firms are either merged into one single enterprise or at least capital links are created.

2. The restraints of competition that are associated with mergers are particularly obvious and by no means hypothetical when all competitors in a particular market merge and thereby obtain a monopoly position. Thus concentration may restrain competition as much as cartelization. Therefore, the most recent proposals for changes in large economies have focussed more on merger control issues. Smaller economies, like Mongolia, do not engage in significant merger control.

3. The Law of Mongolia on Competition, which was approved by Parliament on July 2010, aims at protecting competition in the commodity markets of Mongolia and requires business entities which want to merge or acquire a significant part of another competitor to notify their intention.

4. According to the Article 8 of the law, dominant entities shall submit an application to the Authority for Fair Competition and Consumer Protection of Mongolia (AFCCP) if they intend to restructure through a merger and acquisition, to purchase more than 20 percent of common shares or more that fifteen percent of preferred shares of a competitor.

5. The AFCCP shall review the application and issue of an assessment within 30 days from receiving it. This period could be extended up to 30 days. The AFCCP can reject authorisation where it considers that there are circumstances which restrict competition. The Government of Mongolia shall adopt a detailed regulation on the AFCCP assessment when a dominant business specified in Article 8 of the Law on Competition reorganizes through a merger and acquisition with other legal entities, purchases the shares of competitors selling the same type of goods and products or merges with other entities.

6. Recently, the AFCCP has drafted this regulation and sent it to other government bodies for comments. According to this draft regulation, the application shall classify and review the forms of the reorganization through merger and the purchase of shares and shall assign them to 3 merger types:

   1. The horizontal merger and purchase of shares;

   2. The vertical merger;

   3. The conglomerate merger;
7. The types of reorganization through a merger of legal entities and the purchase of shares shall be determined as follows:

- The type where the legal entity dominant on the market purchases more than twenty percent of common shares or more than fifteen percent of preferred shares of a competitor selling the same goods and products shall be an horizontal merger;

- The type where the dominant legal entity reorganizes through a merger with other entities or merges with related entities shall be determined on the basis of the review of the application and documents submitted from the legal entity.

- There shall be an inquiry on whether the applicant legal entities have previously breached the Law on Competition. The repeated breach of such law by any one of the applicant legal entities shall be grounds for refusing the reorganization through a merger with other entities and the purchase of shares.

- Where the dominant legal entity reorganizes through a merger with other entities and purchases shares, the Agency for Fair Competition and Consumer Protection shall investigate whether competition will be restricted in the relevant market and shall issue a decision:
  - Issuing a relevant assessment by determining the market share of the relevant legal entities, market concentration and market capacity as specified in the regulation on determining natural monopolies and dominant business entities reorganizing through a merger with other entities;
  - Determining whether the merger of the dominant legal entity with other entities aims at pushing other competing business entities out of the market and has the potential of impeding new entry to the market;
  - Determining whether there is a potential of engaging in the monopolizing activity by illegally using the dominant position on the market as specified in Article 7.1 of the Law on Competition;
  - Determining whether there is a potential for engaging in activities that restrict the economic interests of other competing business entities and those of consumers;
  - Determining whether the benefit to the national economy exceeds the damage caused to competition.

8. In addition, exemptions could apply if it is determined that the benefit to the national economy exceeds the damage to be caused to competition.

9. A prohibition decision shall be the ground to refuse the state registration of the legal entity at the General State Registration Agency and to trade at the “Mongolian Stock Exchange” (JSC).

10. The main change in merger control is that the AFCCP will regulate only dominant business entities through merger and acquisition. (AFCCP had to regulate all business entities).
LE CONTRÔLE DES CONCENTRATIONS TRANSFRONTALIÈRES PAR LES PAYS EN DÉVELOPPEMENT OU L'INDISPENSABLE CONJONCTION ENTRE UN DROIT ET UNE MISE À NIVEAU MONDIALISÉS

-- Conseil de la Concurrence du Maroc 1--

1. La globalisation des échanges a généré une multiplication des fusions et ententes sur le plan transnational. Il en est résulté une vigilance accrue et un renforcement des contrôles nationaux. La problématique est encore plus délicate pour les pays en développement. La volonté de préserver la concurrentiabilité des tissus économiques nationaux et la protection contre les effets des concentrations transfrontalières a d’ailleurs été encouragée par les conseils prodigués par les instances économiques et financières internationales. Certains ont même vu dans ces processus la possibilité de récolter des flux financiers.

2. Il faut cependant préciser que le constat de ces contrôles reste relativement limité du fait qu’au moment où l’économie se mondialise, ces derniers reposent fondamentalement sur des droits nationaux avec leurs particularités et au mieux avec une coopération bilatérale ou internationale. On reste donc loin de la mise en œuvre d’un droit de la concurrence mondialisé.

3. La problématique est encore plus épineuse pour les pays en développement qui sont confrontés non seulement à des difficultés objectives de lutte contre les pratiques anticoncurrentielles et de contrôle des concentrations, mais également à l’impératif de mettre à niveau leurs économies en vue d’affronter les processus concurrentiels internes et internationaux.

4. Essayons donc d’examiner successivement les difficultés des systèmes de contrôle fondés sur des droits nationaux avant de nous pencher sur l’indispensable mise en œuvre d’un droit mondialisé de la concurrence et l’impératif d’une mise à niveau des économies concernées.

1. Les difficultés des systèmes de contrôle fondés sur des droits nationaux

5. Précisons d’abord que la majorité des pays dispose actuellement d’un droit et des institutions de régulation de la concurrence et de contrôle des concentrations. La tâche est déjà énorme sur le plan interne. Elle se complique sérieusement lorsqu’on passe à la sphère internationale, particulièrement en ce qui concerne les fusions-acquisitions transfrontalières. La problématique est évidemment encore plus épineuse pour les pays en développement ou en transition.

6. La difficulté essentielle réside dans le fait que les différents codes nationaux peuvent entrer en conflit surtout en raison du principe juridique de l’effet qui signifie que le droit national est applicable dès qu’une opération produit un effet sur les échanges du pays concerné.

1 Contribution soumise par M. Abdelali Benamour, Président du Conseil de la concurrence du Maroc.
7. Une telle situation génère des solutions difficilement conciliables pour le même cas. N’a-t-on pas vu des cas d’abus de position dominante traités différemment par différentes législations ?

8. Bien sûr, on a parfois essayé d’atténuer les effets des solutions unilatérales par la prise en considération, dans les décisions nationales, des intérêts des entreprises des autres États comme on a multiplié les accords bilatéraux, mais une telle situation reste préjudiciable pour certains États, particulièrement pour les pays en développement. Non seulement ces pays se trouvent dans la nécessité de mettre à niveau leur tissu économique afin d’apprécier correctement la problématique de la concurrence interne et internationale, mais ils doivent en plus affronter des cas de concentrations transfrontalières extrêmement compliqués. A titre d’exemple, durant cette année, le Conseil de la Concurrence du Maroc a eu à traiter du cas de concentration des filiales marocaines de « Kraft Foods Inc » et « Cadbury PLC ». Évidemment, nous avons examiné ce cas comme on l’aurait fait pour n’importe quelles entreprises marocaines. Il faut cependant préciser qu’on aurait voulu avoir des informations sur la fusion à l’échelon internationale et sur les entreprises concernées pour mieux cerner la problématique ; mais maîtriser ce processus s’est avéré très compliqué.

9. Bref, le fait d’appréhender les questions de concentrations transnationales par les droits nationaux s’avère très délicat, particulièrement pour les pays en développement ou en transition. Aussi a-t-on réfléchi à la difficile mise en œuvre d’un droit mondialisé de la Concurrence.

2. L’indispensable réflexion sur un droit de la concurrence mondialisé

10. Face aux insuffisances des solutions unilatérales et des accords bilatéraux, il est apparu évident que dans le cadre d’une économie globalisée, il faille réfléchir à un droit transnational de la concurrence. Des recommandations ont été faites dans ce sens aussi bien dans le cadre de l’OCDE dès 1967 que par la CNUCED et enfin au niveau des longues négociations qui ont abouti à la mise sur pied de l’OMC en 1995 et qui ont continué jusqu’à la conférence de Cancun en Septembre 2003 et bien au delà.

11. Force est de constater que tous les efforts destinés à faire émerger un droit mondialisé de la concurrence ont échoué. Précisons à ce sujet que le Professeur Wolfgang Fikentscher de l’Université de Munich a présenté en 1995 une sorte de code mondial du commerce, appelé code de Munich, constituant une synthèse entre les dimensions commerciale et concurrentielle des échanges avec la mise en œuvre d’une autorité antitrust instaurée au sein de l’OMC. Le projet n’a pas été adopté. Les pays développés craignent les règles contraignantes et la cession de leurs compétences en la matière alors que les pays en développement restent attachés aux spécificités des transitions économiques.

12. En fait, il semble que les pays les plus perdants en la matière soient ces derniers, particulièrement en ce qui concerne les effets des cartels et des fusions-acquisitions transnationales dont ils maîtrisent difficilement les rouages. Le meilleur positionnement pour eux consisterait peut-être à réclamer la mise en œuvre d’un droit mondialisé de la concurrence qui couvrirait bien entendu un certain nombre d’exemptions économiques et sociales durant la phase de la transition. Ce droit mettrait en évidence les interactions du libre commerce et de la concurrence en veillant à ce que les barrières étatiques aux échanges ne soient pas relayées par des barrières privées dues aux grandes unités qui émergeraient des cartels ou des fusions.

13. Globalement, les pays en développement pourraient réclamer une approche « développement » à mettre en symbiose avec un droit mondialisé de la concurrence. Ceci suppose, outre les exceptions signalées précédemment, que les pays en question mènent un processus de mise à niveau de leurs économies avec un certain appui international.

3
3. **L’impératif de la mise à niveau des économies en développement dans un cadre mondialisé**

14. Lorsqu’on se penche sur l’histoire économique des nations, on pourrait mettre en évidence trois étapes importantes.

15. La première étape, peut être la plus longue, était celle d’un monde dominé par l’idée de modernité reposant sur la raison du siècle des lumières avec comme orientations essentielles, la révolution scientifique ; l’État-nation laïc et démocratique ; le libéralisme ou l’économie de marché ; enfin la prise en charge par l’État régulateur des débordements du marché ainsi que de la solidarité qui était traditionnellement celle des régions, du sang ou des confessions. Moralité, qui dit élargissement du marché des sphères disloquées du moyen âge vers celles de l’État-nation, dit prise en charge par ce dernier des solidarités et des débordements que peut générer le libre marché.

16. La deuxième étape est celle des regroupements régionaux comme celui qui s’est opéré dans le cadre de l’Union Européenne. On franchit une nouvelle étape dans l’organisation et l’élargissement des espaces de la citoyenneté dont celui du marché. Dès lors, la sphère concurrentielle s’élargit, ce qui nécessite un effort solidaire de mise à niveau des régions les moins favorisées par une action institutionnalisée afin de permettre à tout le monde d’affronter le libre jeu de marché et la concurrence. C’est ce qu’on a largement observé, particulièrement au profit de l’Espagne, du Portugal, de la Grèce, de l’Italie et dans d’autres circonstances.

17. La troisième étape qui a été en fait presque concomitante avec la précédente, mais qui s’est bien développée par la suite, est celle de la mondialisation. Le marché s’élargit encore plus, mais contrairement aux deux autres situations où le processus d’élargissement s’est accompagné par une régulation et une solidarité organisée destinée à mettre à niveau les structures les plus fragiles, on n’a rien prévu jusqu’à présent au niveau supranational, au profit de la mise à niveau des pays en développement. Toutes les tentatives dans ce sens semblent avoir échoué.

18. En conclusion, Il semble donc nécessaire, pour les pays en transition, de se positionner peut-être en faveur d’une sorte de Code de Munich remanié de façon à permettre à l’institution supranationale qui en découle, de veiller à l’application du libre commerce et de la libre concurrence, mais de prévoir également des exceptions transitionnelles ainsi que des moyens d’aide à la mise à niveau.
ANNEXE°

19. La libération des échanges de tout type d’entraves étatiques doit être prolongée et garantie par un contrôle des opérateurs afin d’éviter que ceux-ci ne reconstituent artificiellement les barrières à l’entrée au marché : c’est ce qu’on appelle communément le contrôle des opérations de concentration.

1. En effet, il est admis que certaines concentrations peuvent bénéficier à l’économie dans la mesure où elles permettraient un rendement accru et mettre à la disposition des consommateurs des produits de meilleure qualité et à des prix plus bas. D’autres, par contre, peuvent occasionner la réduction de la concurrence sur tel ou tel marché en créant ou en renforçant un opérateur dominant, le conduisant à pratiquer des prix plus élevés avec des choix réduits ou à moins d’innovation.

2. La loi marocaine 06-99 sur la liberté des prix et de la concurrence est venue pallier ce genre de situations. Elle requiert l’obligation de notifier certaines concentrations économiques aux autorités de la concurrence. Elle définit d’une manière explicite les critères de notification des projets de concentration, le test d’évaluation et d’appréciation, la procédure de notification ainsi que le régime de sanctions à appliquer au cas où les règles de contrôle ne sont pas respectées.

3. Toutefois, il y a lieu de signaler que le contrôle des concentrations sous le régime de la loi marocaine actuelle n’est pas très développé au Maroc ; le Conseil de la Concurrence n’a eu à examiner qu’un seul cas depuis sa réactivation en 2009.

1. **Aperçu sur le régime du contrôle des concentrations au Maroc**

1.1 **Définition de la concentration**

4. Aux termes des dispositions de l’article 11 de la loi 06-99, est considéré comme concentration, tout acte, quelque soit sa forme, qui porte sur :

- le transfert de propriété ou de jouissance sur tout ou partie des biens, droits et obligations d’une entreprise ;
- ou encore tout acte qui a pour objet ou pour effet de permettre à une entreprise ou un groupe d’entreprise, d’exercer directement ou indirectement sur une ou plusieurs entreprises une influence déterminante.

5. Ce faisant, la loi marocaine concerne non seulement les fusions et acquisitions comme mode de formation des concentrations, mais aussi les prises de contrôle.

6. A ce sujet, la prise de contrôle est considérée comme une concentration lorsqu’elle permet d’exercer une influence déterminante sur l’activité de l’entreprise à acquérir, c’est le cas ou l’acquéreur peut peser sur les décisions stratégiques ou influer sur la composition des organes décisionnels de cette entreprise.

1.2 **Le seuil de notification : plus de 40\% des parts de marché**

7. L’article 10 alinéa 2, de la loi 06-99 soumet chaque projet de concentration, tel que défini ci-dessus, à un contrôle administratif par les autorités de la concurrence\(^1\). Ce contrôle doit intervenir lorsque les parts de marché réalisées par les entreprises qui font partie de l’acte ou qui en sont l’objet, durant l’année civile précédente, représentent plus de 40\% des ventes, achats ou autres transactions, sur un marché national de biens, produits et/ou services de même nature ou substituables ou sur une partie substantielle de celui-ci. Font partie de la concentration, du reste, non seulement des entreprises qui sont engagées dans l’opération, mais aussi toutes les entreprises qui sont économiquement liées à une entreprise impliquée ou concernée\(^2\) par cette opération.

8. Les entreprises concernées doivent indiquer, pour toute opération de concentration, les parts de marché détenues sur le marché national dans la mesure ou celles-ci atteignent directement pour les entreprises concernées, 40\% sur le territoire marocain ou sur une partie substantielle de celui-ci, en précisant la base de calcul ou l’estimation de ces parts. Enfin il y a lieu de souligner que selon les termes de l’article 12 de la loi ci-dessus mentionnée, les opérations soumises au contrôle des concentrations doivent être notifiées aux autorités de la concurrence préalablement à leur réalisation.

2. **Méthodologie poursuivie par l’autorité de la concurrence marocaine en matière de contrôle des concentrations**

9. Le contrôle d’une opération de concentration vise essentiellement à s’assurer que celle-ci ne porte pas atteinte au libre jeu de la concurrence en créant ou en renforçant une position dominante. Pour répondre à cette préoccupation, le contrôle des concentrations se déroule en trois étapes successives et liées entre elles : il s’agit de la définition du marché pertinent suivie du calcul des parts de marché pour aboutir à une appréciation des effets concurrentiels de la concentration sur le marché en question.

2.1 **Définition du marché pertinent**

10. La définition du marché est un facteur essentiel dans l’application des règles du droit de la concurrence en matière de concentration. Manifestement, cette définition joue un rôle clé dans la mesure où le contrôle de l’opération de concentration ne s’applique, aux termes de l’article 10 de la loi 06-99, que pour certaines opérations qui réalisent des parts de marché supérieures aux seuils de 40 \%.

11. Ainsi, l’objectif de la définition du marché de référence est de permettre à l’autorité de concurrence de préciser le cadre qui détermine les limites dans lesquelles la pression de la concurrence s’exerce et de mesurer le pouvoir économique des entreprises concernées vis-à-vis de leur homologue et des consommateurs. Il est par conséquent nécessaire de définir le marché pertinent aussi bien en termes de

---

\(^1\) Dans le schéma institutionnel actuel retenu par la loi marocaine, les autorités de la concurrence sont constituées par le Premier Ministre ou l’autorité déléguée par lui à cet effet à savoir le Ministère délégué auprès du Premier Ministre chargé des affaires économiques et générales qui dispose d’un pouvoir décisionnel dans le contrôle des concentrations et le Conseil de la Concurrence qui ne dispose que d’un pouvoir consultatif en la matière.

\(^2\) Sont considérées comme entreprises économiquement liées à une entreprise concernée par une opération de concentration et jugées comme une entreprise unique : (i) les entreprises dépendantes et/ou dominantes ainsi que les entreprises affiliées à un groupe de sociétés ; (ii) les entreprises contrôlées par l’entreprise concernée seule ou avec d’autres entreprises, et vice versa, les entreprises en mesure d’exercer une influence déterminante sur l’entreprise concernée.
produits qu’en termes géographiques pour déterminer si l’entreprise se trouve sous la pression suffisante d’une concurrence effective.

2.2 Le calcul des parts de marché

12. Pour ce qui est du calcul des parts de marché, la méthode adoptée par l’autorité de la concurrence peut être basé sur un volume ou une valeur : sur des marchés de marchandises, par exemple où la variation des prix est limitée, il n’y a pas de différence entre les parts de marché calculées sur la base des prix et celle calculées sur la base des volumes. Cependant si les produits en question sont différenciés et portent par exemple une marque, les parts des marchés basées sur la valeur peuvent diverger considérablement des parts des marchés basées sur le volume. Les parts calculées sur la base des valeurs sont généralement considérées comme les plus précises.

2.3 Appréciation des effets concurrentiels d’une concentration

13. Dès qu’elle définit le marché pertinent et calcule la part de marché résultant de l’opération de la concentration et que le seuil défini par la loi est atteint ou dépassé, l’autorité de la concurrence doit procéder à un examen concurrentiel, notamment pour constater si la concentration est de nature à créer ou renforcer une position dominante des entreprises concernées.

14. Elle doit tenir compte de la position sur le marché des entreprises concernées et de leur puissance économique et financière, des possibilités de choix des fournisseurs et des utilisateurs, de leur accès aux sources d’approvisionnement ou aux débouchés, de l’existence en droit ou en fait de barrières à l’entrée, de l’évolution de l’offre et de la demande des produits et services concernés, des intérêts des consommateurs ainsi que de l’évolution du progrès technique et économique.

2.4 Délai et procédures de réalisation des contrôles de concentration

15. En application des dispositions de l’article 12 de la loi 06-99, le Premier Ministre et son Ministre Délégué chargé des affaires économiques et générales ainsi que le Conseil de la Concurrence disposent d’un délai total de 6 mois pour autoriser ou non une concentration. En termes de phases, ce délai est ainsi précisé :

- **Phase I (maximum 2 mois après la réception de la notification complète)**

   Après avoir reçu une notification complète de l’opération de concentration, le Premier Ministre renvoie le dossier à son Ministre délégué chargé des affaires économiques et générales pour étude et avis. La Direction de la Concurrence et des Prix relevant de ce département ministériel examine dans un délai de deux mois si la concentration est de nature à porter atteinte à la concurrence notamment et si elle est susceptible de créer ou de renforcer une position dominante sur un marché. Elle prépare un dossier dans lequel ses conclusions serviront au Premier Ministre pour prendre une décision motivée afin de :

---

3 Le marché pertinent de produits comprend tous les produits et/ou services considérés comme interchangeables ou substitutables en raison de leurs caractéristiques, de leur prix et de l’usage auquel ils sont destinés. Quand au marché pertinent géographique, il comprend le territoire sur lequel les entreprises concernées sont engagées dans l’offre et la demande des produits et/ou services où les conditions de concurrence sont suffisamment homogènes.

4 Une position dominante est une position de force économique permet qui à l’entreprise qui en bénéficie d’empêcher le maintien d’une concurrence effective sur le marché en cause, en lui conférant le pouvoir se comporter de manière indépendant de ses concurrents et des consommateurs.

5 Ce département ministériel a reçu une délégation expresse de pouvoirs du Premier Ministre à l’effet de contrôler les opérations de concentration.
− autoriser la concentration sans engagements ou ;
− autoriser la concentration avec des engagements ou encore ;
− demander l’avis du Conseil de la Concurrence.

Le silence gardé par le Premier Ministre pendant deux mois vaut acceptation tacite du projet de concentration ainsi que des engagements qui y sont attachés le cas échéant.

- Phase II (maximum 6 mois après la réception d’une notification complète, délai de la phase I compris)

Dans le cas où le projet de concentration a été jugé de nature à porter atteinte à la concurrence en créant ou en renforçant une position dominante, il est soumis par le Premier Ministre au Conseil de la Concurrence pour avis. Dans ce cas, le délai d’examen est porté alors à 6 mois à compter de la date de la réception complète de la notification chez le Premier Ministre.

Le Conseil procède alors à l’examen du projet de concentration en évaluant les effets concurrentiels du projet soumis. Indubitablement, il est tenu de porter son appréciation sur le fait que ce dernier apportera une contribution suffisante au progrès économique du pays qui soit de nature à compenser les atteintes à la concurrence qui peuvent être occasionnées.

Dans son travail d’appréciation, le Conseil est appelé également à tenir compte de la compétitivité de l’entreprise en cause au regard de la concurrence internationale.

A l’issue de cet examen, le Conseil doit émettre un avis motivé dans un délai raisonnable n’excédant pas le délai légal défini par la loi. Et c’est seulement après avoir reçu l’avis du Conseil de la Concurrence que le Premier Ministre peut, par décision motivée :

− autoriser une concentration ou ;
− interdire un projet de concentration susceptible de créer ou de renforcer une position dominante sur le marché, ou encore
− demander des modifications ou compléments à l’opération notifiée, ou prendre toutes mesures propres à assurer ou à établir une concurrence suffisante. L’autorisation de l’opération de concentration peut être subordonnée à l’observation des prescriptions de nature à apporter au progrès économique du pays une contribution tangible pour compenser les atteintes à la concurrence.

2.5 *Le rôle des tribunaux en matière de contrôle des concentrations*

16. Chaque décision du Premier Ministre en matière de contrôle des concentrations est susceptible de faire l’objet d’un recours devant la juridiction administrative compétente. Le principal aspect sur lequel doit se prononcer le tribunal est de savoir si la décision du Premier Ministre est fondée que ce soit en interdisant ou en autorisant avec ou sans conditions cette concentration et par conséquent de savoir si la concentration peut créer ou renforcer une position dominante.

17. En effet, non seulement les décisions d’interdiction de concentration touchant directement aux intérêts des entreprises sont susceptibles d’être attaquées devant le juge administratif, mais aussi celles
autorisant ce genre d’opération. Dans ce cas de figure, les concurrents et les autres tiers dont les intérêts légitimes sont lésés par ces décisions peuvent déposer plainte devant le tribunal compétent.

2.6  Régime des sanctions applicables au non respect des règles de contrôle des concentrations

18. Le Premier Ministre peut, par décision motivée et sur recommandation du Conseil de la Concurrence, ordonner des mesures conservatoires par injonction aux parties intéressées par la concentration, aux fins de revenir à l’état antérieur au cas où la concentration ne lui a pas été notifiée. En outre et à défaut de notification obligatoire et en cas de non respect des décisions sur les concentrations notifiées, le Premier Ministre peut après consultation du Conseil de la Concurrence, saisir le procureur du Roi près du tribunal du premier instance compétent pour mener des poursuites judiciaires contre les contrevenants conformément aux dispositions du l’article 70 de la loi 06-99 qui prévoient, entre autres, des amendes pouvant atteindre 2 à 5% du chiffre d’affaires des entreprises concernées.

3. Analyse de l’expérience du Conseil de la Concurrence du Maroc en matière de contrôle des concentrations


3.1 Présentation du cas de concentration transfrontalière

20. En février 2010 et conformément à la réglementation en vigueur au Maroc, le Premier Ministre a saisi, pour avis, le Conseil de la Concurrence du projet de concentration que lui a notifié la multinationale Kraft Foods Inc. qui comptait lancer une offre publique d’achat (OPA) sur l’ensemble des actions d’une autre multinationale, à savoir Cadbury PLC.

21. L’objectif de l’opération qui est en fait une prise de contrôle et non une fusion, avait une ampleur internationale dans la mesure où elle devait permettre à Kraft Foods Inc. de s’annexer de nouvelles activités (confiserie, chocolaterie, chewing-gum,…) géographiquement diversifiées à l’échelle mondiale. Les nouvelles activités se rapprochaient de ses activités de base dans l’industrie alimentaire (vente des boissons conditionnées et de produits alimentaires) en recherchant les effets de synergie au niveau du marketing et de la distribution notamment. Ces nouvelles activités étaient celles développées par Cadbury PLC.

22. Au niveau national, cette opération concernait les deux filiales des deux multinationales présentes sur le territoire marocain et qui étaient des sociétés de droit marocain, en plus d’une joint-venture que l’une d’elles avait constitué avec un groupe marocain.

23. L’examen du cas a permis au Conseil de confectionner et d’appliquer une méthodologie d’approche telle qu’expliquée dans le point 2 ci-dessus mentionné.

24. Ainsi l’avis émis par le Conseil et suivi par le Premier Ministre a estimé que l’opération projetée n’aboutira pas au renforcement d’une position dominante dans les marchés concernés6 par l’opération et que cette dernière pourrait avoir un effet bénéfique sur l’environnement concurrentiel des entreprises nationales, leur permettant d’élèver leur niveau de compétitivité aux normes internationales.

---

6 Après segmentation, les marchés concernés étaient ceux de la confiserie et celui de la biscuiterie.
3.2 Principales conclusions de cette expérience

- En l’absence de tout accord avec les autorités de la concurrence ayant déjà eu l’occasion de se prononcer sur cette concentration (Commission Européenne, FTC, autorité anglaise de la concurrence,…), le Conseil de la Concurrence a du construire son appréciation sur ses propres analyses, à partir d’informations fournies par la partie concernée ou collectées par ses propres soins : il n’y a eu aucun échange avec ces autorités ;

- Le Conseil de la Concurrence ayant récemment obtenu le statut de participant désigné au Forum Mondial sur la Concurrence de l’OCDE et membre du réseau ICN n’a pas encore assez développé ses relations avec les autorités de la concurrence en matière de coopération bilatérale ou multilatérale sur les questions se rapportant aux concentrations ;

- Les deux multinationales concernées ont déjà obtenu des autorisations de la part de la Commission Européenne et des autorités roumaines de la concurrence, avec un engagement sur l’exclusion du marché du chocolat de l’opération. Cet engagement n’a pu être imposé au Maroc, eu égard à l’insignifiance du marché marocain de ce produit ;

- L’application du contrôle des concentrations est subordonné à un seuil en terme de parts de marché qui est calculé par rapport au territoire national marocain, dès qu’il y a effet sur ce dernier, nonobstant la nationalité des entreprises ou la localisation juridique de la concentration ;

- Dans son évaluation, le Conseil de la Concurrence n’a pris en considération que les effets de l’opération sur le marché national. Le test permettant de décider si l’opération peut être ou non autorisée a été examiné uniquement par rapport à ce marché, sachant que le marché géographique des multinationales concernées est mondial. Dans ce cas, il était difficile d’identifier les problèmes de concurrence et d’établir notamment le pouvoir de marché ou la domination de la nouvelle entité issue de l’opération ;

- Le contrôle des concentrations est une activité inhabituelle et délicate dans le sens où elle implique un jugement *ex ante* sur le futur par opposition au contrôle des ententes illicites qui s’appuie sur des appréciations *ex post* ;

- La méthode d’appréciation appliquée au cas a intégré aussi bien le bilan concurrentiel que le bilan économique de l’opération.
CROSS-BORDER MERGER CONTROL BY DEVELOPING COUNTRIES, OR THE VITAL LINK BETWEEN GLOBALISED LAW AND ECONOMIC UPGRADING

-- Competition Council of Morocco¹--

1. The globalisation of trade has triggered an increase in the number of cross-border mergers and agreements. This has resulted in heightened vigilance and a strengthening of national controls. The problems involved are even more delicate for developing countries. Moreover, the desire to preserve the competitiveness of national economic infrastructure and protect against the effects of cross-border concentration has been encouraged by the advice dispensed by international economic and financial institutions. For some, these processes have even been viewed as an opportunity to collect financial flows.

2. Nevertheless, it must be pointed out that the observation of such controls has remained relatively limited insofar as controls at a time when the economy is globalising are based fundamentally on national laws, with their own particularities, and at best on bilateral or international co-operation. The institution of globalised competition law thus remains a distant prospect.

3. The issues involved are even thornier for developing countries, which face not only objective difficulties in combating anti-competitive practices and merger control, but also the overriding need to upgrade their economies so as to cope with domestic and international competitive processes.

4. Let us therefore attempt to look in turn at the difficulties of control systems based on national law before turning to the vital implementation of globalised competition law and the necessity of upgrading the economies involved.

1. The difficulties of control systems based on national law

5. Let it be stipulated from the outset that a majority of countries currently have legislation and institutions for regulating competition and controlling concentration. The task is already vast domestically; it gets seriously more complicated when the focus becomes international, especially with regard to cross-border mergers and acquisitions. The problems are obviously thornier for developing countries or transitional economies.

6. The primary difficulty stems from the existence of potential conflicts between national codes, especially as a result of the legal principle of effectiveness, which means that national law shall apply as soon as an operation produces an effect on the trade of the country in question.

7. Such a situation generates multiple solutions for a given case, and these may be difficult to reconcile. Have there not been examples of abuse of dominant position cases being handled differently under the laws of different countries?

¹ Contribution submitted by Mr. Abdelali Benamour, Chair of the Competition Council of Morocco.
8. Of course, it has been attempted at times to mitigate the effects of unilateral solutions by having national decisions factor in the interests of businesses from other countries, just as bilateral agreements have become more numerous, but such a situation remains detrimental to certain countries, and particularly developing ones. Not only do these countries find themselves in the position of having to upgrade their entire economies in order to cope properly with the problems of domestic and international competition, but in addition they must deal with extremely complex cases of cross-border concentration. For example, in the course of this year, the Moroccan Competition Council had to address a merger case involving the Moroccan subsidiaries of Kraft Foods Inc. and Cadbury PLC. Obviously, we examined this case as we would have done for any Moroccan companies. It should be specified that we would have liked to have information about the merger on an international level, and about the businesses concerned, in order to get a better handle on the problem; it proved highly complicated to grasp this process fully.

9. In short, tackling cross-border concentration issues with domestic law proves highly delicate, especially for developing countries or transitional economies. As a result, thought has been given to the difficult process of instituting globalised competition law.

2. Indispensable consideration of globalised competition law

10. Given the inadequacies of unilateral solutions and bilateral agreements, it became obvious that a globalised economy demanded consideration of cross-border competition law. Recommendations along these lines had been made by the OECD back in 1967 and by UNCTAD, as well as in lengthy negotiations culminating in the establishment of the WTO in 1995 and continuing until the September 2003 Cancun conference and a long time thereafter.

11. It must be admitted that all efforts to bring about globalised competition law have failed. In 1995, Professor Wolfgang Fikentscher of the University of Munich presented a sort of world trade code known as the “Munich Code” consolidating the commercial and competition-related dimensions of trade with the institution of an anti-trust authority within the WTO. The plan was not adopted. Developed countries fear binding rules and the surrender of their powers in this area, whereas developing countries remain attached to the particularities of economic transitions.

12. As it happens, it would seem that the biggest losers here are the latter, especially with regard to the effects of cartels and cross-border mergers and acquisitions, the complexities of which they have a hard time grasping. For these countries, the optimum stance might be to call for implementation of globalised competition law, which would of course incorporate a number of economic and social exceptions during the transitional phase. Such law would highlight the interactions of free trade and competition while taking care not to let State-imposed trade barriers be replaced by private barriers erected by the large entities emerging from cartels or mergers.

13. Worldwide, developing countries could demand that a “development” approach could be used in symbiosis with globalised competition law. Apart from the exceptions cited earlier, this would assume that the countries in question carry out a process of upgrading their economies, with a certain degree of international support.

3. The need to upgrade developing economies within a globalised framework

14. Looking at the economic history of nations, three important steps can be highlighted.

15. The first, and perhaps longest, step was that of a world dominated by the idea of modernity grounded in the reason of the Age of Enlightenment, the essential orientations of which being: the scientific revolution; the secular and democratic nation-state; liberalism or the market economy; and lastly, a takeover by a regulating State of control over market excesses as well as of the solidarity that was
traditionally the province of regions, bloodlines or religious communities. The moral of the story is that when the market expands from fragmented mediaeval spheres to those of the nation-state, it is that nation-state which must cope with the solidarity and excesses that a free market can generate.

16. The second step is that of regional groupings such as the one formed by the European Union. This is a new step in the organisation and expansion of areas of citizenship, including that of the market. Consequently, the sphere of competition has widened, entailing a joint effort to raise the level of the most highly disadvantaged regions via an institutionalised action to allow everyone to cope with the workings of a free market and competition. Such an effort has been observed repeatedly, in particular for the benefit of Spain, Portugal, Greece and Italy, and in other circumstances.

17. The third step, which in fact began practically at the same time as the second, but which expanded considerably thereafter, was globalisation. The market widened even more, but in contrast to the two other situations in which the enlargement process was accompanied by regulation and organised solidarity to bolster the shakiest structures, to date nothing has been provided on a supranational level to assist developing countries. All attempts along these lines seem to have failed.

18. In conclusion, it would therefore seem necessary for transitional economies to position themselves in favour of some sort of Munich Code reworked so that the resultant supranational institution could monitor enforcement of free trade and free competition but also institute transitional exceptions and lend assistance in upgrading their economies.
1. The unshackling of trade from all sorts of State-imposed barriers must be extended and
   guaranteed by control over operators so that these operators do not artificially reconstitute barriers to
   market entry: this is what is commonly known as concentration (or merger) control.

2. It is acknowledged that some instances of concentration may in fact benefit the economy by
   allowing greater output and giving consumers access to lower-priced and higher-quality products. Other
   instances, however, may reduce competition on a given market by creating or strengthening a dominant
   operator, prompting that operator to charge higher prices for less choice or less innovation.

3. Moroccan Act 06-99 on pricing freedom and competition was instituted to counter such
   situations. It requires that certain economic concentration operations be notified to the competition
   authorities. It stipulates explicitly the criteria for notifying proposed mergers, the evaluation test, the
   notification procedure and the penalties to be imposed if control rules are not complied with.

4. Nevertheless, it should be pointed out that concentration control under current domestic law is
   not very highly developed in Morocco; the Competition Council has examined only one case since its re-
   activation in 2009.

1. Overview of the Moroccan concentration control regime

1.1 Definition of concentration

5. Under Article 11 of Act 06-99, concentration is construed as any act, irrespective of its form,
   involving:

   • Transfer of ownership or the right to use all or part of a firm’s assets, rights and obligations;

   • Any act, the purpose or effect of which is to enable a firm or group of firms to exert a decisive
     influence, directly or indirectly, over one or more other firms.

6. Even so, Moroccan law covers not only mergers and acquisitions as a means of concentration,
   but takeovers as well.

7. In this regard, a takeover is considered a concentration operation if it confirms a decisive
   influence over the activity of the firm to be acquired, as is the case when the acquiring party can sway
   strategic decisions or influence the composition of the firm’s executive bodies.

* Contribution submitted by Mr. Khalid El Bouayachi, Rapporteur-General and Director of Investigations of
  the Competition Council of Morocco.
1.2 Notification threshold: market share of over 40%

8. Article 10, paragraph 2 of Act 06-99 makes any proposed concentration, as defined above, subject to administrative control by the competition authorities. This control model intervenes if the aggregate market share of the firms taking part in the act or constituting the purpose thereof, during the previous calendar year, accounted for more than 40% of the sales, purchases or other transactions on a national market for goods, products and/or services of the same type or substitutable for a substantial portion thereof. Moreover, concentration involves not only the firms engaged in the operation, but also all firms having economic ties to a firm involved in or concerned by the operation.

9. The firms involved must indicate, in respect of any concentration operations, any domestic market shares if the aggregate direct market shares for the firms concerned amount to 40% within Morocco or a substantial part thereof, specifying the basis for calculating or estimating those market shares. Lastly, it should be emphasised that under Article 12 of the aforementioned Act, operations subject to concentration control must be notified to the competition authorities before they are carried out.

2. Methodology used by the Moroccan competition authority in respect of concentration control

10. The essential purpose of controlling a concentration operation is to ensure that the operation does not impede competition by creating or strengthening a dominant position. To address this concern, concentration control takes place over three successive and interrelated steps: what these involve is ascertaining the relevant market; then computing market shares; and, lastly, assessing the competition-related effects of that concentration on the market in question.

2.1 Defining the relevant market

11. Defining the market is an essential factor in enforcing the rules of competition law regarding concentration. Clearly the definition plays a key role insofar as, under Article 10 of Act 06-99, control over a concentration operation shall be exercised only if the market shares involved exceed the 40% threshold.

12. Therefore, the objective of defining the reference market is to allow the competition authority to delineate the boundaries within which competitive pressures come to bear and to assess the economic power of the firms involved vis-à-vis their counterparts and consumers. Consequently, it is necessary to define the relevant market both in terms of products and geographically in order to ascertain if the firm is subject to sufficient effective competition.

---

1 Under the institutional structure currently established by Moroccan law, the competition authorities are constituted by the Prime Minister or the Prime Minister’s appointed delegate (in this case the Minister for Economic and General Affairs, who has decision-making power in concentration control), and the Competition Council, whose powers in this area are solely advisory.

2 The following are considered to be firms with economic ties to a firm concerned by a concentration operation and deemed to be a single enterprise: (i) dependent and/or dominant enterprises, as well as enterprises affiliated to a group of companies; (ii) firms controlled by the firm in question alone or together with other firms, and conversely, firms in a position to exert a decisive influence over the firm in question.

3 The relevant product market comprises all products and/or services considered to be interchangeable or substitutable by virtue of their characteristics, price and intended use. For its part, the relevant geographic market comprises the areas in which the firms involved are engaged in supply and demand of the products and/or services, in which competitive conditions are sufficiently uniform.
2.2 Computing market shares

13. To compute market shares, the method adopted by the competition authority can be based on volume or value: on merchandise markets, for example, where price variations are limited, it makes no difference whether market shares are computed on the basis of prices or volumes. However, if the products in question are differentiated and are branded, for example, market shares based on value might diverge considerably from market shares based on volume. Market shares computed on the basis of value are generally considered more accurate.

2.3 Assessing the competitive effects of a concentration

14. As soon as it defines the relevant market and computes the market share resulting from the concentration operation, and if the legally stipulated threshold is attained or exceeded, the competition authority must conduct a competition analysis, in particular to ascertain whether the concentration is such as to be likely to create or strengthen a dominant position\(^4\) for the firms involved.

15. The analysis must factor in the market positions of the firms involved and their economic and financial power, options open to suppliers and users, their access to sources of supply or sales outlets, the existence of \textit{de jure} or \textit{de facto} barriers to entry, supply and demand trends for the products and services involved, consumers’ interests and technical and economic progress.

2.4 Timeframe and procedures for conducting concentration controls

16. Pursuant to Article 12 of Act 06-99, the Prime Minister and his delegated Minister for Economic and General Affairs, along with the Competition Council, have a total of six months in which to authorise a concentration or not. This timeframe is divided into the following phases:

- **Phase I (maximum: two months after receipt of complete notification)**

  After receiving complete notification of the concentration operation, the Prime Minister forwards the dossier to his delegated Minister for Economic and General Affairs\(^5\) for study and opinion. The Directorate for Competition and Prices, which is a part of that ministerial department, has two months in which to ascertain whether the concentration is likely to impede competition, and in particular whether it is likely to create or strengthen a dominant market position. The Directorate prepares a dossier in which its conclusions will help the Prime Minister take a reasoned decision to:

  - Authorise the concentration unconditionally;
  - Authorise the concentration subject to conditions; or,
  - Request the opinion of the Competition Council.

  A two-month silence on the Prime Minister’s part is tantamount to tacit acceptance of the concentration proposal and of any conditions that may have been a part of it.

---

\(^4\) A dominant position is a position of economic strength allowing the firm in that position to thwart the preservation of effective competition in the market in question by wielding the power to behave independently of its competitors and consumers.

\(^5\) This ministerial department has been given express delegation of the Prime Minister's powers to control concentration operations.
• Phase II (maximum: six months after receipt of complete notification, including Phase I)

In the event a proposed concentration has been deemed likely to impede competition by creating or strengthening a dominant position, the Prime Minister submits the matter to the Competition Council for an opinion. In such cases, the deadline is extended to six months from the date on which complete notification is received by the Prime Minister.

The Council then proceeds to review the concentration proposal, assessing its competitive effects. Indubitably, it is required to express its opinion on whether the proposal’s contribution to the country’s economic progress would be sufficiently beneficial to offset any detrimental effects on competition.

In making its assessment, the Council must also factor in the competitiveness of the firm in question in relation to international competition.

After this review, the Council must issue a reasoned opinion within a reasonable amount of time not exceeding the deadline imposed by law. It is only after having received the opinion of the Competition Council that the Prime Minister may, by a reasoned decision:

- Authorise the concentration;
- Prohibit the concentration on the grounds that it would create or strengthen a dominant market position; or,
- Request changes or additions to the proposed operation, or take any measures needed to ensure or establish adequate competition. Authorisation of the concentration operation may be made conditional on compliance with directives that could result in a tangible contribution to the country’s economic progress which could offset the detrimental effects on competition.

2.5 The role of the courts in concentration control

17. Each of the Prime Minister’s decisions in the realm of concentration control may be appealed to the competent administrative jurisdiction. The main aspect on which the courts must rule is whether the Prime Minister’s decision – whether to prohibit or allow the concentration, with or without conditions – is justified, and thus whether the concentration can create or strengthen a dominant position.

18. Indeed, decisions prohibiting concentrations that directly affect corporate interests are not the only ones open to challenge before an administrative court; decisions authorising such operations are contested as well. In such cases, competitors and other third parties whose legitimate interests are adversely affected by the decisions may file complaints with the competent court.

2.6 Penalty regime applicable in the event of non-compliance with concentration control rules

19. The Prime Minister may, by a reasoned decision and on recommendation of the Competition Council, issue an injunction to the parties involved in the concentration, imposing protective measures to revert to the previous state of affairs if he had been served no notice of the concentration. In addition, and in the event of failure to serve compulsory notification, or of non-compliance with decisions in respect of notified concentrations, the Prime Minister may, after consulting with the Competition Council, refer to the Crown Prosecutor of the competent court of first instance to initiate judicial proceedings against violators, pursuant to Article 70 of Act 06-99, which provides, inter alia, for fines of up to 2 to 5% of the turnover of the firms in question.
3. **Analysis of the Moroccan Competition Council’s experience of concentration control**

20. Although the Moroccan Competition Council’s experience of concentration control is only recent, it did have an opportunity since its re-activation in 2009 to review a proposed cross-border concentration operation in 2010. It would therefore be interesting to look briefly at that project and draw initial conclusions from the experience.

3.1 **Presentation of the cross-border concentration case**

21. In February 2010, and pursuant to regulations in force in Morocco, the Prime Minister petitioned the Competition Council for its opinion regarding a concentration proposal that had been notified to him by the multinational Kraft Foods Inc., which was intending to launch a takeover bid for all shares of another multinational, Cadbury PLC.

22. The purpose of the operation, which was in fact a takeover and not a merger, had international ramifications insofar as it would enable Kraft Foods Inc. to take on new lines of business (confectionery, chocolates, chewing gum, etc.) that were geographically diversified on a global scale. The new lines of business were a close match to its basic activities in the food industry (sale of prepared beverages and food products), the aim being to harness synergies, especially in marketing and distribution. The new activities had been developed by Cadbury PLC.

23. At the national level, the operation involved the two multinationals’ two subsidiaries present in Morocco and incorporated under Moroccan law, along with a joint venture that one of the subsidiaries had set up with a Moroccan group.

24. Its review of the case enabled the Council to formulate and apply the methodology explained in Section 2 above.

25. The opinion issued by the Council and followed by the Prime Minister held that the planned operation would not lead to the strengthening of a dominant position in the markets concerned by the operation and that the operation could have a beneficial effect on the competitive environment of national firms, enabling them to raise their competitiveness to international standards.

3.2 **Main conclusions from this experience**

- In the absence of any agreement with competition authorities having already had a chance to speak out on this concentration (the European Commission, FTC, UK competition authorities, etc.), the Competition Council had to formulate its judgement on the basis of its own analyses, using input provided from the party in question or compiled by its own efforts. There was no contact with these authorities.

- The Competition Council, having recently become an official participant in the OECD Global Forum on Competition and a member of the International Competition Network (ICN), has not yet sufficiently developed its contacts with competition authorities in the realm of bilateral or multilateral co-operation on issues involving concentration.

- Both of the multinationals concerned have already received authorisations from the European Commission and the Romanian competition authorities, subject to a commitment to exclude the

---

6 After segmentation, the markets concerned were confectionery and biscuits.
chocolate market from the operation. This commitment could not be imposed in Morocco, given the insignificance of the Moroccan market for this product.

- Enforcement of concentration control is contingent on a market share threshold that is calculated over Moroccan national territory as soon as that territory is affected, irrespective of the nationality of the firms or the legal location of the concentration.

- In its assessment, the Competition Council took only the operation’s domestic market effects into consideration. The test by which it decided whether the operation could or could not be authorised was examined solely with relation to that market, it being understood that the geographical market of the multinationals concerned was worldwide. In this case, it was difficult to identify competition problems, and in particular to establish the market power or domination of the new entity resulting from the operation.

- Concentration control is an unusual and delicate activity insofar as it entails an *ex ante* judgement about the future, as opposed to the control of illegal agreements, which relies on *ex post* assessments.

- The evaluation method used in this case incorporated both an assessment of competition and an assessment of the operation’s economic consequences.
CONTRÔLE DES FUSIONS TRANSNATIONALES: DÉFIS À RELEVER POUR LES PAYS EN DÉVELOPPEMENT ET LES ÉCONOMIES ÉMERGENTES

-- Ministère des Affaires Économiques et Générales (Maroc) --

I. Description générale du système de contrôle des concentrations dans notre pays :

1. Selon l’article 11 de la loi marocaine 06-99 sur la liberté des prix et sur la concurrence, sont considérées comme concentrations les opérations suivantes :
   - Le transfert de propriété ou de jouissance sur tout ou partie des biens, droits et obligations d’une entreprise ; ou
   - Tout acte qui a pour objet ou pour effet de permettre à une entreprise ou un groupe d’entreprises d’exercer, directement ou indirectement, sur une ou plusieurs autres entreprises une influence déterminante.

2. Une opération est soumise au contrôle des concentrations lorsque la part de marché réalisée par les entreprises parties à l’acte ou qui en sont l’objet, durant l’année civile précédente, est de plus de 40% conformément aux dispositions de l’article 10 alinéa 2 de la loi " les entreprises qui sont parties à l’acte, ou qui en sont l’objet, ou qui leur sont économiquement liées ont réalisé ensemble, durant l’année civile précédente, plus de 40 % des ventes, achats ou autres transactions sur un marché national de biens, produits ou services de même nature ou substituables, sur une partie substantielle de celui-ci ".

3. Le franchissement de ce seuil de 40 % de parts de marché cumulé induit de plein droit l'obligation de notifier au Premier ministre tout projet de concentration tel que cela est défini à l'article 12 de la loi.

4. Le Ministère des Affaires Économiques et Générales, en particulier la Direction de la Concurrence et des Prix, examine le dossier et prépare un rapport pour le Premier Ministre. Dans un délai de deux mois, le Premier Ministre peut, par décision motivée soit :
   - Autoriser la concentration,
   - Autoriser la concentration avec des engagements,
   - Demander l’avis du Conseil de la Concurrence.

5. Le silence gardé par le Premier Ministre pendant ces 2 mois vaut acceptation tacite du projet de concentration, ainsi que les engagements qui y sont joints le cas échéant.

* Contribution soumise par M. El Hassane Bousselmame, Directeur de la Concurrence et des Prix, Ministère des Affaires Économiques et Générales (Maroc).
6. Si la concentration est de nature à porter atteinte à la concurrence, notamment par la création ou le renforcement d’une position dominante, elle est soumise par le premier Ministre à l’avis du Conseil de la Concurrence. Ce dernier prépare son avis et le transmet au premier ministre.

7. Le délai maximum pour examiner l’opération de concentration est de 6 mois après la réception d’une notification complète.

8. Après avoir reçu l’avis du Conseil de la Concurrence, le Premier Ministre peut, par décision motivée soit :
   - Autoriser une concentration ;
   - Interdire un projet de concentration susceptible de créer ou de renforcer une position dominante sur le marché ;
   - Modifier ou compléter l’opération notifiée ou prendre toute mesure propre à assurer ou à établir une concurrence suffisante. Une opération peut être subordonnée à l’observation des prescriptions de nature à apporter au progrès économique et social une contribution suffisante pour compenser les atteintes à la concurrence.

9. L’alinéa 5 de l'article 12 de la loi dispose expressément que "durant ce délai précité, les entreprises concernées ne peuvent mettre en œuvre leur projet".

10. Une nouvelle réforme de la loi est en cours. Elle concernera plusieurs volets, en particulier les opérations de concentration économique.

11. En effet, l’obligation de notification des entreprises parties à l’opération de concentration quand la part de marché dépasse les 40%, pose un problème au niveau de l’évaluation des parts de marchés des entreprises concernées en pourcentage aussi bien de la part des entreprises que de l’autorité de concurrence qui tend à adopter un seuil du montant du chiffre d’affaires en valeur absolue. D’autres modifications vont être apportées à la procédure relative aux opérations de concentration économique.

II. Les concentrations transfrontalières

12. À la lecture du premier article de la loi 06-99, on relève que le système de contrôle des concentrations exige la notification du projet dès lors qu’il y a un effet sur le marché domestique. La loi dispose ainsi que "la présente loi s’applique à toutes les personnes physiques ou morales qu’elles aient ou non leur siège ou des établissements au Maroc, dès lors que leurs opérations ou comportements ont un effet sur la concurrence sur le marché ou sur une partie substantielle de celui-ici".

13. Cet article vise implicitement les personnes morales pouvant avoir leur siège en dehors du Maroc, d’où la nature éminemment extraterritoriale de la loi marocaine sur la concurrence.

14. C’est une loi nationale de portée internationale dans la mesure où les fusions envisagées à l’échelle internationale et ayant un impact sur le marché national doivent être notifiées.

15. Il y a lieu de citer comme illustration la société Kraft Foods Inc. établie aux États-Unis qui a déposé, par le biais de son mandataire, une notification d’une opération de concentration auprès de notre département suite à son projet d’acquisition de la société britannique Cadbury plc.

16. Après analyse de cette opération, nous avons jugé qu’elle ne présente pas de problème particulier de concurrence au niveau du Maroc.
17. La principale faiblesse de cette portée extraterritoriale de notre loi est bien entendu celle de son effectivité puisqu’une loi doit être appliquée dans son intégralité et notamment dans son dispositif répressif. Les sanctions extraterritoriales prévues à l’article 70 de la loi disposent que « les personnes morales peuvent être reconnues pénallement responsables lorsque les circonstances de l’espèce le justifient [...] la peine encourue est une amende dont le montant est pour une entreprise de 2 % à 5 % du chiffre d’affaires hors-taxes réalisé au Maroc au cours du dernier exercice clos. »

18. Il est difficile d’imaginer que de telles sanctions puissent être appliquées à de grands groupes internationaux installés à l’extérieur du Maroc qui sont généralement dotés d’une puissance économique sans commune mesure avec celle du Maroc.

19. De ce fait, les sanctions prévues à l’article 70 ne semblent pouvoir être appliquées qu’aux entités établies localement et liées sous différentes formes aux réseaux des entreprises multinationales ayant initié les opérations de concentration visées.

20. D’autre part, on peut noter que les entreprises multinationales sont très attentives aux règles relatives aux concentrations, et prennent le soin de notifier tout projet même dans les plus petits pays, par sécurité juridique mais aussi pour des soucis d’image de l’entreprise. Mais là se pose un autre problème relatif à la capacité ou à la volonté de ces pays d’interdire ou d’exiger des engagements de ces entreprises au risque de voir ces investissements quitter le pays, au moment où la priorité pour ces économies en développement est d’attirer des investissements étrangers.

21. Concernant les accords bilatéraux que nous avons signés, il y a lieu de citer deux accords bilatéraux avec la Tunisie et la Jordanie sur l’échange l’information en matière de pratiques anticoncurrentielles et des concentrations économiques. Un autre accord bilatéral est en cours de signature avec l’Égypte.

22. Il est à rappeler que depuis l’entrée en vigueur de la loi sur la concurrence, le Maroc a autorisé une douzaine d’opérations de concentration
I. General description of the concentration control system in our country

1. Article 11 of Moroccan Act 06-99 on pricing freedom and competition states that the following operations are considered to be concentrations:
   - Transfer of ownership or the right to use all or part of a firm’s assets, rights and obligation; or
   - Any act, the purpose or effect of which is to enable a firm or group of firms to exert a decisive influence, directly or indirectly, over one or more other firms.

2. An operation is subject to concentration controls of market share captured by the firms taking part in the act, or constituting the purpose thereof, during the previous calendar year accounts for more than 40% pursuant to the provisions of Article 10, paragraph 2, of the Act: "firms which are parties to the act, or constitute the purpose thereof, or firms which have economic ties to such firms and which have together accounted for, in the course of the previous calendar year, over 40% of the sales, purchases or other transactions on a national market for goods, products or services of the same type of substitutable for a substantial portion thereof".

3. Exceeding this 40% threshold on aggregate market share makes it de jure compulsory to notify the Prime Minister of any planned concentration as laid down in Article 12 of the Act.

4. The Ministry of Economic and General Affairs, in particular the Directorate of Competition and Pricing, examines the dossier and drafts a report for the Prime Minister. Within a period of two months, the Prime Minister may, under a reasoned decision:
   - Authorise the concentration;
   - Authorise the concentration subject to conditions;
   - Request the opinion of the Competition Council.

5. A two-month silence on the Prime Minister’s part is tantamount to tacit acceptance of the concentration proposal and of any conditions that may have been a part of it.

* Contribution submitted by Mr. El Hassane Bousselmame, Director of Competition and Pricing, Ministry of Economic and General Affairs (Morocco).
6. If the concentration is such as to be likely to impede completion, notably be creating or strengthening a dominant position, it is submitted by the Prime Minister to the Competition Council for an opinion. The latter body prepares its opinion and submits it to the Prime Minister.

7. The maximum deadline for examining the concentration operation is 6 months following receipt of full notification.

8. After receiving the opinion of the Competition Council, the Prime Minister may by a reasoned decision:
   - Authorise a concentration;
   - Prohibit the concentration on the grounds that it would create or strengthen a dominant market position; or
   - Request changes or additions to the proposed operation, or take any measures needed to ensure or establish adequate competition. Authorisation of the concentration operation may be made conditional on compliance with directives that could result in a tangible contribution to the country’s economic progress which could offset the detrimental effects on competition.

9. Paragraph 5 of Article 12 of the Act expressly states that “during the above-mentioned period, the firms concerned may not proceed with the planned operation”.

10. The Act is currently being reformed once again. Amendments will be made to several provisions, particularly those relating to economic concentration.

11. The reason for this reform is that the requirement that the firms party notify the concentration operation once market share exceeds 40% poses a problem in terms of the assessment of the percentage market share of the firms concerned both for the firms and for the competition authority, which tends to take turnover in absolute terms as the threshold. Other amendments are to be made to the procedure regarding economic concentration operations.

II. Cross-border concentrations

12. The first article of Act 06-99 clearly states that the concentration control system requires notification of a planned merger should the latter have an impact on the domestic market. The Act provides that “the present Act shall apply to all physical and legal persons, regardless of whether or not they have headquarters or establishments in Morocco, in all cases where their operations or behaviour have an impact on market competition or a substantial portion thereof”.

13. This article implicitly addresses legal persons with headquarters outside Morocco, hence the eminently extraterritorial nature of Moroccan competition law.

14. It is national legislation that is international in scope in that notification must be given of all mergers at the international level which have an impact on the domestic market.

15. An example worth mentioning here is that of Kraft Foods Inc., incorporated in the United States, which through its representative notified our department of a concentration operation following its planned takeover of the British company Cadbury plc.

16. After analysing this operation, we decided that it did not pose any particular problems over competition in Morocco.
17. The main weakness of the extraterritorial scope of our Act is clearly that of its effectiveness in that an Act must be applied in its entirety, particularly in terms of its penalties. The extraterritorial penalties provided for in article 70 of the Act state that “legal persons may be held criminally responsible where the circumstances so justify […] the penalty incurred consists in a fine amounting for a firm to 2% to 5% of its pre-tax turnover in Morocco in the course of the previous financial year.”

18. It is scarcely conceivable that such penalties could be imposed on major international groups established outside Morocco, which generally wield economic power which is wholly disproportionate to that of Morocco.

19. Consequently, it would seem that the penalties laid down in article 70 can only be imposed on locally established entities with ties to the networks of the multinational firms which initiated the concentration operations in question.

20. Moreover, it should be noted that multinational firms pay close attention to the rules governing concentrations and are careful to notify any planned concentration even in the smallest countries, not only to be legally safe but also out of a concern to safeguard their firm’s image. However, another problem arises here with regard to the ability of the will of such countries to prohibit or to impose conditions of these firms in view of the risk of seeing such investments being withdrawn from the country, at a time when the priority for these developing economies is to attract foreign investment.

21. With regard to the bilateral agreements we have signed, it is worth mentioning two bilateral agreements with Tunisia and Jordan respectively on the exchange of information on anti-competitive practices and economic concentrations. Another bilateral agreement is in the process of being signed with Egypt.

22. It should be recalled that since the entry into force of the competition Act, Morocco has authorised about a dozen concentration operations.
1. General Points

1.1 Brief overview of the merger control regime, with particular reference to the following issues

1.1.1 Merger control regime existing in Pakistan

1. Section 11 of the Competition Act, 2010 (Act), provides that no undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market.

2. Section 11(2) of the Act provides that where an undertaking, intends to acquire the shares or assets of another undertaking, or two or more undertakings intend to merger the whole or part of their businesses, and meet the pre-merger notification thresholds stipulated in regulations prescribed by the Commission, such undertaking or undertakings shall apply for clearance from the commission of the intended merger.

3. Section 11(2) of the Act provides that the concerned undertakings shall not proceed with the intended merger until they have received clearance from the Commission.

4. The Commission issued “Competition (Merger Control) Regulations, 2007”, which lays down regulations covering notification thresholds, and the procedure for filing merger clearance application as well as procedure for the Commission to adhere to in reviewing the merger. Pakistan has two-phase merger clearing process: Phase-I has to be completed in 30 days. And in merger cases which require in-depth inquiry, Phase-II is initiated, which has to be completed within 90 days. So far, only two cases have gone to Phase-II.

- The criteria (turnover, market shares etc.) used for establishing jurisdiction over merger operations;

The merger parties will be required to make application for clearance from the Commission under sub-section (2) of section 11, in case either of the following notification thresholds are met:

- the value of gross assets of the undertaking, excluding value of goodwill, is not less than three hundred million rupees (equivalent to US$ 3.488 million) and/or the combined value of the undertaking and the undertaking(s) the shares of which are proposed to be acquired or the undertakings being merged, is not less than one billion rupees (equivalent to US$ 11.628 million); or

- annual turnover of the undertaking in the preceding year is not less than five hundred million rupees (equivalent to US$ 5.814 million) and/or the combined turnover of the
undertaking and the undertaking(s) the shares of which are proposed to be acquired or the undertakings being merged is not less than one billion rupees (equivalent to US$ 11.628 million); and

- the transaction relates to acquisition of shares or assets of the value of one hundred million rupees (equivalent to US$ 1.163 million) or more; or

- in case of acquisition of shares by an undertaking, if an acquirer acquires voting shares, which taken together with voting shares, if any, held by the acquirer shall entitle the acquirer to more than 10% voting shares;

- in the case of an asset management company carrying out asset management services, its collective exposure for itself and in all of its collective investment schemes in a single entity is more than 25% of total voting rights; or

- the value of total assets under management of an Asset Management Company is one billion rupees (equivalent to US$ 11.628 million) or more;

• If a notification system is in place, whether this is voluntary or mandatory; whether notification fees are payable; whether there are special requirements for merger notification;

Pakistan has a mandatory pre-merger clearance regime, if the merger meets the notifications thresholds. Parties have to pay fee, and have to apply on a prescribed form.

• The substantive test used to assess mergers

Section 11(1) of the Act lay down the substantive test, which is “substantially lessening of competition by creating or strengthening a dominant position in the relevant market.”

• Special provisions for cross-border mergers

Regulation 27 of the Competition (Merger Control) Regulations, 2007 provides that where a merger is subject to review under merger laws in more than one jurisdiction, the commission shall:

- without compromising effective enforcement of the domestic law, seek to cooperate its reviews of transnational mergers in appropriate cases;

- consider actions by which they can eliminate or reduce the impediments to cooperation and coordination;

- encourage merging parties to facilitate coordination among competition authorities, in particular with respect to timing of notifications and voluntary waivers of confidentiality rights, without drawing any negative inferences from a party’s decision not to do so;

- give the merging parties, the opportunity to consult with the concerned competition authority at key stages of investigation with respect to any significant or practical issue that may arise during the course of investigation;

- give an opportunity to third parties, with a legitimate interest, in the merger review as recognized under reviewing country’s merger laws, to express their view under the merger review process;

- treat foreign undertakings, no less favorably than domestic undertakings in like circumstances; and

- endeavor in reaching, in so far as possible, consistent, or at least non-conflicting outcomes.
2. **Specific questions**

2.1 **Co-operation among competition authorities (international, regional and bilateral)**

2.1.1 *Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?*

5. None, so far.

2.1.2 *Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there No Agreement in existence yet on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?*

6. No agreement in existence yet.

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

7. The Commission may consider foreign interest, if it is not in direct conflict with the local interest.

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organizations?*

8. The Competition Commission of Pakistan regularly contributes to the workings of OECD, ICN and UNCTAD, and draw lessons from their work products.

2.1.5 *Does your regime belong to a regional organization in the field of competition law? Does this organization have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?*

9. No regional organization of the South Asian countries yet.

2.2 **Jurisdictional issues (e.g. notification, information exchange, enforcement and extraterritoriality)**

2.2.1 *If your jurisdiction requires merger notification, are the current notification.*

10. The present threshold levels are adequate and appropriate for mergers notifications.

2.2.2 *Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?*

11. None, so far.
2.2.3 To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

12. The Commission normally draws guidance from the decisions of European Union, United States and developed jurisdictions, but their decisions only hold persuasive value and not authoritative. So far no cross-border merger has been decided by the Commission.

2.2.4 Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

13. No.

2.2.5 Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

14. Only competition concerns are taken into consideration.

2.2.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.

15. Yes, it is possible to impose structural remedies i.e. divesture.

2.3.2 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

16. No.

2.3.3 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

17. Pakistan has only one Competition Authority.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Poland --

1. General points

1. Merger control system has existed in Poland since 1990. At the moment, it corresponds to the standards elaborated in the OECD and the ICN. Merger control is a part of competition policy together with separates the anti-cartel provisions. The merger control includes all concentrations, which might have an effect on the Polish territory and meet the working criteria set out in the Act of 16 February 2007 on competition and consumer protection. The antimonopoly law does not introduce the definition of concentration, but indicates what kind of transactions are concentrations. Pursuant to Article 13(2) concentrations cover the following cases:

- a merger of two or more independent undertakings;
- takeover – by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way obtaining direct or indirect control over one or more undertakings by one or more undertakings;
- creation by undertakings of one joint undertaking;
- acquisition by the undertaking, of a part of another undertaking’s property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10,000,000.

2. The criteria for the notification obligation are objective in nature and are based on the turnover of enterprises engaged in concentration. Pursuant to Article 13(1) of the antimonopoly law, the concentration is subject to notification if:

- the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1,000,000,000, or
- the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50,000,000.

3. Merger control system in Poland is mandatory, and entrepreneurs have an obligation to refrain from carrying out the transaction until its evaluation by the antitrust authority. Transactions must be notified using a special form, which also determines what kind of documents should be submitted. Notification applications are subject to a fee of around EUR 1,250.
4. Evaluation of concentration is based on the test of a significant restriction of competition. The wording of the test and its fundamental interpretation is consistent with the European law. An additional and complementary test to assess the concentration is a test of public interest, which allows authorizing anticompetitive mergers, if it is in other overriding public interest, such as national security.

5. All transactions are treated in the same manner. There are no separate rules for transnational transactions.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

6. The Polish system of merger control is independent of other national systems of merger control. The Polish legal system recognizes and does not infringe the rights of other national competition authorities to control and decide whether the notified mergers are anti-competitive. In terms of jurisdiction over concentrations, there have never been any problems in cooperation with other national competition authorities.

7. Poland is not a party to any bilateral international agreements on competition law. The Polish competition authority (UOKiK) has the right to cooperate with other antitrust authorities and conclude agreements, but they are non-binding international agreements. In the opinion of Polish competition authority, there was no need to conclude such agreements, so far. The current legal system provides the possibility of effective collaboration in dealing with transnational mergers. However, certain restrictions apply to: 1. the inability to transfer evidence containing protected information; 2. Inability to benefit from waivers. In the present practice, however, restrictions do not adversely affect the cooperation with other national competition authorities in merger cases.

8. Polish merger control test does not take into account interests of other countries. Evaluation of a given concentration is dependent on the designation of geographic aspect of the relevant market. If the relevant market in a given case is the supranational market, then the Polish antitrust authority examines the effect of a concentration outside Polish borders. In the administrative practice, the Polish antitrust authority, whenever possible, tries to cooperate in good faith with other national antitrust authorities.

9. The Polish competition authority has taken an active part in international initiatives and forums of cooperation for the protection of competition, namely the OECD and the ICN. Authority's staff is involved in the work of the working groups of the forums devoted to merger control. The international standards and best practices amending the Polish antitrust legislation are an important source of inspiration of these changes.

10. In terms of regional initiatives in the field of multijurisdictional merger control, the most important is the membership in the European Union and the division of powers between the Commission and national authorities. Cooperation between national authorities occurs especially when using the system for referrals of cases to the Commission or the taking of cases from the Commission by national authorities. In this context, principles of cooperation developed in the ECA forum are important. The UOKiK is not a party to other agreements, which in any way affect the jurisdiction or lay down the rules for cooperation with other competition authorities.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

11. The Polish system of merger control is based on compulsory notification of all transactions meeting the notification thresholds. Notification turnover thresholds were significantly increased over the
past 10 years. Because of this, all transnational transactions, which even slightly could affect the markets on the Polish territory are subject to notification. The increase of turnover thresholds served to reduce business transaction costs by limiting the obligation of notification. However, a problem can be noticed that by increasing the working turnover thresholds and adapting them to transnational transactions, they have become too high for certain transactions of a purely local nature. The result is that it becomes reasonable to restore the notification criteria based on objective indicators, such as the market share.

12. The UOKiK has no legal opportunities to oblige entrepreneurs from outside Poland to cooperate during the investigation. However, in many cases, such cooperation took place on a purely voluntary basis. In a few cases the Polish office helped foreign authorities to obtain a response from Polish entrepreneurs, as well. In half of the cases, through persuasion of the UOKiK, Polish entrepreneurs have responded to the call by foreign authorities.

13. The UOKiK has a full legal independence in exercising the jurisdiction over merger transactions affecting the Polish territory. In this sense, decisions taken by other competition authorities may not bind the Polish competition authority in while making any decision. Nonetheless, UOKiK take into account any decisions taken by the foreign competition authorities. Furthermore, this does not preclude an effective cooperation with other national authorities and the coordination of activities relating to a notified transnational concentration. In the present practice, however, there was no need to make the decision of the Office dependent on the position of other foreign competition authorities.

14. The UOKiK is an independent body and the political influence from other public administration or government bodies is limited. Moreover, any political intervention is excluded in reference to examination of transnational mergers notified to the UOKiK. There is no legal basis in the Polish system of competition protection for any other authority to change the decision of the UOKiK or impose obligations on it. It should be noted, however, that in addition to merger control exercised from the standpoint of competition protection, there is a possibility of merger control under other legislation. For example, the Financial Supervisory Authority also controls the concentration of entrepreneurs from the financial sector in terms of transaction safety and consumer protection. Those two perspective, do not necessarily lead to the same conclusions. Such a situation occurred in relation to the concentration of the Unicredit/HVB.

15. Transnational transactions are not regulated differently from domestic transactions and the same rules apply. For this reason, non-economic issues can be taken into account if the concentration is assessed on the basis of public interest test. In applying this test, the UOKiK may approve the anti-competitive concentration if:

- the concentration is expected to contribute to economic development or technical progress;
- it may exert a positive impact on the national economy.

16. In practice, the UOKiK relied on public interest test when assessing mergers in energy sector. In this context the Polish energy security and social security and the fight against unemployment were invoked. However, the public interest test may not be a basis for blocking a concentration, including transnational concentration.

17. In the current practice of the Polish competition authority, transnational transactions were not particularly complex cases. However, they could potentially be a challenge in coordinating the activities of many national bodies and the protection of the rights of entrepreneurs. In particular, this protection must involve regulation of the transmission of data containing business secrets.
2.3 Remedies (types, consultation, monitoring and enforcement)

18. In the current practice, the UOKiK has never issued a conditional decision in relation to a transnational merger. The Polish competition authority may use both the structural and behavioural conditions. Structural conditions consist in obliging an entrepreneur to give up certain assets, e.g. sale of stores or production line. Behavioural conditions rely on the imposition on an entrepreneur of the duty to act in a specific manner, such as providing distribution networks for third parties.

19. Structural conditions are the primary type of conditions applied by the UOKiK. Behavioural conditions are accepted only if the structural conditions cannot be adopted. Preference for structural conditions is due to the fact that they provide a permanent modification of the market structure and effectively counteract the anticompetitive effects of concentrations. Behavioural conditions are usually temporary and are much more difficult to monitor. Also, the determination of the wording of behavioural conditions is more difficult than in the case of structural conditions.

20. The practice of the UOKiK shows that very often the discussions with entrepreneurs concentrate on the period to implement the condition. Overseeing the implementation of structural conditions is easier than in the case of behavioural conditions. Entrepreneurs often want to avoid a detailed description of conditions, since it facilitates their evasion of commitments. The more accurate the description of all the commitments, the easier it is to monitor their implementation.

21. The primary instrument for monitoring the performance of the conditions covers the obligation imposed on entrepreneurs to periodically report progress in the implementation of conditions. In case of doubt the UOKiK may request the entrepreneur to produce all documents related to the implementation of conditions or may carry out an audit at entrepreneur’s premises. As regards the monitoring of conditions, no additional agreements with other national antitrust authorities have ever been concluded. This situation resulted from the fact that the previously imposed conditions had to be implemented on the Polish territory, and so there was no need to involve other bodies. Moreover, there were no such situations under which other foreign competition authority asked the UOKiK for help in monitoring the implementation of conditions.

22. In the practice of the UOKiK, there has been no coordination of the activities of the Polish authority with other national competition authorities in terms of joint setting of conditions.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING
AND EMERGING ECONOMIES

-- Russian Federation --

1. According to the Russian legislation, mergers, joining and foundation of companies as well as purchasing of stocks (shares) of companies are subject to the antimonopoly control.

2. At that, the antimonopoly legislation provides for both pre- and post- merger control.

3. Since 2006 thresholds for obtaining pre merger approval by the antimonopoly authority or provision of post merger notification to the antimonopoly authority have been repeatedly raised. It was made in order to reduce administrative burden for business and control more effectively those transactions that may affect competition in the relevant markets. The last increase of the thresholds (nearly twice) was set in the Federal Law No. 164-FZ of 17 July 2009.

4. Currently, prior approval of the antimonopoly authority is needed in the following cases:

   - merger or joining of companies if the aggregate value of their assets exceeds 3 bln rub. (75 mln Euro) or their total revenues from sale of products for the preceding calendar year exceed 6 bln rub. (150 mln. Euro);

   - foundation of a company through placing stocks (shares) or property into its capital stock if the total value of the companies’ founders assets exceeds 7 bln rub (175 mln Euro) or their total revenues from sale of products for the preceding calendar year exceed 10 bln rub (250 mln. Euro);

   - transactions between the companies if total value of assets of acquirer company and of the company the stocks (shares) and property or rights of which is acquired exceeds 7 bln rub (175 mln. Euro) or their total revenues from sale of products for the preceding calendar year exceed 10 bln rub (250 mln Euro) while the total value of assets (group of persons) of the acquiring company whose stocks, property or rights are acquired exceeds 250 mln rub (6, 3 mln Euro).

5. Besides, prior approval of the antimonopoly authority is needed if a company involved in the transaction or included in one group of persons is included in the Register of economic entities occupying more than 35% of the market share on a particular product market (the Register is maintained by the FAS Russia).

6. The companies have the right to send to the antimonopoly authority a post notification, instead of receiving the prior authority’s approval, about similar actions or transactions if they are made within a group of persons.
7. The FAS Russia should receive post notifications in the following cases:

- establishment of a company as a result of merger, joining to the company of one or more companies, if the aggregate value of their assets or their total revenues from sales of products during the preceding year exceeds 400 mln rub (10 mln. Euro);

- transactions, if the total value of the acquiring company assets, and the company whose shares, property or rights are acquired, or their total revenues from sales of products during the preceding year exceeds 400 mln rub (10 mln. Euro) while the total value of assets, shares, property or rights of the acquired company exceeds 60 mln rub (1.5 mln. Euro).

8. The different thresholds are established by the antimonopoly authority for the financial and credit organizations for obtaining pre-merger approval and submission of post notification. The thresholds are established on the basis of total value of assets of the parties to the transaction.

9. Currently the FAS Russia is proposing to cancel the procedure of submission of post notifications. If the remedies imposed by the antimonopoly authority are not fulfilled, the authority can bring a case to the Court and request for annulment of the transaction.

10. The antimonopoly authority can do the following when carrying out prior control over economic concentration:

- satisfy an application if the transaction, other action declared in the application would not lead to restriction of competition;

- satisfy an application imposing structural and behavioral remedies aimed at ensuring competition;

- prolong the period of examination of application in case if the antimonopoly authority suspects the transaction or other action can lead to restriction of competition;

- refuse to satisfy an application if the antimonopoly authority during the examination of an application comes to a conclusion that the transaction or other actions declared in the application would lead or can lead to restriction of competition.

11. The procedure of applications examination as well as procedure of submitting applications and notifications, including a list of information required to be submitted are provided in the Federal Law "On Protection of Competition" (hereinafter - Law), as well as in the number of other regulatory legal acts.

12. The merger decisions taken by the antimonopoly authority are published on the FAS Russia official website (www.fas.gov.ru) that ensures transparency of the authority’s activity and allows the stakeholders to express their opinions on the cases/transactions.

13. If the company is established without prior approval of the FAS Russia, it has to be liquidated or reorganized; if the transaction is carried out without obtaining the prior approval of the antimonopoly authority it is recognized as invalid. However it can be done only in case if the Court upholds a decision of the FAS Russia about the fact that such an establishment of a company or such transaction has led or may lead to restriction of competition.

14. Failure to submit an application, as well as violation of the order of submission of application can be subject to the administrative liability.
15. The state fee for examination of application equals 20,000 rub (500 Euro) (according to Point 89, Part 1, Article 333.33 of the Tax Code of the Russian Federation).

16. It is worth mentioning that the FAS Russia, introducing changes to the legislation, followed the OECD Council recommendations on mergers and acquisitions control C(2005) 34 aimed at effective, efficient and timely examination of transactions (increase of thresholds for obtaining pre merger approval and receiving post merger notification, facilitating of the procedure for submitting applications within a group of persons, specification of requirements for submitting the notifications and procedure of examination of transactions).

17. The norms of control over economic concentration prescribed in the Law are to be applied equally by the Russian and foreign legal entities (Article 3 of the Law).

18. With regard to international cooperation, the FAS Russia has a right to cooperate with international organizations, foreign government Agencies, to participate in development and implementation of international agreements of the Russian Federation.

19. The FAS Russia widely uses its powers in the field of international cooperation. It signed and implements a number of multilateral and bilateral agreements with foreign Competition Authorities and associations (Austria, Bulgaria, Brazil, Canada, Chile, China, Denmark, Italy, Japan, Korea, Latvia, Mexican United States, Mongolia, Poland, Romania, Slovakia, USA, Ukraine, Finland, France, Czech Republic, Sweden, Estonia, ICAP, BRIC) which cover various types of cooperation.

20. These documents contain, inter alia, provisions regulating the procedure of information exchange between Competition Authorities, including confidentiality issues, during holding of investigations and/or examination of transactions by Competition Authorities that signed these agreements.

21. Most clearly the mechanism and procedure of interaction between the parties in part of application of the antimonopoly legislation are provided in the two new type agreements in the field of competition policy signed between the FAS Russia and the Federal Competition Commission of the United Mexican States (June 2010) and between the FAS Russia and the Hungarian Competition Authority (September 2010).

22. Example of cooperation between the Russian and Hungarian Competition Authorities can be described by a request submitted by the Hungarian Competition Authority to the FAS Russia where they requested to provide information on acquisition of the EMFESZ Company (the second largest gas seller in Hungary after the German company E.On), belonging to Gazprom group of persons, by the RosGas AG Company; and along with this it was pointed out that the Gazprom Company has denied any involvement in the transaction. The request was sent to evaluate the degree of natural gas supply influence on the Hungarian market. The FAS Russia sent an official request to the Gazprom company, the response from which was immediately resent to the Hungarian Competition Authority.

23. One of the practical results of cooperation between the FAS Russia and the Directorate General for Competition of the European Commission were consultations on the merits of consideration of the acquisition of the Sun Microsystems company by the Oracle Corporation Company.

24. Notifications for this transaction have been submitted for consideration to many competition authorities worldwide, including Russia and the European Commission. For the FAS Russia it was extremely important to understand the views of the European Commission concerning the consequences of this transaction in order to take a coordinated decision on this issue.
25. The precondition of the European Commission for holding the consultations was a submission of waiver by those companies by which they confirm their consent on holding of consultations between the FAS Russia and the European Commission with the possibility to exchange confidential information.

26. The waivers submitted by the companies to the FAS Russia and the European Commission contained restrictions that the submitted confidential information could be exchanged only within the frameworks of consultations held between the FAS Russia and the European Commission in order to define a common position, thus imposing a ban to pass this information to the third parties, as well as to use it for any other purposes.

27. After receipt of these letters, the FAS Russia and the European Commission held telephone consultations during which they discussed the basic approaches to market analysis and to examination of the transaction, as well as concerns in relation to maintenance of competition in the markets where these companies operate.

28. Apart from the indicated above ways of cooperation, the FAS Russia attempted to cooperate with the Department of Justice and Federal Trade Commission of the United States and the DG Comp. Thus, after examination of the application submitted by the Graftech Holdings Inc and Graftech Seadrift Holding companies to the FAS Russia by which they asked for the permission to acquire 81.1% of shares in the share capital of the LLC «Seadrift Coke LP», as well as to acquire the rights allowing to operate the «Seadrift Coke LP» Company business, the FAS Russia came to a conclusion that this transaction can affect competition in the global market of graphite electrodes and informed above mentioned authorities about its position concerning this transaction with the recommendation to take it into account in case if the companies also submit to them their applications.

29. An example of imposing the remedies by the antimonopoly authority during consideration of cross-border transaction was the acquisition of the RUSAL assets by the Alcoa Company (the world's largest producers of aluminum). The FAS Russia approved this transaction imposing a number of behavioral remedies on the Alcoa Company.

30. It is important to note that one of the major restrictions for effective cooperation between the Competition Authorities of different countries is the confidentiality issues, as the right to refer the information to the confidential one belongs to its owner and without his permission such information can not be provided to the third parties.

31. Inability of the FAS Russia to receive confidential information from foreign Competition Authorities creates considerable difficulties during examination of cross-border transactions or transactions committed outside the Russian Federation, as well as during the investigation of violations of antimonopoly legislation. The FAS Russia needs such information in order to conduct a comprehensive investigation of the market and activities of economic entities operating on this market, to obtain evidences of violations of antimonopoly legislation and to assess possible consequences of the transactions or other actions performed by the economic entities.

32. In this regard, the FAS Russia is currently doing its best to eliminate these difficulties that would enhance the cooperation with foreign Competition Authorities within the frameworks of examination of cross-border transactions.
CONTRÔLE DES FUSIONS TRANSNATIONALES: DÉFIS À RELEVER POUR LES PAYS EN DÉVELOPPEMENT ET LES ÉCONOMIES ÉMERGENTES

-- Sénégal --

1. Le droit de la concurrence est-il adapté aux économies des pays en voie de développement ? La controverse doctrinale sur cette question semble aujourd’hui dépassée. Sous le poids de l’ouverture des économies des pays en développement vers l’extérieur et la mondialisation croissante, la politique et le droit de la concurrence ont fini par faire partie intégrante de l’agenda des négociations commerciales multilatérales, bilatérales et régionales.

2. Ainsi, la plupart des pays en voie de développement ont adopté depuis les années 90, des politiques et des droits de la concurrence adaptés à leurs différents niveaux de développement, mais également à leurs caractéristiques économiques, culturelles et sociales. Au demeurant, la politique de concurrence des États est aujourd’hui, plus que par le passé, plus décisivement adossée à leurs stratégies de développement.

3. Au Sénégal par exemple, dans les années 60, même si les principes de la liberté d’entreprise et de la libre concurrence étaient reconnus dans la loi 65-25 du 4 mars 1965 sur les prix et les infractions à la législation économique, les pratiques anticoncurrentielles n’y étaient pas réglementées. Seules les ententes étaient prévues dans ce texte et une commission des ententes était censée examiner et autoriser, le cas échéant, les ententes bénéfiques au marché et à l’économie.

4. C’est finalement en 1994 que les pratiques anticoncurrentielles, qualifiées à l’époque de collectives (ententes, abus de positions dominantes…) ou individuelles (refus de vente, pratiques discriminatoires, etc.), ont été définies et réglementées.

5. Cependant, cette loi 94-63 du 22 août 1994 sur les prix, la concurrence et le contentieux économique, ne réglementaient pas les concentrations. Sans doute les besoins de création et de promotion d’entreprises fortes, pourvoyeuses d’emplois et de recettes fiscales, mais également la volonté de mettre en place des champions nationaux compétitifs sur les marchés, ont été les principales raisons de l’exclusion des concentrations du champ d’application de la loi.


7. La question des opérations de concentrations internationales revêt un intérêt majeur pour les pays de la région ouest-africaine dont les caractéristiques des marchés ne sont pas très différentes. Un autre intérêt réside dans le fait que la plupart des entreprises opérant dans ce marché sont étrangères ou sont

* Contribution soumise par M. Malick Diallo, Secrétaire Général de la Commission Nationale de la Concurrence du Sénégal.
majoritairement dominées par des ressortissants de pays développés. Par conséquent, les opérations de fusion, d’acquisition et de prise de participation se font généralement en dehors de la zone mais avec des répercussions sur le marché régional.

8. Après avoir dressé brièvement le régime juridique des concentrations dans l’UEMOA, nous essaierons de faire le point sur les défis et les enjeux posés par les concentrations transfrontières pour les économies des pays en développement en particulier pour le Sénégal. Enfin nous conclurons par des considérations de principes aptes à faire évoluer le traitement de ces questions sur le plan international.

1. Régime juridique des opérations de concentration dans l’UEMOA

9. Le droit communautaire de la concurrence définit une concentration comme étant:

- la fusion entre deux ou plusieurs entreprises antérieurement indépendantes ;
- l'opération par laquelle une ou plusieurs personnes détenant déjà le contrôle d'une entreprise au moins, ou une ou plusieurs entreprises, acquièrent directement ou indirectement, que ce soit par prise de participations au capital ou achat d'éléments d'actifs, contrat ou tout autre moyen, le contrôle de l'ensemble ou de parties d'une ou de plusieurs autres entreprises ;
- la création d'une entreprise commune accomplissant de manière durable toutes les fonctions d'une entité économique autonome.

10. Lorsqu’une opération de concentration crée ou renforce une position dominante sur le marché susceptible d’entraver de manière significative le fonctionnement normal de la concurrence sur le marché, cette concentration est assimilée à un abus de position dominante.

11. Le droit communautaire de la concurrence prévoit également des attestations négatives ou d’exemptions par catégorie ou individuelles applicables aux concentrations, dont l’effet sur la concurrence n’est pas négatif (voir en annexe une décision d’attestation négative en faveur d’une concentration dont font partie des entreprises étrangères). En tout état de cause, les projets de concentration doivent obligatoirement être notifiés à la Commission.

2. Défis et enjeux des concentrations transfrontières pour les pays en développement

12. L’un des enjeux majeurs liés aux concentrations transfrontières pour les pays de la région ouest-africaine en général, et pour le Sénégal en particulier, réside dans l’attrait de l’investissement direct étranger. En effet, depuis quelques années le Sénégal a mis en place un programme de facilitation de la création et de l’établissement d’entreprises, qui lui a d’ailleurs valu un classement honorable dans le « Doing business » de 2009 et 2010. Les investissements étrangers s’opèrent de différentes manières, dont la conclusion de contrat avec des entreprises nationales, la prise de participation des grands groupes étrangers dans des entreprises locales ou le rachat pur et simple d’entreprises en difficulté, les opérations de concentration constituent ainsi un outil de création ou de renforcement de certaines entreprises dans les pays en développement.

13. Dans un contexte de difficultés économiques marquées par la crise économique et financière, ces opportunités de création d’emplois et de richesses ne sont pas forcément vues d’un mauvais œil par les gouvernements.

14. Un autre enjeu non moins important est la création de grandes entreprises dans la région susceptibles de faire efficacement concurrence aux entreprises étrangères. En effet, en jouant sur les
avantages comparatifs des États, certaines entreprises ont procédé à des fusions dans des secteurs comme l’huile de palme ou le savon (voir la décision en annexe) afin de renforcer leur pouvoir sur le marché. De telles opérations peuvent être bénéfiques pour le consommateur en termes de baisse de prix des produits concernés.

15. Un autre enjeu lié aux concentrations internationales pour les PED est constitué par les transferts de technologie dont ces opérations peuvent être porteuses. En effet, pour des entreprises nationales à la recherche de nouvelles technologies et d’innovation, conclure des contrats avec de grands groupes multinationaux peut être source de bénéfices considérables.

16. A ces remarques s’accolent également de nombreux défis à relever pour les autorités de la concurrence des pays en développement. Ces défis sont notamment l’examen préalable des projets de concentration, les analyses économiques à mener pour en juger les effets potentiels, les modalités de contrôle et de sanctions, la recherche des informations pertinentes dans d’autres juridictions etc.


18. Face à cette situation, les autorités de la concurrence de la zone UEMOA rencontrent d’énormes difficultés à examiner les opérations de concentration. Pour rappel, contrairement aux pays développés comme les États-Unis ou l’Union Européenne qui donnent aux entreprises la possibilité d’apprécier la conformité des opérations de concentration ou d’ententes afin de les mettre en œuvre directement sans notification, la législation communautaire (UEMOA) de la concurrence fait obligation aux entreprises de notifier les projets d’entente ou de concentration. Dès lors, se pose la question des procédures applicables aux concentrations opérées à l’extérieur de la zone mais dont les effets se ressentent dans le marché communautaire.

19. Cela pose la problématique de la coopération internationale en matière d’application du droit de la concurrence. La Commission de l’UEMOA n’a conclu à ce jour aucun accord de coopération bilatérale avec une autre autorité de concurrence de pays développés ou émergents. En sus, cette coopération, basée sur l’application volontaire ne garantit pas suffisamment la poursuite des infractions au droit de la concurrence et en particulier des concentrations dans d’autres juridictions.

20. Par conséquent, la Commission de l’UEMOA doit renforcer les prérogatives des structures nationales de concurrence qui sont parfois mieux placées pour surveiller leur marché et détecter les opérations de concentrations internationales non notifiées.

3. Conclusion

21. En définitive, les défis et enjeux liés aux concentrations transfrontières pour les pays en développement tiennent d’une part aux besoins de développement économique mais également à la nécessité de la protection des petites et moyennes entreprises contre la surpuissance des firmes multinationales étrangères. Ces objectifs, parfois opposés, rendent délicate l’action des autorités de concurrence et des États.

22. A ce titre, les challenges suivants sont à relever par les autorités de concurrence des pays en développement.
• La poursuite des négociations multilatérales pour une harmonisation des règles régissant les concentrations en particulier et les pratiques anticoncurrentielles en général ;

• La mise en place d’un organe supranational, doté de prérogatives importantes pour la poursuite des infractions au droit de la concurrence qui dépassent le cadre national ;

• Le renforcement de la coopération internationale en matière de concurrence par le biais de la CNUCED, de l’OCDE, de l’ICN, etc. ;

• La révision de l’Ensemble des Nations Unies sur les principes et règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives, pour en faire un outil efficace de lutte contre les pratiques anticoncurrentielles transfrontières.
ANNEXE

UNION ECONOMIQUE ET MONETAIRE
OUEST AFRICAINE

La Commission

DECISION N° 000/2008/CM/UEMOA
PORTANT ATTESTATION NEGATIVE A L'EGARD DU PROJET DE CONCENTRATION
ENTRE LES SOCIETES UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI,
SHCI et, SANIA

LA COMMISSION DE L'UNION ECONOMIQUE ET MONETAIRE OUEST AFRICAINE,

VU le Traité de l'UEMOA, notamment en ses articles 88, 89 et 90 ;

VU Le Règlement n°02/2002/CM/UEMOA du 23 mai 2002 relatif aux
pratiques anticoncurrentielles à l'intérieur de l'Union Economique et
Monétaire Ouest Africaine ;

VU le Règlement n°03/2002/CM/UEMOA du 23 mai 2004 relatif aux
procédures applicables aux ententes et abus de position dominante à
l'intérieur de l'Union Economique et Monétaire Ouest Africaine ;

VU la demande présentée par les Cabinets d’Avocats EKDB et CMS,
Bureau Francis Lefebvre, sis respectivement à Cocody II Plateaux, rue
des jardins, 25 BP 1582 Abidjan 25, Côte d'Ivoire et à 1 – 3, Villa
Emile BERGERAT 92522 Neuilly sur Seine Cedex, France, pour le
compère des entreprises UNILEVER, SIFCA, COSMIVOIRE, PALMCI,
NAUVU, PHCI, SHCI et, SANIA

Après avoir mis les États membres et les entreprises intéressées en mesure de présenter
leurs observations et considérant ces observations ;

Considérant l’avis du Comité Consultatif de la Concurrence recueilli à sa quatrième
session tenue à Abidjan du 06 au 10 octobre 2008,

Considérant les faits et les motifs sur lesquels la Commission se fonde et exposés
ici après :

A) FAITS ET PROCÉDURE :

1. Par courrier en date du 25 juin 2008, les cabinets d’avocats EKDB et CMS bureau
Francis Lefebvre, demeurant tous en Côte d’Ivoire, sur mandats respectifs des
sociétés SIFCA, COSMIVOIRE et PALMCI, d’une part, et UNILEVER CI, d’autre part,
ont conjointement notifié à la Commission de l’UEMOA un projet d’accord aux fins
d’obtention d’une attestation négative ou, à défaut, une exemption individuelle.
Les entreprises concernées ont été présentées ainsi qu’il suit :

**UNILEVER Côte d’Ivoire SA**, de droit ivoirien, au capital de 8 053 000 000 F CFA, sis à Abidjan, Boulevard de Vridi, 01 BP 1751 Abidjan 01, spécialisée dans la transformation physique et chimique de tout corps d’origine végétale ou synthétique, en vue d’obtenir des produits détergents et des produits industriels à base de corps gras ainsi que dans le stockage des huiles, des corps gras et dérivés ;

**SIFCA SA**, de droit ivoirien, au capital de 3 000 000 000 F CFA, sis à Abidjan, Boulevard du Havre, zone portuaire, 01 BP 1289 Abidjan 01, ayant pour objet social l’étude et la réalisation d’opérations de toute nature, tendant au développement des affaires commerciales, industrielles et agricoles en Afrique noire ;

**COSMIVOIRE SA**, de droit ivoirien, au capital de 4 254 470 000 F CFA, sis à la Zone industrielle de Vridi, 01 BP 3576 Abidjan, ayant pour objet social, l’achat, l’entreposage, l’échange, la représentation, la transformation, la formulation et la commercialisation de tous produits chimiques et cosmétiques naturels ou artificiels, de toutes huiles végétales, animales ou minérales, naturelles ou artificielles, ainsi que de tous produits dérivés ;

**PALMCI SA**, de droit ivoirien, au capital de 20 000 000 000 F CFA dont le siège social est au Boulevard de Vridi, 18 BP 3321 Abidjan 18, spécialisée dans l’exploitation et la mise en valeur des plantations de palmiers à huile, terrains et établissements agro-industriels de production d’huile de palme brute et d’amandes de palmistes ;

**NAUVU Investments PTE LTD (Ci-après NAUVU)**, de droit singapourien, sis au 6 Temasek Boulevard - 29th Floor- Suntec Tower Four- Singapour 038986, ayant pour objet le commerce de gros ; société commune constituée par le Groupe WILMAR, spécialisée dans la production d’huile de palme et le groupe OLAM, en activité dans le négoce international de matières premières agricoles.

2. L’accord objet de la demande vise à réaliser une opération de concentration qui devrait permettre une spécialisation des parties prenantes, dans la filière huile de palme de la Côte d’Ivoire.

Ainsi, est-il projeté qu’à l’issue de l’opération, resteront en activité la Société UNILEVER Côte d’Ivoire qui se consacrera exclusivement aux activités relatives à la savonnerie, les sociétés SIFCA et NAUVU qui se spécialiseront dans la production et l’exploitation de l’huile brute et raffinée.

La notification déposée par les sociétés impliquées dans l’opération est composée des pièces suivantes :

- une lettre signée par Maîtres Ibrahima BAH et Soualiho DIOMANDE du Cabinet EKDB, Maîtres Olivier BENOIT et Benoît PHILIPPE du Cabinet CMS Bureau Francis LEFEBVRE mandataires des sociétés demanderesses,

- trois copies des mandats donnés respectivement par la société UNILEVER au cabinet Francis LEBVRE, et par les sociétés SIFCA, COSMIVOIRE et PALMCI au Cabinet EKDB,
- trois copies de l’accord cadre conclu entre les parties à l’opération,
- trois copies des rapports et comptes annuels des sociétés SIFCA, UNILEVER, COSMIVOIRE, PALMCI, PHCI, WILMAR, OLAM et NAUVUU,
- trois copies de l’Etude BOAD sur la promotion et le développement de la filière oléagineuse dans l’Espace UEMOA,
- trois copies de l’Etude réalisée par le Cabinet CCA CY sur la filière oléagineuse, à la demande de COSMIVOIRE et UNILEVER,
- trois copies d’extraits Internet relatifs à la fabrication artisanale du savon.

Ces différents documents ont été produits en originaux ou en copies certifiées conformes.


Pour l’ouverture de la procédure d’examen de la notification, la Commission a procédé aux formalités suivantes, conformément aux dispositions des articles 10.4 et 28.1 du Règlement précité,
- la délivrance d’un accusé de réception aux demandeurs, par les lettres n°06571/PC/DMRC/DConc et n°06572/PC/DMRC/DConc du 01 août 2008,
- la transmission d’une copie du dossier de notification aux autorités compétentes des États membres,
- la publication du projet de concentration sur le site de l’UEMOA et dans deux journaux d’annonces légales par État membre.

4. Dans le délai prescrit par l’acte de publication de la notification (un mois), la Commission a enregistré les observations écrites de deux États membres et d’une entreprise sénégalaise, à savoir :
- le Togo par lettre n°909/MCIAPME/DCIC du 05 septembre 2008,
- le Niger par lettre n°0587/MCI/N/DCI/C du 10 septembre 2008,

Les observations du Burkina Faso sont parvenues à la Commission le 16 septembre 2008.

B) Position du problème :

6. La demande adressée à la Commission vise à titre principal l’obtention d’une attestation négative concernant une opération de concentration dans la filière de l’huile de palme en Côte d’Ivoire.


Il s’agit de vérifier si les parts de marché déclarées être détenues par les entreprises parties à l’opération de concentration les placent individuellement ou collectivement en position dominante, dans les branches de l’huilerie et de la savonnerie.

7. A titre secondaire et accessoirement, les parties à l’opération sollicitent le bénéfice de l’exemption au cas où elles succomberaient dans leur demande principale. A l’appui, elles ont fait valoir les avantages économiques qui seraient tirés de la mise en œuvre des accords notifiés.


C) Analyse des arguments des demandeurs :

8. Tel que se présente le dossier de notification de l’opération de concentration, il y a lieu de distinguer l’accord principal portant sur les actifs des entreprises et leur gouvernance et les accords accessoires relatifs aux activités et aux relations commerciales entre ces entreprises.

La réglementation communautaire n’ayant pas apporté de précision sur les modalités d’examen des accords accessoires, en cas de concentration, il convient d’apprécier ceux-ci suivant les principes établis pour le contrôle des ententes.

9. Dans le dispositif de l’UEMOA, le contrôle à priori des opérations de concentration se fait indirectement, suivant les dispositions de l’article 89 b) du Traité qui interdit les pratiques assimilables à l’abus de position dominante.

Ces pratiques sont définies par l’article 4 alinéa 2 du Règlement n°02/2002/CM/UEMOA du 23 mai 2002 relatif aux pratiques anticoncurrentielles au sein de l’UEMOA qui dispose : « constituent une pratique assimilable à un abus de position dominante les opérations de concentration qui créent ou renforcent une position dominante détenue par une ou plusieurs entreprises, ayant comme conséquence d’entraver de manière significative une concurrence effective à l’intérieur du marché commun. »
Deux conditions sont ainsi posées : la création ou le renforcement d’une position dominante et l’entrave significative à une concurrence effective à l’intérieur du Marché Commun.

10. S’agissant de la première condition, les parties demanderesses ont fait valoir l’absence de position dominante ante et post concentration, en se fondant sur leurs parts de marché respectives dans le secteur de l’huile alimentaire où SIFCA et NAVU n’auront que 13%, et dans le secteur de la savonnerie où UNILEVER aura 24% de part de marché.

Un tel argument s’apprécie en fonction des paramètres suivants : l’accès à la matière première, l’importance des échanges intracommunautaires et les importations extracommunautaires.

Si on se réfère à la production de l’huile de palme brute (CPO) à partir de laquelle sont obtenus l’huile raffinée et le savon, une définition restrictive du marché géographique pourrait limiter l’analyse au seul marché de la Côte d’Ivoire qui concentre environ 89% du total régional (source rapport d’étude BOAD d’avril 2008).

En plus, la production ivoirienne étant en bonne partie consommée localement par les industriels et les transformateurs artisanaux, les échanges intracommunautaires sur ce produit (CPO) sont moindres. Les parties à l’opération notifiée occupent environ 70% de cette production, soit par des plantations exploitées en propre soit par des plantations villageoises encadrées.

Aussi, l’opération envisagée va aboutir à faire des sociétés SIFCA et NAUVU les leaders pour le commerce local de la matière première.

11. Toutefois, il est difficile d’en déduire une position dominante occupée par ces entreprises pour au moins les raisons suivantes :

   - en tenant compte des importations d’huile de palme, d’huile de soja et d’autres corps gras dans la région, il est peu probable que les parties à l’opération puissent se soustraire des contraintes de la concurrence, et cela d’autant plus que la filière oléagineuse de la Région affiche une faible compétitivité vis-à-vis des importations venant d’Asie, notamment.

   - l’autoconsommation est assez développée dans le secteur ;

   - les prix de la matière première (CPO) sont déterminés sur la base du cours mondial et fait intervenir l’Association Interprofessionnelle du Palmier à Huile.

12. Au regard des activités industrielles de production d’huile alimentaire et de savon, les parts de marché déclarées par les parties notifiantes sont moins importantes (13,9% de la consommation totale d’huile alimentaire du marché régional pour UNILEVER et COSMIVOIRE réunies et 28,6% pour le savon).

Sans confirmer l’exactitude des chiffres fournis, il est toutefois possible de constater, à travers les statistiques officielles que le pouvoir de marché est très dispersé autant pour le savon que pour l’huile alimentaire qui font l’objet d’échanges intracommunautaires considérables.

14. Il y a lieu également de tenir compte de la part non négligeable de la production artisanale d’huile et de savon destinés en bonne partie à la consommation locale mais qui font aussi l’objet de commerce intracommunautaire informel. Les parts de ce secteur sont évaluées dans l’étude fournie par les parties notifiantes à environ 21% du marché du savon et 32% du marché de l’huile.

Au regard de ce qui précède, il est à conclure que l’opération de concentration notifiée ne crée ni ne renforce une position dominante et de ce fait ne tombe pas sous l’interdiction de l’article 88 b du Traité.

15. Sous ce rapport l’entrave significative à la concurrence interdite comme conséquence de la création ou du renforcement d’une position dominante, devrait être d’office écartée.


17. Toutefois, il apparaît nécessaire d’indiquer dans quelle limite cette attestation négative pourrait couvrir les accords notifiés par les parties, comme étant accessoires à l’opération de concentration.

A cet égard, il est à considérer les dispositions de l’article 88 a du Traité qui interdit les accords entre entreprises ayant pour objet ou pouvant avoir pour effet de restreindre ou de fausser le libre jeu de la concurrence à l’intérieur de l’Union.

Entre autres, cette interdiction vise les « accords de répartition des marchés ou des sources d’approvisionnement en particulier ceux portant sur une protection territoriale absolue, les accords de limitation ou de contrôle de la production, des débouchés, du développement technique ou des investissements etc. »

18. Au regard de ces dispositions, la Commission a émis des réserves sur les clauses suivantes qu’elle a estimé restreindre la concurrence au-delà du nécessaire :

- l’article 5.3 b du contrat de fourniture de stéarine dont la mise en œuvre pourrait empêcher tout accès des concurrents à la matière première.

- l’article 21 du contrat fournisseur liant UNILEVER-CI et AFRICO-CI pour la fabrication d’emballages qui ne saurait être transféré en l’état à la Société SIFCA, dans la mesure où son application pourrait empêcher les concurrents d’accéder aux prestations de AFRICO-CI et de ses affiliés, sans qu’aucun droit de propriété industrielle puisse justifier cette restriction.

19. Les arguments présentés par les demandeurs insistent sur le fait que les accords de non concurrence et le contrat de fourniture de stéarine accompagnant l’opération de concentration sont nécessaires, pour assurer une transition correcte aux entreprises qui ont besoin de s’adapter à leur nouvel environnement et leur restructuration.
20. Ce point de vue n’ayant pas suffi pour justifier les restrictions en cause, la Commission a estimé utile d’amender les accords accessoires, pour soustraire du bénéfice de l’attestation négative les deux clauses objet de ses réserves.

21. Par ailleurs, afin d’éviter le prolongement des restrictions de concurrence au-delà du nécessaire, il s’avère nécessaire de procéder à une évaluation des effets des accords accessoires sur le fonctionnement du marché, à l’issue de la cinquième année de mise en œuvre.

Ces préalables indiqués, la Commission 

Émet la décision qui suit:

**Article 1** :
Une attestation négative est délivrée concernant le projet de concentration entre les sociétés UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI et SANIA.

**Article 2** :
La présente attestation négative couvre l’opération de concentration ainsi que tous les accords accessoires notifiés, à l’exclusion de l’article 5.3 b du contrat de fourniture de stéarine entre UNILEVER-CI, SANIA, UNILEVER PLC et NAUVU ainsi que de l’article 21 du contrat fournisseur liant UNILEVER-CI et AFRICO-CI pour la fabrication d’emballages.

**Article 3** :
Les destinataires de la présente décision sont les sociétés UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI, SANIA et leurs affiliés.

**Article 4** :
Il sera procédé à l’évaluation de la mise en œuvre des accords accessoires couverts par l’attestation négative, après une période de cinq ans à compter de la date de notification de la présente décision aux destinataires.

**Article 5** :
La présente décision qui entre en vigueur à sa date de signature sera publiée au Bulletin Officiel de l’Union.

Fait à Ouagadougou le 12 OCT 2009
Pour la Commission
le Président

Soumain CISSE

7
1. Is competition law adapted to the economies of developing countries? The doctrinal controversy over this issue now seems to be a thing of the past. Under the combined weight of the opening up of the economies of developing countries to the outside and growing globalisation, competition policy and law have finally become an integral part of the agenda of regional, bilateral and multilateral negotiations.

2. Accordingly, since the 1990s, most developing countries have adopted competition policies and legislation that are tailored to match their level of development, as well as their social, cultural and economic particularities. The outcome of this is that the competition law of States is now aligned more closely to their development strategies than it has been in the past.

3. In the 1960s in Senegal, for example, even though the principles of freedom of enterprise and free competition had been recognised in Act 65-25 of 4 March 1965 on prices and infringements of economic legislation, the Act did not regulate on anti-competitive practices. The Act provided solely for cartels and a cartel commission was supposed to examine and authorise, where appropriate, cartels that were beneficial for the market and the economy.

4. It was not until 1994 that anti-competitive practices, referred to at the time as being either collective (cartels, abuse of dominant positions, etc.) or individual (refusal to sell, discriminatory practices, etc.) were eventually defined and regulated.

5. However, this legislation, namely Act 94-63 of 22 August 1994 on prices, competition and economic disputes, did not regulate concentrations. The need to create and promote strong firms which would generate jobs and tax revenues, and also the will to establish national champions which could compete in the markets, were doubtless the main reasons for excluding concentration from the Act’s scope of application.

6. At present, and more precisely since 2002, concentrations are governed by WAEMU Community competition law applicable in Member States and consequently in Senegal, in accordance with Regulations 02 and 03/2002/CM/UEMOA relating respectively to anti-competitive practices within the Union and to the applicable procedures.

7. The issue of international concentration operations is of major interest to the countries in the West African region whose market characteristics are relatively similar. Another interest lies in the fact that most firms operating in this market are either foreign or majority owned by nationals from developed countries. Consequently, merger, acquisition and share purchasing operations generally take place outside the area but nonetheless impact the regional market.

8. After providing a brief overview of the legal regime applicable to concentrations within the WAEMU, we shall attempt to take stock of the challenges that cross-border concentrations pose for the economies of developing countries and in particular for Senegal. We shall conclude by considering principles that might help advance the way in which such issues are dealt with at the international level.
1. **Legal regime applicable to concentration operations in the WAEMU**

9. Community competition law defines a concentration as:

- the merger between two or more previously independent enterprises;
- the operation whereby one or more persons who already have control of at least one enterprise, or of one or more enterprise, directly or indirectly acquire, either through acquisition of a stake in the capital or through the purchase of assets or through a contract or any other means, control of all or part of one or more other enterprises;
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

10. Any concentration operation which creates or strengthens a dominant position on the market that is likely to significantly impede normal competition on that market is considered to be an abuse of a dominant position.

11. Community competition law also provides for negative clearances or exceptions, either by category or on an individual basis, for concentrations which do not have an adverse impact on competition (see attached negative clearance in favour of a concentration of which foreign enterprises are a part). At all events, the Commission must be notified of any planned concentration.

2. **Challenges and opportunities for developing countries in relation cross-border concentrations**

12. One of the major opportunities that cross-border concentrations offer countries in the West African region in general, and Senegal in particular, is the possibility of attracting foreign direct investment. Over the past few years Senegal has introduced a programme to facilitate the creation and establishment of firms, which resulted in Senegal earning an honourable ranking in the 2009 and 2010 “Doing business” chart. Foreign investment works in a variety of ways, including the signing of contracts with national firms, acquisition of stakes in local firms by major foreign groups or the straightforward take-over of firms in difficulty, and concentration operations therefore represent an instrument for creating or strengthening certain firms in developing countries.

13. Against a background of economic difficulties marked by the economic and financial crisis, such opportunities for job and wealth creation are not necessarily viewed unfavourably by governments.

14. Another opportunity afforded by concentrations is the creation of major firms in the region which can compete effectively with foreign firms. By taking advantage of the competitive advantages of States, a number of firms in sectors such as the palm oil and sugar sectors (see the ruling attached in the annex) have merged in order to strengthen their market power. Such operations can be beneficial to consumers by lowering the prices of the products concerned.

15. Another opportunity afforded by international concentrations to developing countries is that of technology transfer operations, which can be highly rewarding in that signing contracts with major multinational groups can generate substantial benefits for national firms seeking new technologies and innovation.

16. Besides these opportunities for firms there are also many challenges that the competition authorities in developing countries will need to meet. These challenges consist in the prior review of concentration projects, the economic analyses that need to be performed to assess the potential effects of concentrations, control and penalty procedures, the search for relevant information in other jurisdictions, etc.
17. It is clear that after the failure of multilateral negotiations on competition, the lack of harmonised rules regarding the definition of good and bad concentrations and the criteria for judging between the two complicates the task of examining mergers and acquisitions for competition authorities. What is considered as a good concentration in Senegal, for example, may be seen as a bad concentration in France or another country. This situation is driving States into a madcap race to become competitive and attract foreign investment that is no longer the sole preserve of developing countries, as witnessed by the recent visits to China and India by the President of the French Republic.

18. Faced with this situation, the competition authorities in the WAEMU zone are encountering huge difficulties in examining concentration operations. By way of a reminder it is worth noting that, unlike the United States or the European Union which allow firms to assess the conformity of concentration or cartel operations directly so that they can be implemented without a need for notification, WAEMU Community competition legislation requires firms to give prior notification of any planned cartels or concentrations. As a result, the question arises as to the procedures that are applicable to concentrations carried out outside the zone whose impacts are felt within the Community market;

19. This raises the issue of international co-operation on compliance with competition law. To date, no bilateral co-operation agreements have been signed by the WAEMU Commission with competition authorities in developing or emerging countries. In addition, such co-operation, based on voluntary compliance, does not provide sufficient guarantees that proceedings will be taken to prosecute infringements of competition law and in particular concentrations in other jurisdictions.

20. Consequently, the WAEMU Commission must strengthen the prerogatives of national competition structures, which are sometimes the bodies best placed to monitor the market and detect any un-notified international concentration operations.

3. Conclusion

21. To sum up, the challenges relating to cross-border concentrations for developing countries lie firstly in their economic development needs and secondly in the need to protect small and medium-sized enterprises against the excessive power of foreign multinational firms. These occasionally conflicting objectives mean that competition authorities and States must strike a delicate balance in their actions.

22. In this respect, the competition authorities in developing countries must meet the following challenges:

- The continuation of multilateral negotiations to harmonise the rules governing concentrations in particular and anti-competitive practices in general;
- The creation of a supranational body, with substantial powers to prosecute infringements of competition law that go beyond national frameworks;
- The strengthening of international co-operation on competition through UNCTAD, the OECD, ICN, etc.;
- Revision of the United Nations Conference for the Review of the Set regarding the fair rules and principles agreed at the multilateral level for the control of restrictive business practices to transform it into an effective tool to combat cross-border anti-competitive practices.
ANNEX

WEST AFRICAN ECONOMIC AND MONETARY UNION

Commission

RULING NO. 009/2008/COM/UEMOA
GRANTING A NEGATIVE CLEARANCE REGARDING THE PLANNED CONCENTRATION BETWEEN UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA

THE WEST AFRICAN ECONOMIC AND MONETARY UNION COMMISSION:

HAVING REGARD TO The UEMOA treaty, and in particular sections 88, 89 and 90;

HAVING REGARD TO Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the West African Economic and Monetary Union;

HAVING REGARD TO Regulation No. 03/2002/CM/UEMOA of 23 May 2004 regarding the procedures applicable to cartels and abuses of dominant position within the West African Economic and Monetary Union;

HAVING REGARD TO The application submitted by the Law Firms EKDB and CMS, Bureau Francis Lefebvre, respectively located at Cocody II Plateaux, rue des jardins, 25 BP 1592 Abidjan 25, Côte d'Ivoire and 1-3 Villa Emile Bergerat 92522 Neuilly sur Seine Cedex, France, on behalf of the firms UNILEVER, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA;

After giving the Member States and the firms concerned an opportunity to present their comments and considering these comments;

Considering the opinion of the Competition Advisory Committee handed down at its fourth session held in Abidjan from 6 to 10 October 2008;

Considering the facts and grounds on which the Commission has based its decision and which are set out below:

A) Facts and procedure

1. By letter dated 25 June 2008, the law firms EKDB and CMS bureau Francis Lefebvre, both resident in Côte d'Ivoire, mandated respectively by Sifca, Cosmivoire and Palmci on the one hand, and Unilever CI on the other, jointly notified the WAEMU Commission of a planned agreement with a view to obtaining a negative clearance or, in the absence of the latter, an individual exemption.
The firms concerned were presented as follows:

**Unilever Côte d’Ivoire SA**, a company registered under Côte d’Ivoire law, with paid-up capital of 8 053 000 000 CFA francs, with head offices in Abidjan, Boulevard de Vridi, 01 BP 1751 Abidjan 01, specialised in the physical and chemical processing of all bodies of vegetable or synthetic origin with a view to obtaining detergent or industrial products based on fatty substances, as well as in the storage of oils, fatty substances and derivatives;

**Sifca SA**, a company registered under Côte d’Ivoire law, with paid-up capital of 3 000 000 000 CFA francs, with head offices in Abidjan, Boulevard du Havre, port zone, 01 BP 1289 Abidjan 01, whose corporate purpose is the design and performance of all kinds of operation aimed at the development of business, industrial and agricultural affairs in Black Africa;

**Cosmivoire SA**, a company registered under Côte d’Ivoire law, with paid-up capital of 4 254 470 000 CFA francs, with head offices in the Vridi industrial zone, 01 BP, whose corporate purpose is the procurement, storage, trading, representation, processing, formulation and commercialisation of all natural or artificial chemical and cosmetic products, all natural or artificial vegetable, animal or mineral oils, as well as all derivative products;

**Palmci SA**, a company registered under Côte d’Ivoire law, with paid-up capital of 20 000 000 000 CFA francs, with head offices on the Boulevard de Vridi, 18 BP 3321 Abidjan 18, specialised in the operation and development of palm oil plantations, land and agro-industrial establishment producing crude palm oil and palm kernels;

**Nauvu Investments Pte Ltd** (referred to hereinafter as **Nauvu**), a company registered under Singaporean law, with head offices at Temasek Boulevard – 29th floor – Suntec Tower Four – Singapore 038986, whose corporate purpose is wholesale business; a joint company consisting of the Wilmar Group, specialised in palm oil production and the Olam Group, which is active in the international trade in agricultural raw materials.

2. The aim of the agreement that is the object of the application is to carry out a concentration operation which should allow the parties to acquire a specialisation in the palm oil sector in Côte d’Ivoire.

It is therefore planned that on completion of the operation the following companies will remain in activity: Unilever Côte d’Ivoire, which will devote itself exclusively to activities relating to soap-making, and the companies Sifca and Nauvu which will specialise in the production and exploitation of crude and refined oil.

The notification filed by the companies involved in the operation comprises the following items:

- A letter signed by Ibrahima Bah and Soualiho Diomand from the EKDB law firm, and by Olivier Benoit and Benoît Philippe from the CMS bureau Francis Lefebvre law firm acting as the legal representatives of the applicant companies;
- Three copies of the mandates given respectively by the company Unilever to the Francis Lefebvre law firm, and by the companies Sifca, Cosmivoire and Palmci to the EKDG law firm;
- Three copies of the framework agreement signed by the parties to the operation;
- Three copies of the annual reports and accounts of the companies Sifca, Unilever, Cosmivoire, Palmci, Phci, Wilmar, Olam and Nauvu;
- Three copies of the West African Development Bank (BOAD) Study on the promotion and development of oil sector in the WAEMU area;
Three copies of the Study by the CCA CY consultancy on the oil sector, commissioned by Cosmivoire and Unilever;

Three copies of Internet articles regarding hand-made soap production.

Originals or certified true copies of all these documents were provided.

3. With regard to the provisions of Regulation No. 3/2002/CM/UEMOA of 23 May 2002 on the procedures applicable to cartels and abuses of dominant position, the Commission considered that the notification had been made in accordance with the requisite conditions. In order to open the notification review procedure, the Commission completed the following formalities in pursuance of articles 10.4 and 28.1 of the above-mentioned Regulation:

- Issuing of an acknowledgment of receipt to the applicants in the form of letters Nos 06571/PC/DMRC/DConc and 06572/PC/DMRC/DConc of 1 August 2008;
- Forwarding of a copy of the notification file to the competent authorities in Member States;
- Publication of the planned concentration on the WAEMU web site and in two legal announcement journals by Member States.

4. Within the period specified by the act of publication of the notification (one month), the Commission registered the written comments of the two Member States and a Senegalese firm, namely:

- Togo in letter No. 909/MCIAPME/DCIC of 5 September 2008;
- Niger in letter No. 0587/MCI/N/DCI/C of 10 September 2008;
- the firm Suneor in a letter dated 9 September 2008.

The Commission received comments by Burkina Faso on 16 September 2008.

5. In response to the reservations regarding certain sections of the accessory agreement formulated by the Commission in letter No. 07799/DMRC/DConc of 18 September 2008, the applicants provided additional information in a letter dated 23 September 2008.

B) Explanation of issue

6. The application made to the Commission is primarily aimed at obtaining a negative clearance regarding a concentration operation in the palm oil sector in Côte d’Ivoire.

A petition was therefore made for application of Article 88 b of the Treaty, of Article 4 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU, and Article 3 of Regulation 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions.

The issue at stake is to verify whether the market shares that are declared to be held by the firms party to the concentration operation places them individually or collectively in a dominant position in the oil and soap-making sectors.

7. The secondary and accessory purpose of the application by the parties to the operation is to seek to benefit from an exemption in the event that their application fail in its primary aim. In support of this request, they have cited the economic benefits that would accrue from implementation of the notified agreements.
In such an eventuality, the aim would be to apply Article 88 a) of the Treaty, of Article 3 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU, and Article 7 of Regulation 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions.

C) **Analysis of the applicants’ arguments**

8. As presented in the concentration operation notification file, a distinction had to be drawn between the main agreement relating to the assets of the firms, and their governance, and the accessory agreements relating to the activities and business relations between these firms.

Since Community regulations did not specify the procedure for examining accessory agreements in the event of a concentration, such agreements had to be evaluated in accordance with the principles laid down for the review of cartels.

9. In the WAEMU system, *a priori* review of concentration operations is conducted indirectly, in accordance with the provisions of Article 89 b) of the Treaty which prohibits practices that are tantamount to abuse of a dominant position.

A definition of such practices is given in Article 4 paragraph 2 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU which states that: “concentration operations which create or strengthen a dominant position held by one or more firms, the outcome of which is to significantly impede effective competition within a common market, are deemed to constitute a practice that is tantamount to abuse of a dominant position.”

Two conditions must be met in order to meet the above definition, namely: the creation or strengthening of a dominant position, and the significant hindering of effective competition within the Common Market.

10. With regard to the first of the above conditions, the applicant parties argued that no dominant position existed either before or after the concentration on the basis of their respective market shares in the edible oil sector, where Sifca and Navu would have a share of merely 13%, and in the soap-making sector where Unilever would have 24% of the market.

Such an argument is assessed on the basis of the following parameters: access to raw materials, the scale of trade within the Community, and imports from outside the Community.

With reference to the production of the crude palm oil (CPO) from which the refined oil and soap are obtained, a restrictive definition of the geographical market could limit the analysis solely to the Côte d’Ivoire market where approximately 89% of the regional total is concentrated (source: West African Development Bank (BOAD) study report of April 2008).

Moreover, since production in Côte d’Ivoire is largely consumed locally by industry and small-scale processing firms, there is not much trade in this product (CPO) within the Community. The parties to the notified operation account for around 70% of this production, either from plantations exploited on own account or from managed village-owned plantations.

Consequently, the planned operation will result in the companies Sifca and Nauvu becoming market leaders for local trade in the raw material.

11. However, it is difficult to deduce from this situation that these firms occupy a dominant position for at least the following reasons:
– if account is taken of imports of palm oil, soya oil and other fatty substances to the region, it is unlikely that the parties to the operation could free themselves from the constraints of competition, particularly in view of the fact that the edible oil sector in the region does not offer strong competition to imports from Asia in particular;
– there is a high degree of auto-consumption in the sector;
– raw material (CPO) prices are determined on the basis of world commodity prices and are regulated by the Association Interprofessionnelle du Palmier à l’Huile.

12. With regard to industrial edible oil and soap-making activities, the market shares declared by the notifying parties are smaller (13.9% of total consumption of edible oil in the regional market for Unilever and Cosmivoire together, and 28.6% for soap).

Without confirming the accuracy of the figures provided, it is nonetheless possible to note, from the official statistics, that the market power is highly dispersed both for soap and for edible oil in which there is considerable trade within the Community.

13. Imports of edible oils and soap from the rest of the world also account for a significant share of the regional market and exert very strong competitive pressure on the local edible oil sector.

14. Account must also be taken of the non-negligible share of cottage industry production of oil and soap which is aimed largely at local consumers but which is also traded informally within the Community. The markets shares of this sector are evaluated in the study provided by the notifying parties at around 21% for soap and 32% for edible oil.

In view of the above, the conclusion can be drawn that the notified concentration operation neither creates nor strengthens a dominant position and as a result is not prohibited under Article 88 b) of the Treaty.

15. Seen from this standpoint, the possibility that the outcome of the creation or strengthening of a dominant position might be a significant impediment to competition of the type that is banned under the Treaty should be dismissed de facto.

16. Consequently, the notified concentration operation should benefit from a negative clearance as provided for in Article 3 of Regulation No. 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions within the WAEMU.

17. However, it seems necessary to indicate the extent to which this negative clearance could cover the agreements notified by the parties, as accessories to the concentration operation.

In this respect, consideration must be given to the provisions of Article 88 a) of the Treaty which prohibits agreements between firms whose purpose is or might be to restrict or distort the free play of competition within the Union.

This prohibition is aimed, inter alia, at “agreements to divide up markets or procurement sources and in particular those relating to absolute territorial protection, agreements to limit or control production, outlets, technical development or investment, etc.”

18. With regard to these provisions, the Commission has issued reservations regarding the following clauses which it considers restrict competition more than it is necessary to do so:
article 5.3 b) of the stearine supply contract whose implementation could deny competitors all access to the raw material;
article 21 of the supply contract between Unilever-CI and Africo-CI for the manufacture of packaging which would not be transferred as-is to the Sifca company in that its application could deny competitors access to services supplied by Africo-CI and its affiliates, without this restriction being justified under any industrial property rights.

19. The arguments presented by the applicants stress the fact that the non-competition agreements and stearine supply contract accompanying the concentration operation are necessary to ensure a proper transition for the firms, which need to adapt to their new environment and restructuring.

20. Since this point of view was not sufficient to justify the restrictions in question, the Commission felt that it would be helpful to amend the accessory agreements to remove the two clauses regarding which it had issue reservations from the scope of the negative clearance.

21. Moreover, in order to prevent the restrictions on competition from being prolonged for longer than was needed, it proved necessary to carry out an assessment of the impacts of accessory agreements on market operation at the end of the fifth year of their implementation.

Having made this recital, the Commission

Hereby rules as follows:

Article 1

A negative clearance is granted with regard to the planned concentration between the companies UNILEVER, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA.

Article 2

The present negative clearance shall cover the concentration operation as well as all accessory agreement notified, except for Article 5.3 b) of the stearine supply contract between Unilever Cl, Sania, Unilever plc and Nauvu as well as Article 21 of the supply contract between Unilever Cl and Africo Cl for the manufacture of packaging.

Article 3

The intended recipients of the present decision are the companies Unilever Cl, Sifca, Cosmivore, PALMCI, Nauvu, PHCI, SHCI, Sania and their affiliates.

Article 4

An assessment shall be made of the implementation of the accessory contracts covered by the negative clearance five years after the date of notification of the present decision to the parties to which it is addressed.
**Article 5**

The present decision, which will enter into force on its date of signature, will be published in the Official Journal of the Union.

Done in Ougadougou on 22 October 2008
On behalf of the Commission
The Chairman

[Signature and official stamp of the Chairman of the West African Economic and Monetary Union Commission]

**Soulayla Cissé**
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Singapore --

1. Introduction

1.1 What is a cross-border merger?

1. A cross-border merger broadly refers to a merger where some or all of the parties or assets involved in the merger are registered in different countries. Globalisation - the increasing economic integration of the world\(^1\) - has led to increasing cross-border mergers around the world.\(^2\) As a small, open economy, Singapore too has been frequently exposed to cross-border mergers where some or all of the merger parties are situated outside Singapore but where the merger has an effect on Singapore’s economy.

1.2 Cross-border mergers and Singapore

2. Singapore has always been an open economy, founded on trade. With its small size, limited domestic population and lack of natural resources, the country’s very survival depends on it.\(^3\) In 2009, Singapore’s total trade\(^4\) as a percentage of GDP came up to 282%\(^5\).

3. Given Singapore’s large exposure to international trade and the strong presence of multinational corporations (MNCs) in Singapore, cross-border mergers are particularly relevant to Singapore. Of the 22 mergers notified to CCS since the merger control regime began on 1 July 2007, 17 had a cross-border element.\(^6\)

1.3 Singapore’s merger control regime and challenges for small economies

4. Singapore has a voluntary merger regime where merger parties may, of their own accord, apply to the Competition Commission of Singapore (“CCS”) for a decision if they think their merger situation could raise competition concerns. This regime was put in place in recognition that, in a small and open

---


\(^4\) Total trade is taken as the sum of exports and imports, where exports include domestic exports and re-exports.


economy, the competition authority has limited resources\(^7\), while most merger transactions involve tradable goods that do not typically raise competition concerns. A smaller authority forced to review too many transactions may have little or no resources left to pursue other important enforcement priorities, including cartel enforcement.\(^8\)

5. As part of its voluntary merger regime, CCS encourages parties to consider making an application where:

   a) the merged entity will have a market share of 40% or more; or

   b) the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more.

6. With such a voluntary notification system together with notification thresholds set in place for merger review, Singapore has avoided having a notification system that is unduly burdensome and instead achieved a reasonably effective and efficient one.

7. The operative provision in the Singapore Competition Act that regulates mergers is Section 54, which prohibits mergers or anticipated mergers that substantially lessen competition (“SLC”) or are likely to substantially lessen competition (“the Section 54 Prohibition”).

8. Merger situations which take place outside of Singapore or which involve parties who are not in Singapore may also be caught by the Section 54 Prohibition, as long as the merger gives rise to a SLC in Singapore. This ‘effects’ doctrine allows CCS to exercise jurisdiction over the extraterritorial activities which produce economic effects within Singapore. Indeed, many of the merger notifications CCS has received thus far are from MNCs, rather than local companies. There are no exemptions or special provisions for cross-border mergers.

9. Given the small size of the local market relative to that of the overall transaction, it has been discussed in the literature that for cross-border mergers, particularly for foreign-to-foreign mergers, competition agencies of small economies may face difficulties in taking effective enforcement actions undermining the merger or imposing commitments against mergers which raise competition concerns.\(^9\) However, this issue has not led to an undesirable outcome in Singapore to date. It is interesting to make a comparison between two cross-border mergers that have been handled by CCS. In one merger, there was some form of interdependence among various competition agencies as the competition issues were common across jurisdictions and Singapore could follow the lead of the larger agencies. In the second merger, the competition matters involved were specific to Singapore and hence it was necessary for Singapore to look at these matters independently even though it was a cross-border merger and other competition authorities’ approvals were also sought.

\(^7\) In enforcing competition law, small economies may need to invest comparatively more resources than in larger economies; a small competition authority’s budget to GDP ratio may be higher than that of a larger authority’s.


2. CCS' experience with cross-border mergers

2.1 Case study #1: Thomson-Reuters merger

10. This case involved a merger between the Thomson Corporation (“Thomson”) and Reuters Group PLC (“Reuters”) (collectively referred to as “the parties”), both of whom are global providers of financial information products and services. Thomson and Reuters complement each other in terms of the nature of their respective businesses, and the geographical regions in which they operate. CCS reviewed the merger based on the following market definition: segmenting the financial solutions offered into discrete content sets (i.e., aftermarket broker research, earnings estimates and fundamentals).

11. This was a global merger which was reviewed by the European Commission (“EC”) and the United States Department of Justice (“US DOJ”), amongst other jurisdictions. During CCS’ period of assessment, it was announced that the US DOJ and the EC had approved the merger, subject to commitments offered by the parties to the US DOJ and the EC. CCS’ assessment indicated that the merger might have resulted in a SLC in Singapore. However, as the commitments to the DOJ and the EC would essentially create another competitor that could supply its products worldwide, CCS considered that the commitments would have worldwide effect, and was of the view that any competition concerns arising in Singapore would be sufficiently mitigated by the commitments offered to the US DOJ and the EC. The feedback received by CCS from market inquiries in respect of the commitments was also largely positive. The merger was eventually cleared by CCS on the basis of the accepted commitments.

12. It is important to note that although the acceptance of commitments in overseas jurisdictions may be relevant in CCS’ assessment of the competitive impact of the merger in Singapore, commitments accepted by overseas competition authorities do not necessarily imply that CCS will allow the merger to proceed in Singapore. Any overseas commitments must be viewed in light of the facts and circumstances of the case, to see if they are capable of addressing competition concerns arising within Singapore, if any.

2.2 Case study #2: Prudential-AIA merger

13. This joint notification was made on 23 April 2010 in relation to a proposed acquisition by Prudential plc (“Prudential”) of AIA Group Limited (“AIA”) (collectively referred to as “the parties”). The relevant good/service involved was the provision of insurance products in the life and health insurance business in Singapore.

14. In this merger, the only overlap between AIA’s and Prudential’s business was in Asia. This acquisition would allow Prudential to improve its strategic position in Asia and develop the market in Asia, which was seen as a strong growth market.10 Sources reported that a takeover of AIA by Prudential would make the company the biggest foreign insurer in Asia by far.11 For AIA, the transaction would help AIG, the parent company, to raise funds to finance a bailout by the US government during the financial crisis in

---


The parties had sought antitrust approvals from various jurisdictions/authorities. Clearance was received from the KFTC on 13 April 2010. CCS assessed that the competition matters arising from the merger would be specific to Singapore because the relevant product/good was not homogeneous across countries. Life insurance is catered uniquely to each individual country’s needs. Further, there are also regulatory requirements that are specific to individual countries. In Singapore, insurance companies are required to be registered with the Monetary Authority of Singapore (MAS) – Singapore’s financial and insurance regulator - to conduct any insurance business there. Approval from the Ministry of Health (MOH) is also required for any life insurance business providing certain health insurance policies.

In the end, the merger did not proceed as it was rejected by the Prudential shareholders and the application to CCS was withdrawn.

2.3 Comparison of case studies #1 and #2

In case study #1 (Thomson-Reuters merger), the competition issues identified were not Singapore-specific, but common to the various jurisdictions affected by the merger as the relevant product was fairly homogeneous and the issues were relatively global in nature. Therefore, the remedies imposed by the larger competition agencies (the US DOJ and the EC), which had more leverage to assert their authority, would have helped to resolve similar concerns in other markets like Singapore. As a result, CCS could follow the lead of the US DOJ and the EU and similarly hold that there was no SLC caused by the merger in view of the commitments provided by the parties to the US DOJ and the EC.

In case study #2 (Prudential-AIA merger), the competition matters identified were specific to Singapore. As such, other jurisdictions’ assessment of the merger (such as the KFTC’s clearance of the merger) or their proposed commitments, if any, would not have been applicable in Singapore’s context. It was therefore necessary for CCS to independently assess the Singapore-specific facts and circumstances. Similarly, had it got to the stage where proposed remedies were to be considered necessary, any proposed remedies considered by CCS would not have been directly applicable to the other Asian jurisdictions. Nevertheless, given the merging parties’ large business presence in Singapore, CCS’ assessment of this merger could have given other authorities in Asia some reference on the type of concerns and remedies they could consider when doing their own merger assessment.

3. International and regional cooperation on cross-border mergers

CCS has regular discussions with overseas competition authorities on mergers and believes that ongoing international and regional cooperation among competition authorities is very important. This is so especially in light of the common difficulties that competition authorities of small economies may face, in terms of requesting for information from overseas companies, or imposing commitments against foreign-to-foreign mergers which raise competition concerns locally.


20. CCS is also open to cooperating and coordinating with other national competition authorities in the discussion of appropriate remedies and enforcement actions for cross-border mergers, should such a situation arise in future.

3.1 International cooperation

21. Singapore has ongoing cooperation with overseas competition authorities and international competition networks. A recent example is CCS’ participation in the 2010 International Competition Network (ICN) Merger Workshop in Rome where CCS was a moderator at the conference hosted by the Italian Competition Authority.

3.2 Regional cooperation

22. In addition, together with other ASEAN member states, Singapore endeavours to develop a regional platform to facilitate cooperation between competition regulatory bodies. This is highlighted by the unveiling of the Handbook on Competition Policy and Law in ASEAN for Business and the ASEAN Regional Guidelines on Competition Policy during the 1st ASEAN Experts Group on Competition (AEGC) Business Forum in Singapore in November 2010. CCS was both the inaugural Chair of AEGC in 2008, as well as the Chair of the working group on Regional Guidelines. CCS also participated actively as a member of the Handbook working group. The forum in Singapore was jointly organised by the AEGC, the ASEAN Secretariat and CCS, and supported by InWEnt – Capacity Building International, Germany – and German Federal Foreign Office.

4. Conclusion

23. As a small and open economy with a strong presence of multinational corporations and sizeable external trade, Singapore’s economic activities are highly sensitive to international merger activities. Due to its small size, a voluntary merger regime with notification thresholds is adopted for effective and efficient merger control. Singapore actively cooperates with other competition authorities to learn from one another and strengthen these inter-agency ties.

24. Small jurisdictions, like Singapore, can learn from larger competition agencies in cases of cross-border mergers where competition concerns are similar globally, and where major jurisdictions have greater influence and resources to negotiate commitments from the parties.

25. Nevertheless, it is also possible, and at times necessary, for small competition authorities to work independently in cross-border merger cases where there is a substantial lessening of competition in these small economies but not in the larger ones, and where the competition concerns, and hence remedies, are specific to the individual countries.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Slovak Republic --

1. General points

1. Concentration control is realized by the Antimonopoly Office of the Slovak Republic (hereinafter only „the Office“) pursuant to the Act No. 136/2001 Coll. on Protection of Competition (hereinafter only „the Act“).¹

2. According to this Act merging undertakings are obliged to notify the concentration which meets the notification criteria to the Office. Concentration being subject to the Office’s control must not be implemented.

3. However, based on the request of the undertaking, in legitimate cases the Office may enable the undertaking to exercise some rights and obligations resulting from a concentration according to the decision.

4. A concentration shall be subject to control by the Office if:

   a) the combined global turnover of the parties to the concentration is at least EUR 46,000,000 for the closed accounting period preceding the establishment of the concentration and at least two of the parties to the concentration attain a turnover of at least EUR 14,000,000 each in the Slovak Republic for the closed accounting period preceding the establishment of the concentration; or

   b) at least one of the parties to the concentration attains a total turnover of at least EUR 19,000,000 in the Slovak Republic for the closed accounting period preceding the establishment of the concentration and at least one other party to the concentration attains a total global turnover of at least EUR 46,000,000 for the closed accounting period preceding the establishment of the concentration.

5. According to special legislation, the concentration notification is tariffed by the sum of EUR 3 319.

6. Documents and information included into concentration notification are specified in Decree of the Office No. 204/2009, laying down details of particulars of a notification of concentration².

7. Based on the request of undertaking in legitimate cases the Office may constrict the extent of information which the notifying undertakings are obliged to submit in the notification of the concentration.

The Office agrees with the request to constrict the extent of required information mainly if there is no significant horizontal overlap or no vertical combination of merging parties’ activities. Thus the Office reduces costs of merging parties involved in the notification of the concentration when this concentration does not have potential negative restrict conditions on effective competition.

8. The Office assesses whether the concentration does not create or strengthen a dominant position resulting in significant impediments to effective competition in the relevant market.

9. In the case of joint ventures the Office also assesses whether such a concentration does not result in coordination of competition conduct of undertakings.

10. Concentrations being subject to control by the Office and at the same time meeting the notification criteria set by Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter only “the EC Merger Regulation”), fall under the exclusive responsibility of the European Commission.

11. However, it is possible to use the so-called case referral system (Article 4(4), Article 4(5), Article 9 and Article 22 of the EC Merger Regulation), according to which the concentration is assessed by the competition authority which is more appropriate for carrying out a particular merger investigation.

12. Since 2004 the Office used the case referral system once. Based on the request of the Office the European Commission passed the part of concentration of undertakings Tesco/Carrefour, having been referred to the Slovak Republic, for the assessment by the Office. The concentration of undertakings Tesco/Carrefour created or strengthened dominant position of undertaking Tesco resulting in significant impediments to effective competition in the local relevant markets in the Slovak Republic. The Office therefore prohibited this concentration.

2. Specific questions

2.1 Co-operation among competition authorities

13. Cross-border mergers created 2 – 29 % of the total number of concentrations having been notified to the Office in years 2004 - 2010 (besides the Office, the cross-border mergers have been notified mainly to the competition authorities in Germany, Austria, the Czech Republic and Italy).

14. The table below presents the number of concentration notified to the Office, and the number of concentrations having been notified in more member countries each year:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of concentrations notified to the Office</th>
<th>Number of cross-border mergers</th>
<th>Share of cross-border mergers of total number of notified concentrations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>78</td>
<td>3</td>
<td>4 %</td>
</tr>
<tr>
<td>2005</td>
<td>53</td>
<td>1</td>
<td>2 %</td>
</tr>
<tr>
<td>2006</td>
<td>44</td>
<td>5</td>
<td>11 %</td>
</tr>
<tr>
<td>2007</td>
<td>62</td>
<td>10</td>
<td>18 %</td>
</tr>
<tr>
<td>2008</td>
<td>74</td>
<td>10</td>
<td>14 %</td>
</tr>
<tr>
<td>2009</td>
<td>33</td>
<td>3</td>
<td>9 %</td>
</tr>
<tr>
<td>2010</td>
<td>34</td>
<td>10</td>
<td>29 %</td>
</tr>
</tbody>
</table>

15. The Office considers the cooperation with other competition authorities in the area of cross-border mergers to be necessary.

16. Presently, the cross-border mergers cooperation is realized within the platform of the European Competition Authorities (hereinafter only „ECA“), Marchfeld Competition Forum and the International Competition Network (hereinafter only „ICN“).
17. Cooperation within Marchfeld Competition Forum is based on establishment of case database including also cross-border merger operations. Within ECA the countries inform each other on cross-border mergers. Presently, the materials setting the rules of next cooperation within ECA are under preparation.

18. In the area of concentrations, the Office is actively involved in the work and deliberation of international organisations, for example in 2008 we have co-organized ICN Merger Workshop in Brno, Czech Republic. Basic information on concentration control in the Slovak Republic is available also at ICN web site 3.

19. OECD, ICN and the European Commission’s materials from the area of concentrations are inspiring and useful for the Office’s work, namely in the area of effective setting of concentration control principles and in the area of competition legislation application in concentration control.

20. Presently, the Office prepares the amendment to the Act and the particular institutes of concentration control are subject to in-depth analysis. For example, the Office used ICN materials on setting the notification criteria, as well as OECD materials on the substantive test to assess mergers and it proposes to shift from dominance test to SIEC test.

21. Regarding cross-border mergers the Office cooperates with other competition authorities on an informal basis and it comes out from the principles of mutual cooperation adopted by ECA. Currently, we have not entered into an agreement with other NCAs, as this type of contract is international and it should be only approved by executive and legislative bodies of the Slovak Republic.

22. Our legal system does not include a legal instrument which would enable to regard foreign interests when assessing cross-border merger operations.

2.2 Jurisdictional issues

23. Currently set notification criteria cause certain problems in practice, thus within the amendment to the Act we try to set these criteria more effectively. These changes aim at reducing the administrative load of undertakings.

24. The Office is independent without the possibility of political intervention. It acts within the Slovak Republic; it assesses cases which meet the mentioned notification criteria. As it has been mentioned before, the Office does not have a special system on cooperation and procedure for cross–border mergers control, and it even does not regard the special effects, like industrial or investment policy when assessing these operations.

25. The Office has been facing the problem of replies recoverability from the undertakings located outside our jurisdiction. For example, in the case of two main airports in Austria and in the Slovak Republic – Vienna Airport and Bratislava Airport there were only few airline operators at Bratislava airport. Therefore, it was indispensable to collect views on merger from operators that were present at Vienna Airport. We were not very successful. Our Austrian colleagues informally informed us about their results from their investigation process, but this information could not be used as the evidence in our proceedings.

26. Regarding the problems also in this case we feel the need for mutual cooperation and for setting the legal regime of such cooperation.

2.3 Remedies

27. The Office is entitled to impose both behavioural and structural remedies. Since 2004 we have not imposed any remedies in cross-border mergers control, however, within the concentration Vienna Airport/Bratislava Airport, having been assessed also by the Austrian competition authority the Office rejected proposed remedies. In this case the proposed remedies were not sufficient to eliminate competition concerns of the Office. This concentration was prohibited by the Office.

28. Considering the recent practice, remedies enforced in cross-border mergers have never been monitored. However, we consider the cooperation of competition authorities in imposing and monitoring remedies within cross-border mergers to be necessary due to the need to ensure consistent outcomes.

29. The Office cooperates with other countries on an informal basis; however, we miss the legal basis setting and enabling formal cooperation. New amendment to the Act will introduce provisions which would enable cross-border mergers cooperation at the official level.

30. In this connection we welcome the establishment of a Merger Working Group within the European Commission enabling active discussions on the use of existing mechanisms and on the possible creation of new mechanisms for the effective cooperation within the EU member states.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- South Africa --

1. Introduction

1. The South African Competition Commission (the Commission) is an independent authority providing for mandatory merger notifications based on a dual threshold. Firms acquiring direct or indirect control over the whole or part of another firm that meets the minimum lower dual thresholds are required to notify transactions, these transactions are referred to as intermediate mergers. A higher threshold exists which if met classifies the transaction as a large merger. Large mergers are investigated by the Commission and are decided upon by the Competition Tribunal.

2. The current lower merger notification thresholds (intermediate mergers) in South Africa are:

   • Combined turnover and/or asset value of the acquiring firm (for the entire group) and target firm needs to exceed R 560 million (approximately US$ 77,463,500); and

   • The target firm turnover and/or asset value needs to exceed R 80 million (approximately US$ 11,066,214.39).

3. The current higher merger notification thresholds (large mergers) in South Africa are:

   • Combined turnover and/or asset value of the acquiring firm (entire group) and target firm needs to exceed R 6, 6 billion (approximately US$ 912,779,227); and

   • The target firm turnover and/or asset value needs to exceed R 190 million (approximately US$ 26,276,977).

4. The current merger notification fees amount to R100 000 (approximately US$ 13,836) for an intermediate merger and R350 000 (approximately US$ 48,425) for a large merger. The substantive test applied in determining whether or not to approve, conditionally approve or prohibit a merger is: “whether the merger is likely to substantially prevent or lessen competition” (the SLC test).

5. In considering whether or not a transaction is likely to meet the SLC test the competition authorities consider the following factors:

   • Barriers to entry;

   • Level and trends of concentration;

   • History of collusion in the market;

   • Degree of countervailing power;
• The dynamic characteristics of the market (including growth, innovation and product differentiation);

• The nature and extent of vertical integration;

• Whether or not a party to the merger has failed or is likely to fail; and

• Whether the merger will result in the removal of an effective competitor.

6. In addition to the above factors the competition authorities considers the following factors that impact on public interest:

• The effect of the transaction on a particular industrial sector or region;

• The effect of the transaction on employment;

• The ability of small businesses, or firms controlled or owned by historical disadvantaged persons, to become competitive; and

• The ability of national industries to compete in international markets.

7. In the assessments of mergers the authorities explore and consider unilateral effects and co-ordinated effects, as well as the effects of the transaction on the above public interest grounds, which is evident from the judgements of the Competition Commission, Competition Tribunal and Competition Appeal Court.

8. The South African Competition Act\(^1\) (the Act) does not provide for any special provisions for cross border merger control and the competition authorities analyse cross border mergers with the same criteria used to analyse domestic mergers.

9. South African firms are often the target of foreign take-overs and hence cross border issues often arise. South African firms are often used as the springboard to enter the African market. The Commission also see various notifications arising from multinational firms acquiring each other and invariably either firm has some local subsidiary in South Africa which triggers the obligation to file. The major challenge with these types of cross border mergers relates to the timely filing of the transaction and respect for local legislation. Regrettably, major jurisdictions are prioritized by merging parties and we find that it is only at the later stages of the merger process that attention is given to non-priority jurisdictions. Our experience is that merger filings are then submitted late and enormous pressure is place on the jurisdiction to finalise its analysis to ‘fit in’ with the corporate time table. This often leads to frustration and conflict which could be prevented.

2. **Co-operation among competition authorities**

10. The Commission has not experienced any conflict with foreign jurisdictions in analysing and deciding on the effects of merger transactions. At present the South African competition authorities are not party to any international agreements in the field of competition law which provide for cross-border merger control.

---

\(^1\) Act 89 of 1998, as amended.
11. However, South Africa is a member of the Southern African Development Community (SADC) and signatory to the SADC Declaration on Regional Cooperation in Competition and Consumer Policies (the SADC Declaration). As a member of the SADC Competition Committee (emanating from the SADC Declaration), the Competition Commission is committed to contributing to the policy on regional integration with regard to competition law and policy within SADC.

12. SADC does not have rules dealing with the regulation of cross-border merger operations at either the domestic or regional level as yet but does commit Member States to “pursue case specific cooperation to the extent consistent with each member's laws, regulations, and important common interests in preventing hardcore cartels, abuse of dominance, anticompetitive mergers and unilateral conduct”\(^2\). The SADC Declaration also emphasises that there is a need to: “formalize a system of cooperation between national regimes that can harness the collective efforts of relevant national authorities and add value to national enforcement efforts in the face of problems affecting more than one country”\(^3\).

13. The SADC Declaration is especially relevant as the economic effect of mergers within South African markets is sometimes also felt across our borders – given the free-trade agreements that are in place in the region.

14. Other regular interactions occur through networks such as the ICN and the OECD where the competition authorities participate in the respective merger working groups and strive to keep abreast of the latest developments and cutting edge methods of analysis used in merger regulation worldwide.

3. Jurisdictional issues

15. The merger thresholds in South Africa have been increased effective from 1 April 2009 and the Commission is confident that the mandatory regime ensures that the majority of relevant transactions are notified. It is important to note that the Commission also has the authority to call on parties that enter into transactions that fall below the lower threshold to notify such transaction and may subject them to the jurisdiction of the Competition Act if the Commission is of the view that the merger might substantially prevent or lessen competition in any market.

16. The Commission will only consider transactions which have an effect in South Africa - however the Commission does consider the decisions of foreign jurisdictions to the extent where there are similarities between our markets. The Commission regularly interacts with the officials from the European Commission or the US jurisdictions on transactions which are also notified in these jurisdictions and are engaging more and more with competition authorities within the SADC region (e.g. the Namibian Competition Commission).

17. The competition authorities are independent from Government and are required by law to take independent decisions. Should Government wish to making submissions regards transactions being investigated by the Commission, these could be made\(^4\) in the same way as other interested parties and will be considered using the substantive test. The Act does, however, make provision for the Minister of Finance to intervene and establish exclusive jurisdiction in respect of Bank mergers when it is considered to be in the interest of financial stability\(^5\).

---

\(^2\) Article 1(g) SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

\(^3\) Preamble of the SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

\(^4\) Please see section 18 (1) of the Competition Act 89 of 1998, as amended.

\(^5\) Please see section 18 (2) (b) of the Competition Act 89 of 1998, as amended.
18. The Competition Act requires the Commission and Tribunal to consider the effects of a merger on the following non-competition or public interest grounds:

- A particular industrial sector or region;
- Employment;
- The ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive; and,
- The ability of national industries to compete in international markets.

19. The Commission considers the above effects in all transactions and where necessary has imposed conditions to remedy any negative effects but has never prohibited a transaction based on any of these factors.

20. Cross border transactions are dealt with in the same manner as domestic transactions. From a commercial implementation point of view the parties often experience challenges in coordinating obtaining clearances from all the regulatory authorities. Often these pressures are made known to the Commission and where able the Commission tries to accommodate the parties. Where parties trade with international customers this often provides for challenges in getting adequate responses however, these are not uniquely different from domestic transactions.

4. Remedies

21. The Commission has recently imposed conditions on the cross border merger involving Unilever and Sara Lee which required the parties to divest of a deodorant brand (Status) in order to remedy the competition concerns identified. The Commission defined the market as national and negotiated an effective remedy with the parties that specifically addressed the South African issues. Subsequent to the South African decision the European Commission also imposed conditions to the merger requesting a different brand (Sanex) to be divested. During the investigation the Commission has been in contact with the European Commission in order to understand the focus of their investigation. It appeared that their investigation included markets that were not considered by us (South African Commission) as significantly problematic (i.e liquid soap). However the remedy imposed by the European Commission (to divest the Sanex brand) also had an effect in that this brand was also competing in the deodorants market. Although the parties are not obliged to divest the Sanex brand in South Africa it does not make practical and commercial sense to partially own a brand in certain parts of the world. The resultant effect is that the parties will likely divest of two deodorant brands in South Africa as a result of the two different authorities authorising different divestiture conditions. The relevant question needs to be asked whether the divestiture of Sanex alone in South Africa would have sufficiently addressed the competition concerns identified and the answer thereto is an unlikely no. This brand is still small in the deodorant market in South Africa and would have been an unlikely choice to request the parties to divest. Although this problem did not arise during negotiation the parties did approach the Commission in wanting to amend the order of the Competition Tribunal to align the South African condition with the European decision, had this been envisaged likely difficulties with respect to the effectiveness of the remedy would have been encountered.

22. With respect to the monitoring of conditions the Commission takes responsibility for this task and has to date not made any arrangements with other countries to assist with the monitoring of conditions. Parties are obliged to provide at least annual reports confirming compliance and/or trustees are appointed to ensure timely divestitures are made. Where countries in close proximity are affected the Commission will consider in future sharing such responsibility as it would be of mutual benefit.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Switzerland --

1. Introduction

1. The Swiss merger control was introduced in 1995 and can now be considered as a well established system. It is based on a mandatory pre-merger filing, i.e. filing prior to completion of the transaction if statutory turnover thresholds are met. The test in use for the assessment of mergers in Switzerland is the dominance test. A merger may be prohibited or authorized subject to conditions or obligations if it creates or strengthens a dominant position liable to eliminate effective competition.

2. The Swiss Competition authorities have to deal since the very beginning of the merger control system with a comparatively high proportion of cross-border mergers transactions, i.e. mergers which are filed in multiple jurisdictions. This can be explained on the one hand by high turnovers thresholds in international comparison that are often reached by multinationals undertakings and on the other hand by the fact that Switzerland does not belong to a regional organization like the European Union in charge of examining transnational mergers.

3. This contribution starts with an overview of the legal framework regarding merger control in Switzerland (2). Then it illustrates the practice of the Swiss competition Authorities when dealing with cross-border mergers (3) and finishes with an outlook regarding a possible revision of the Swiss merger control provisions in regard with cross-border mergers and international cooperation mechanisms (4).

2. Merger control provisions by the Swiss Competition Law

2.1 Generalities

4. The Federal Law on Cartels and Other Restrictions of Competition (Cartel Act, CartA) and the Swiss Merger Control Regulation regulate merger control in Switzerland. The Competition Law came into effect on 1 July 1996 and was revised in 2003 but without any major amendments concerning merger control. The authorities that enforce the merger control provisions of the Competition Law are the Competition Commission (Comco) and its secretariat.

5. Subject to the Swiss merger control are statutory mergers and takeovers (‘transactions as a result of which one or more enterprises directly or indirectly gain control over one or more previously independent enterprises or parts of it’), as well as corporate joint ventures if the company exercises all the functions of an independent business entity on a permanent basis.

6. Planned concentrations of undertakings must be notified to the Competition Commission before their implementation if in the accounting period prior to the concentration (art. 9 CartA):

   a) the undertakings concerned reported a joint turnover of at least 2 billion Swiss francs, or a turnover in Switzerland of at least 500 million Swiss francs, and
b) at least two of the undertakings concerned reported an individual turnover in Switzerland of at least 100 million Swiss francs.

7. Notwithstanding paragraph a and b, notification is mandatory if a legally enforceable decision establishes that one of the undertakings holds a dominant position in a market in Switzerland, and if the concentration concerns either that market or an adjacent market or an upstream or downstream market. So far, there are only a few undertakings fulfilling this condition and they are all Swiss.

2.2 Special provisions for transnational mergers

8. Irrespective of its actual effects in Switzerland, a merger is considered to have an effect on the Swiss market when the turnover thresholds of article 9 CartA are met. This interpretation was upheld by the Swiss Supreme Court.1

9. In 2009, the Swiss competition authorities clarified that only product sales which are intended for customers located in Switzerland are taken into account for calculating turnover thresholds. This means that if for example the invoice of a product is done by a company based in Switzerland, but the product is neither produced in Switzerland nor intended for sale in the Swiss market, the revenue connected to this product is not counted to the turnover for the notification. As many multinational firms have their domicile in Switzerland, many mergers were notified in Switzerland even without having much connection to the Swiss economy. Thanks to this clarification, less international mergers with little effect on the Swiss market have been notified to the Swiss Competition Commission.

10. Moreover, the Swiss competition authorities have introduced an exemption to the mandatory notification for “foreign” full function joint venture. It is not uncommon that several multinationals found together a joint-venture company abroad which has no connection with Switzerland. In particular, this joint-venture will neither be active in Switzerland nor is expected to do so in the future. In this case, even if the joint-venture partners reach the turnover thresholds, they do not have to notify this kind of joint-venture (see notice about recent practice in mergers available on our website in French, German and Italian: www.weko.admin.ch).

3. Practice with cross-borders mergers

3.1 Cross-borders mergers and waiver of confidentiality obligations

11. As mentioned above, the Swiss competition authorities examine frequently cross-border mergers. It is now a routine practice for this type of mergers to ask the notifying parties for a waiver of confidentiality obligations. If necessary, the authorities request as well the notification filed in other jurisdictions. This waiver enables the Secretariat to cooperate in the notified case directly with other competition authorities and to exchange confidential information. In the vast majority of cases, the waiver is granted in order to cooperate with the EU-Commission or with some EU-Members States. Although undertakings and their legal counsels were at the beginning reluctant in this regard, they have now understood their interest to grant this waiver and file it spontaneously. It speeds up the proceedings and avoids conflicting decisions between jurisdictions. They know if they grant the waiver, they can expect the Swiss decision the same day or the day after the foreign decision. Even in transnational mergers where no waiver is granted, the Swiss Competition Authorities are nevertheless usually informed by the parties about the proceedings in foreign jurisdictions. This situation is of course less favorable, as the Swiss Authorities cannot have direct informal contacts with the foreign jurisdictions.

12. There are two possible scenarios: a) all the relevant markets concerned by the transaction are not national, i.e. they are for instance European or global; or b) there is at least one national or local market.

13. In the first case, the Swiss Competition Authorities carried out very few investigations or sometimes no investigations at all and relied principally on the results of the foreign cooperating agencies. For instance, in the case Norddeutsche Affinerie/Cumerio 2, the Swiss Competition Authorities have even closed their in-depth investigation before the Decision of the EU, as the parties have committed to refrain from the transaction prior to the EU-authorization and to apply the possible EU-remedies in Switzerland, if Switzerland is concerned too. This way, scarce resources can be employed otherwise and the authorities can focus on proceedings which are not reviewed by other jurisdictions.

14. In the latter case of at least one national or local market, the Swiss competition authorities carried out their own investigations for Switzerland but get regularly in touch with the authorities of other jurisdictions in order to learn about the steps that are undertaken in the according investigations and the results.

3.2 Cross-border mergers and remedies

15. For transnational mergers, it is of paramount importance to avoid conflicting decisions and therefore conflicting remedies. If there are no special concerns regarding Switzerland, the Swiss competition authorities usually take note of the remedies imposed by the other jurisdictions and state that these remedies solve as well the competition concerns in Switzerland.3

16. When the merger transaction raises a special concern regarding Switzerland, for instance because some assets which should be divested in accordance with the remedies are located in Switzerland, the remedies can be imposed by the Swiss Competition Authorities in a decision. This decision is appealable before the national courts.

4. Cartels Act revision and international cooperation

17. In 2007/2008, an evaluation of the Cartel Act was carried out by an Evaluation Group under the direction of a Steering Group composed of independent experts and representatives of the Competition Commission (Comco), its Secretariat and the State Secretariat for Economic Affairs (SECO).

18. The provisions of the Cartel Act concerning mergers were part of the evaluation. The results of the evaluation and the recommendations of the evaluation group were compiled in a report that was presented to the Ministry of Economy in December 2008.

19. Based on these recommendations, a project for a revision of the Cartel Act was launched in 2009. The project is currently at an early stage and it has not been decided yet whether the revision will be submitted to the Parliament. The project includes a proposal to add a new provision on cross-borders mergers that have to be notified both in Switzerland and in the EU. The proposed article provides for an exemption from the notification requirement if certain conditions are met.

20. Furthermore, the project for a revision of the Cartel Act includes a proposal to introduce an article enabling the Competition Commission to exchange information with other Competition Authorities, including confidential information in cross-border mergers without authorization of the notifying parties, provided that certain conditions are met.

---

2 Norddeutsche Affinerie/Cumerio, DPC 2008/1, p. 113.
3 As one of the many examples, see Alcan/Pechiney, published in DPC 2003/4, p. 809.
21. In the context of international cooperation, it can also be noted that the Implementing Agreement of the Agreement on free trade and economic partnership between Japan and Switzerland provides for notification in case of cross-border mergers, sets a timing for such notification, and includes provisions on the coordination of enforcement activities and the avoidance of conflicts. However, in light of the provisions of the Agreement concerning confidentiality, the exchange of confidential information in merger cases would require a waiver from the parties.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Chinese Taipei --

1. General points

1. In the 2002 amendments to the Fair Trade Act, the merger control system has adopted a “pre-merger notification system” to replace the “prior approval system” in order to streamline the review process for mergers. Any merging party meeting the merger notification thresholds prescribed in the Fair Trade Act is required to notify the Fair Trade Commission (hereinafter the Commission) before implementing a merger. The merger is automatically cleared if the Commission does not raise any objection within a prescribed period after the filing of the merger. To facilitate the process and make it more efficient, the Commission has also set forth the “Guidelines on Handling Merger Filings”, “Directions for Application of Merging Parties” and “Guidelines on Extraterritorial Mergers” to serve as guidance in reviewing the merger proposal and as a reference for enterprises.

2. Chinese Taipei’s notification system is mandatory. If a merger filing falls within one of the merger types in Article 6 of the Fair Trade Act and falls below the notification thresholds including market shares and turnover prescribed in Article 11 of the Fair Trade Act, the merging parties are required to notify the Commission before implementing a merger. At the same time, the merging parties are required to present sufficient documents and information on the merger, but do not need to pay any notification fees.

3. As defined in Article 6 of the Fair Trade Act, the term “merger” refers to a situation where:
   - an enterprise and another enterprise are merged into one;
   - an enterprise holds or acquires the shares or capital contributions of another enterprise to an extent of more than one-third of the total voting shares or total capital of such other enterprise;
   - an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or properties of such other enterprise;
   - an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter’s business; or
   - an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

4. For any merger that falls within any of the following circumstances, a notification shall be made to the Commission prior to the realization of the merger:
   - as a result of the merger the enterprise(s) will have one-third of the market share;
   - one of the enterprises in the merger has one-fourth of the market share; or
   - sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority.
5. With regard to the turnover for filing a pre-merger notification, currently the Commission has set the threshold as follows:

- an enterprise in a merger is a non-financial one, its sales for the preceding fiscal year exceed NTD 10 billion, and the enterprise it merges with has a sales amount exceeding NTD 1 billion; and

- an enterprise in a merger is a financial enterprise, its sales for the preceding fiscal year exceed NTD 20 billion, and the enterprise it merges with has a sales amount exceeding NTD 1 billion.

6. Pursuant to Article 12 of the Fair Trade Act, the Commission may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The Commission’s standard for merger review depends on whether the overall economic benefit of the merger outweighs the disadvantages resulted from its restraint on competition. Thus, the net effect between the economic benefit and the disadvantages in terms of the competition restraint resulting from the merger is the basis of the substantive test. If there is no suspicion of obvious competition restraint in the merger filing, then the overall economic benefits of the merger can be considered to outweigh the disadvantages resulting from competition restraint. On the other hand, the Commission is also empowered to attach conditions or require undertakings in its decision to the notified merger if it is satisfied that the measure taken can produce enough economic benefits to outweigh the disadvantages resulted from competition restraint.

7. In practice, when reviewing different types of mergers, the Commission considers different factors in weighting the “disadvantages resulted from competition restraint.”

1.1 Consideration of disadvantages resulted from competition restraint

8. Horizontal mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from a horizontal merger:

9. Unilateral Effects: After the merger, the enterprises participating in the merger are not restrained from market competition and can thus elevate the goods price or services remuneration. The Commission may assess the above-mentioned circumstances according to the market shares of merging enterprises, the homogeneity of goods or services, production capacity and import competition.

10. Coordinated Interaction: After the merger, the merging parties and their competitors restrict business activities among themselves or, even though they are not mutually restricting one another from competition, they have taken concerted actions to remove market competition in practice. The evaluations of whether the market conditions are conducive to concerted actions among competing enterprises, the ease of monitoring and detecting deviation from collusion and the effectiveness of punishments are all factors to determine the success of coordinated interaction.

11. Degree of Entry: The likelihood and timeliness of entry by potential competitors, and whether such entry would exert competitive pressures on the existing enterprises in the market shall be examined.

- Countervailing Power: Refers to the ability of trading counterparts or potential trading counterparts to prevent the merging parties from raising the prices of goods or the remuneration for services rendered.

- Other factors affecting the result of competition restraints.
12. Vertical mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from the vertical merger:

- The probability that other competitors could choose their trading counterparts after the merger.
- The degree of difficulty for an enterprise not participating in the merger to enter the relevant market.
- The possibility of merging parties abusing their market power in the relevant market.
- Other factors that may result in market foreclosure.

13. Conglomerate mergers: The Commission shall take the following factors into consideration when determining the likelihood of material potential competition:

- The impact of regulation and control being lifted on the merging parties’ cross-industry operations.
- The probability of cross-industry operations by the merging parties because of technology advancements.
- The original cross-industry development plan of the merging parties besides the merger.
- Other factors that affect the likelihood of material potential competition.

1.2 Consideration of overall economic benefits

14. With regard to the merger filing that raises suspicion of obvious competition restraints, the filing enterprises shall submit information on the following factors regarding the overall economic benefits to the Commission for deliberation:

- Consumer interests.
- The merging parties are originally in a weaker position when trading.
- One of the merging parties is a failing enterprise.
- Other concrete results related to overall economic benefits.

15. As the Commission reviews a merger proposal, the first step is to define the relevant market and calculate the market share or market concentration ratio. Next, the anti-competitive effect will be measured. If the proposed merger will not cause substantial harm to the relevant market, then the Commission doesn’t necessarily review further the effects on the overall economic benefit. On the other hand, for merger applications with a significant concern of causing competition restraints, the enterprises filing the application may provide the above-mentioned overall economic benefit factors for the Commission’s reference.

16. If a merger is pursued without prior notification, regardless of the Commission’s decision to allow or prohibit such a merger, or if the merger fails to perform the undertakings required by the Commission, the Commission may prohibit the merger, and if so, it may prescribe a period for such
enterprise(s) to split, to dispose of all or a part of its shares, to transfer a part of its operations, to remove
certain persons from position, or to make any other necessary disposition.

17. The Commission is inclined to require merger notification where a merger has an impact on its
jurisdiction, regardless of the regions where a merger takes place. Hence, all mergers that conform to the
merger types and thresholds described in the Fair Trade Act shall be filed with the Commission. The
Commission has enacted the “Guidelines on Extraterritorial Mergers” for dealing with mergers involving
two or more foreign enterprises merging outside Chinese Taipei’s territory. Its contents can be divided into
two parts. The first concerns the issue of jurisdiction, and the second relates to cases falling under the
Commission’s jurisdiction as the participating enterprises have the obligation to make notification.
Whether or not mergers with foreign enterprises fall under the jurisdiction of the Commission primarily
depends on whether it could be reasonably predicted that the merger would directly and substantially have
an impact on Chinese Taipei. As for how to assess the impact of mergers of foreign enterprises in the
Chinese Taipei market, the Commission still relies on Paragraph 1, Article 12 of the Fair Trade Act.

18. According to Point 3 (1) of the Guidelines on Extraterritorial Mergers, the jurisdiction over
extraterritorial merger cases shall be determined in line with the following considerations:

- the relative weight of the merger’s effects on the relevant domestic and foreign markets;
- the nationalities, residence, and main business places of the merging enterprises;
- the explicitness of the intent to affect market competition in Chinese Taipei and the foreseeability
  of effects on market competition;
- the likelihood of creating conflicts with the laws or policies of the home countries of the
  combining enterprises;
- the feasibility of enforcing administrative dispositions;
- the effect of enforcement on the foreign enterprises;
- rules of international conventions and treaties, or, regulations of international organizations;
- other factors deemed important by the Commission.

19. In addition, in accordance with Point 3 (2) of the same Guidelines, if none of the merging
enterprises in an extraterritorial merger case has production or service facilities, distributors, agents, or
other substantive sales channels within the territorial domain of Chinese Taipei, jurisdiction shall not be
exercised.

2. Co-operation among competition authorities and jurisdictional issues

20. So far, no conflicts have arisen between Chinese Taipei and a foreign jurisdiction over the
regulation of a cross-border merger. The bilateral agreements between Chinese Taipei and foreign
jurisdictions in the field of competition law have not been used in practice in cross-border merger cases.
However, Chinese Taipei has an active involvement in the work and deliberation of international
organizations such as OECD and ICN in the area of merger control to serve as reference in handling
similar cases in the future.
21. A merging party involved in cross-border mergers with its main business places located outside of the territory of Chinese Taipei will normally designate an agent registered in Chinese Taipei to file the cross-border merger on its behalf. If the Commission requires information from such a party, the designated agent usually provides it. When the Commission conducts investigation or adopts final decisions, the Commission may refer to decisions made by foreign competition authorities in relation to cross-border mergers as well as the industrial and investment policies established by the domestic regulatory authorities. However, the decision of the Commission on cross-merger merger cases will not be bound by such reference.

22. The Fair Trade Act is a domestic law but it does, just the same, apply to foreign enterprises as far as their conduct in Chinese Taipei is concerned. To explain this more clearly, this is the case where their conduct affects market competition in Chinese Taipei, irrespective of whether those foreign enterprises have representatives, subsidiaries or branches in Chinese Taipei or are recognized by the government of Chinese Taipei. The merger notification thresholds are currently appropriate to catch mergers which have an impact on Chinese Taipei’s territory. Whether a party of an intended merger is based domestically or in a foreign country, it is required to provide all necessary documents and to file them with the Commission, so that the Commission can make formal and substantial reviews. If the materials submitted with the merger report fail to comply with the requirements of the regulations or are deficient in content, the Commission may issue notices to require supplementations or corrections within a specified period of time. If such supplementations or corrections are not made within a specified period of time or are made but the submitted materials remain deficient, the filing will not be accepted by the Commission. So far, the Commission has not encountered difficulty when making such requests.

3. Merger remedies

23. Pursuant to Paragraph 2 of Article 12 of the Fair Trade Act, the Commission may attach conditions or require undertakings in any of the decisions it makes on the filing merger cases in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The Commission’s practice regarding the treatment of merger remedies includes structural and behavioral remedies. The Commission usually imposes behavioral remedies on parties to a cross-border merger when it attaches conditions or requests undertakings in its decisions.

24. Take as an example the extraterritorial merger of US-based Microsoft Corporation (hereinafter Microsoft) and US-based Yahoo! Inc. (hereinafter Yahoo). The two corporations proposed to merge outside of the territory of Chinese Taipei. Yahoo authorized Microsoft to use part of its core search technology. Microsoft consolidated the search engines and keyword-based advertising platforms of both companies and became the exclusive provider of these services for Yahoo. After the said consolidation, Yahoo stopped operating the above-mentioned businesses and instead became responsible for the promotion and management of “Premium Direct Advertisers” (PDAs). Such a merger constituted the merger type set forth in Subparagraph 4 of Paragraph 1 of Article 6 of the Fair Trade Act. In addition, the sales of the subsidiaries of both corporations in Chinese Taipei exceeded NTD 4.5 billion for the preceding fiscal year and Yahoo’s subsidiary Yahoo! Taiwan Holdings Limited (Hong Kong), Taiwan Branch (hereinafter Yahoo Taiwan) had more than 65% of the market share in the keyword-based advertising market in 2008. Therefore, the extraterritorial merger of Microsoft and Yahoo had a direct, substantial and reasonably foreseeable impact on the relevant market in Chinese Taipei and thus fell under the jurisdiction of the Commission. At the same time, as Yahoo Taiwan already had more than a 25% market share in the internet advertising and keyword-based advertising service markets, this reached the threshold for pre-merger notification filing as required by Subparagraph 2 of Paragraph 1 of Article 11 of the Fair Trade Act and also did not fall into the exceptions provided in Article 11-1 of the same Act. Therefore, the subsidiaries of both corporations in Chinese Taipei (i.e., Microsoft Taiwan and Yahoo Taiwan) filed a merger with the Commission according to the Fair Trade Act.
25. Before the merger, Microsoft had not provided the keyword-based advertising platform service in Chinese Taipei, thus competition between the two firms had not existed. After the merger, Microsoft consolidated the technologies of both firms and became the provider of the keyword-based advertising platform service, whereas Yahoo stopped providing such a service. Based on the distribution mechanism for the revenue from keyword-based advertising sales as well as each firm’s interests, both firms were to make separate endeavors to increase income from keyword-based advertising businesses. Each firm operated its portals and, although Microsoft was responsible for providing the search technology, Yahoo retained the right to edit the contents of the web pages. After investigation, the Commission made a decision that a merger of Microsoft and Yahoo did not have a significant concern about causing competition restraints and the overall economic benefit of the merger outweighed the disadvantages resulting from competition restraints. Therefore, the Commission did not prohibit the merger.

26. However, in order to prevent the applicant from employing market power through such a merger and engaging in competition restraint or unfair competition in the search service and keyword-based advertising service markets, the Commission imposed undertakings on merging parties in its decisions in accordance with Paragraph 2 of Article 12 and requested that merging parties should perform undertakings. Those behavioral remedies included:

- The applicant shall not employ its market position after the merger to improperly restrict any keyword-based advertising trading counterparts from trading with any particular enterprises;
- The applicant shall not employ its market position after the merger to engage in other unfair transactions with any trading counterparts or enter into agreements concerning trading conditions that may lead to competition restraint;
- The applicant shall not employ its market position after the merger to improperly determine, maintain or alter prices, or impede other enterprises’ fair competition or other actions abusing its dominant market position;
- The applicant is required, within three years from the day after the receipt of this merger decision, to provide the Commission with the following information before the end of December each year: the operating scale of the keyword-based advertising, the numbers of employees and researchers in Chinese Taipei, and the industrial structure such as the market share, and so on.
CONTRÔLE DES FUSIONS TRANSNATIONALES: DÉFIS À RELEVER PAR LES PAYS EN DÉVELOPPEMENT ET LES ÉCONOMIES ÉMERGENTES

-- Tunisie--

1. Dans une économie ouverte qui adopte les mécanismes du marché, la concurrence devient un principe et un passage obligé. Ce choix économique cherche des objectifs tels que l’efficacité, la compétitivité, la maîtrise de l’inflation et le bien être du consommateur. Mais l’adoption d’un régime libéral ne peut pas fonctionner tout seul il doit s’accompagner des instruments et des moyens pour fixer les règles de fonctionnement et de sauvegarde.

2. A ce titre, tous les pays qui ont opté pour l’économie du marché sont obligés de promulguer des règles de concurrence de manière directe ou indirecte. Ce mouvement a concerné la majorité des pays développés et en développement.

3. La Tunisie n’a pas échappé à ce processus. Elle a dès 1991 adopté une loi relative à la concurrence et aux prix, cette loi consacre la liberté des prix et le principe de la concurrence comme règle du marché, elle a prévu comme toute réglementation des dispositions de nature à garantir le fonctionnement du marché et notamment les obligations et les droits des parties.

4. Il convient de rappeler, que l’expérience a montré les limites de la théorie de la concurrence pure et parfaite qui conduit tôt ou tard à la situation de monopole et aux abus. La réglementation moderne prévoit des mesures préventives de nature à maintenir le fonctionnement concurrentiel et éviter tout dérapage vers une situation qui s’éloigne de la logique de concurrence.

5. Nous savons qu’au fond les entreprises n’aiment pas la concurrence, elle les soumet en contine à des pressions de compétition et d’innovation.

6. Pour échapper à la concurrence, souvent les entreprises ont deux possibilités : elles s’entendent ou elles se fusionnent et se restructurent.

7. Le législateur tunisien, conscient du comportement attendu des entreprises a prévu, comme dans toute réglementation moderne, la prohibition des ententes anticoncurrentielles mais aussi le contrôle de concentration et fusions, c'est-à-dire les opérations de restructuration.

8. Si la réglementation tunisienne a prévu la prohibition des PAC dès son apparition en 1991, le contrôle de concentration a fait l’objet d’un grand débat concernant son opportunité pour une économie composée des petites entreprises et pour laquelle, la concentration peut être un moyen de faire face à la concurrence étrangère.

* Contribution soumise par Monsieur Khalifa Tounakti, Directeur Général de la Concurrence et des Enquêtes Économiques, Ministère du Commerce et de l’Artisanat, Tunisie.
9. En effet, pour une économie qui s’ouvre sur l’extérieur et dont sa stratégie de développement est basée sur l’exportation, elle doit se doter des moyens de compétition nécessaire pour maîtriser la qualité et les prix.

10. La concentration est une voie parmi d’autres pour réaliser des économies d’échelle et disposer de la même arme que les entreprises concurrentes.

11. Un contrôle de concentration, pour une économie au stade de libéralisation donne un mauvais message aux entreprises qui ne maîtrisent même pas le concept et l’étendu, un mécanisme de contrôle veut dire souvent interdiction pour le monde des affaires.

12. Il a fallu attendre 1995 pour introduire un régime de contrôle de concentration. Ce régime consiste à soumettre les opérations de concentration ou de fusion à l’autorisation de ministère chargé du commerce après avis du conseil de la concurrence.

13. Par souci d’efficacité et de simplification, ne sont soumises au contrôle que les opérations de concentration étant susceptibles de permettre à une entreprise ou groupe d’entreprises d’exercer une influence déterminante sur une ou plusieurs autres entreprises et par là, sur le marché. L’une de deux conditions doit être remplie pour l’exercice du contrôle :

   • la part du marché des entreprises parties de l’accord dépasse 30% du marché intérieur ;
   • le chiffre d’affaires réalisé par ces entreprises dépasse le montant de 20 millions de dinars (15million $).


15. L’autorisation est accordée après avis du conseil de la concurrence, mais sur la base de l’examen approfondie par les services du ministère (DGCEE) de l’économie de l’opération et son impact sur la concurrence et la structure du marché. Pour l’évaluation de l’opération de fusion ou de concentration plusieurs critères sont utilisés :

   • bilan concurrentiel, effet attendu sur la concurrence à la lumière de la situation actuelle du marché ;
   • impact attendu pour le consommateur notamment sur le prix des produits ;
   • effet prévisible sur l’économie nationale en matière d’exportation, de création d’emploi, d’investissement et d’innovation et progrès technique ;
   • orientation de la politique économique et choix sectoriels stratégiques.

16. Les fusions transnationales préoccupent les pays développés mais surtout les pays en développement et les pays émergents.

17. En effet, si les pays développés notamment l’Union Européenne, les États Unis, le Japon... qui sont à l’origine des multinationales ont des dispositifs juridiques et des moyens de contrôle sur les opérations de fusions qui se réalisent par des entreprises installées sur leur territoire. Les autorités de concurrence dans ces pays contrôlent les fusions à la lumière de leur effet sur le marché intérieur.
18. L’autorisation ou le refus tient compte des considérations propres à ces pays et ne prend jamais en compte les intérêts étrangers sauf dans le cas de coordination et de coopération entre les autorités de concurrence des grandes puissances. À notre connaissance cette coordination est presque absente pour les pays en développement.

19. En effet, le mouvement de concentration et de fusion qui a touché plusieurs secteurs comme par exemple le marché aérien (quatre principales alliances aériennes star alliance, Qualiflyer, OneWorld, et Skyteam), financier (BNP-Prèsas…), des télécommunications (France telecom-Deutsche Telekom - Sprint…), pétrolier (Exxon-Mobil, Total-Petrofina-Elf Aquitaine…), de l’automobile (General Motors, Ford-Mazda, Daimler-Chrysler, Renault-Nissan…) et pharmaceutique (Rhone Poulenc-Hoechst, Glaxo Wellcome-SmithKline Beecham…) ne manque pas d’avoir des effets négatifs dans les pays en développement dans la mesure où les entreprises parties de fusion opèrent dans ces pays directement ou indirectement par leurs filiales.

20. Souvent les pays en développement ne sont ni informés ni consultés même si leurs intérêts sont en jeux notamment dans les domaines pharmaceutique, de l’information, de la télécommunication et de l’énergie.

21. Malheureusement, face à cette situation, les pays en développement subissent les conséquences sans beaucoup des moyens d’action faute d’une vraie volonté de coordination. L’expérience tunisienne en matière de contrôle des fusions transnationales est très limitée, elle s’appuie sur une approche pragmatique de traitement des cas qui ont été soumis aux autorités de concurrence.

22. Souvent les autorisations de fusions concernent les entreprises transnationales qui ont des filiales en Tunisie. Dans ce cas, l’autorité de la concurrence examine le dossier sur la base des critères fixés par la réglementation et donne son avis en tenant compte l’effet sur le marché intérieur et l’intérêt national. Par contre pour les opérations des fusions qui se réalissent à l’extérieur et dont l’effet sur le marché tunisien est évident, on ne dispose d’aucun moyen de contrôle en l’absence d’une coordination avec les autorités homologues des pays partenaires.

23. Pour éviter les effets néfastes transfrontaliers des fusions, la réglementation nationale a montré ses limites. Il convient de progresser dans la voie de coopération entre les autorités de la concurrence et de mieux coordonner des actions contre les abus des sociétés multinationales.

24. Convaincue de cette démarche, la Tunisie a essayé de nouer des relations étroites avec les organismes spécialisés tels que l’OCDE, UNCTAD, OMC, ICN pour acquérir leurs expériences et appliquer leurs recommandations dans le traitement des dossiers relatifs au contrôle des fusions.

25. Par ailleurs, la Tunisie a signé une série d’accords de coopérations bilatérales en matière de concurrence avec quatre pays de la région méditerranéenne. Ces pays sont le Maroc, l’Égypte, la Jordanie et la Syrie, des négociations sont en cours avec l’Union Européenne et la Turquie.

26. Par ces accords, la Tunisie espère jeter les jalons d’une coopération étroite et fructueuse dans le domaine de la concurrence, si ces accords doivent commencer par l’échange d’expérience et d’information, ils mènent tôt ou tard à une coordination plus efficace du contrôle des pratiques anticoncurrentielles et des effets des fusions partagés par les deux parties.

27. La coordination entre les autorités de concurrence doit se faire dans un cadre régional. La Tunisie n’a pas manqué de faire un effort dans ce sens en participant à l’élaboration des règles communes de concurrence destinés aux membres de la ligue des États arabes. Notre pays est très favorable à toute action de concertation ou de coordination de la politique de la concurrence dans le cadre des groupements régionaux tels que le Maghreb arabe, l’accord Aghadir ou les pays d’Euromed en espérant un jour à parvenir à un accord multilatéral.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Tunisia*--

1. In an open economy that is adopting market mechanisms, competition becomes a fundamental principle essential to a successful transition. This economic choice is aimed at achieving objectives such as efficiency, competitiveness, control of inflation and consumer welfare. However, a free-market regime can function properly only if it is accompanied by the tools and means for establishing the appropriate operating rules and safeguards.

2. For this reason, all countries that have opted for a market economy must adopt rules governing competition either directly or indirectly, and the majority of developed and developing countries have already taken steps to do so.

3. Tunisia has been no exception to this process. As early as 1991, it enacted a law on competition and prices that enshrined free pricing and the principle of competition as the rules of the market; like all such legislation, it laid down provisions aimed at ensuring the proper functioning of the market, and in particular at defining the obligations and rights of parties.

4. It should be borne in mind that experience has shown the limits of the theory of pure and perfect competition, which sooner or later leads to a monopoly situation and to abuses. Modern regulation provides for preventative measures aimed at maintaining competition and averting any slippage towards a situation that might undermine the principle of competition.

5. We know that, ultimately, businesses do not like competition, which continuously subjects them to pressures to compete and innovate.

6. Businesses often seek to escape competition in two possible ways, *i.e.* either by forming cartels or by merging and restructuring.

7. Tunisian lawmakers, aware of how businesses can be expected to behave, have, as in any modern regulatory system, passed laws that prohibit anti-competitive agreements but that also control concentrations and mergers, *i.e.* restructuring operations.

8. Although the Tunisian legislation provided for the prohibition of anti-competitive practices when it was enacted in 1991, there has been considerable debate on whether it is advisable to control concentration in an economy made up of small companies for which concentration can be a means of countering foreign competition.

* Contribution submitted by Mr. Khalifa Tounakti, Director-General for Competition and Economic Surveys, Ministry of Trade and Crafts, Tunisia.
9. The fact of the matter is that an economy opening up to the outside world and having an export-based development strategy must provide the means of competition necessary to keep quality and prices under control.

10. Concentration is but one way to achieve economies of scale and gain the same advantages as competing businesses.

11. Controlling concentration in an economy still in the liberalisation stage sends a wrong message to businesses, which do not even fully understand the concept and scope of a control mechanism, which they often perceive as tantamount to a ban.

12. For this reason, it was necessary to wait until 1995 before introducing a concentration control regime. This regime consists of submitting concentration and merger operations to the Ministry of Trade for authorisation after obtaining the opinion of the Competition Council.

13. In the interest of efficiency and simplification, this control is limited to those concentrations that may enable a company or group of companies to exert a decisive influence on one or more other companies, and thus on the market. This control is undertaken only if the concentration meets one of the following two conditions:

   - the market share of the companies involved in the agreement exceeds 30% of the domestic market;
   - the companies’ combined turnover exceeds 20 million dinars (US $15 million).

14. The companies concerned must notify the Ministry of Trade of the planned concentration, following a procedure defined by law. The file submitted consists of numerous documents, including the draft agreement, the companies’ accounts (balance sheets), the list of shareholders, subsidiaries and the economic assessment of the aims of the operation.

15. Authorisation is granted after obtaining the opinion of the Competition Council, on the basis of an in-depth examination of the concentration by the services of the Ministry of the Economy (DGCEE) assessing its impact on competition and the structure of the market. A number of criteria are used to evaluate the merger or concentration operation:

   - expected overall impact on competition in the light of current market conditions;
   - expected impact for consumers, in particular on product prices;
   - foreseeable impact on the domestic economy with respect to exports, job creation, investment and innovation and technological progress;
   - economic policy aims and strategic sectoral choices.

16. Although cross-border mergers are of concern to developed countries, they are of even greater concern to developing and emerging countries.

17. The developed countries where multinationals originate, such as the European Union, the United States, Japan, etc., have legal systems and means of control over the merger operations carried out by companies established within their borders. These countries’ competition authorities control mergers in the light of their impact on the domestic market.
18. However, the decision to authorise or deny the merger takes account solely of considerations specific to those countries, but never of foreign interests, except when there is co-ordination and co-operation in this regard between the competition authorities of the major powers. To our knowledge, such co-ordination is virtually non-existent in the developing countries.

19. For example, the trend towards concentrations and mergers that has affected a number of sectors, such as air transport (four main air carrier alliances: Star Alliance, Qualiflyer, Oneworld and Skyteam), finance (BNP-Paribas, etc.), telecommunications (France Telecom-Deutche Telecom – Sprint, etc.), oil (Exxon-Mobil, Total-Petrofina-Elf Aquitaine), automobiles (General Motors, Ford-Mazda, Daimler-Chrysler, Renault-Nissan, etc.) and pharmaceuticals (Rhone Poulenc-Hoechst, Glaxo Wellcome-SmithKline Beecham, etc.), has inevitably had a negative impact on developing countries since the companies involved in the mergers operate directly or indirectly in these countries through their subsidiaries.

20. Developing countries are often neither notified nor consulted, even when their interests are at stake, for example in the fields of pharmaceuticals, information technology, telecommunications and energy.

21. Unfortunately, developing countries suffer the consequences of this situation with scant means of action for want of a genuine will to engage in co-ordination. The Tunisian experience with regard to cross-border merger control is very limited, and is based on a pragmatic approach to dealing with the cases that have been submitted to the competition authorities.

22. Merger authorisations often involve transnational companies that have subsidiaries in Tunisia. In such cases, the competition authority examines the application on the basis of criteria set by law and gives its opinion in the light of the domestic market impact and the national interest. However, for merger operations that take place abroad and have an obvious impact on the Tunisian market, there is no means of control since there is no co-ordination with the corresponding authorities of the partner countries.

23. Domestic legislation has shown its limits in preventing the negative cross-border effects of mergers. Steps must be taken to improve co-operation between competition authorities and do a better job of co-ordinating action to counter the abuses of multinational enterprises.

24. Convinced of the need for this approach, Tunisia has sought to forge close ties with specialised bodies such as the OECD, UNCTAD, WTO and ICN to learn from their experience and to apply their recommendations in handling merger control cases.

25. Tunisia has also signed a series of bilateral co-operation agreements in the field of competition with four countries of the Mediterranean region – Morocco, Egypt, Jordan and Syria – and negotiations are under way with the European Union and Turkey.

26. Through these agreements, Tunisia hopes to lay the groundwork for close and fruitful co-operation in the field of competition. While the agreements must begin with the exchange of experience and information, they must ultimately lead to more effective co-ordination of the control of anti-competitive practices and of the impact of mergers that affect both parties.

27. Co-ordination among authorities should be carried out within a regional framework. Tunisia has already made an effort in this direction by helping to prepare common rules of competition for the members of the League of Arab States. Our country is strongly in favour of any co-operation or co-ordination initiative in the field of competition policy within regional groupings such as Arab Maghreb Union, the Agadir Agreement or the Euromed countries, and it hopes that one day a multilateral agreement will be reached.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Ukraine --

1. General issues

1.1 Review of the merger control system in Ukraine

1. The Ukrainian legislation has a comprehensive control system for concentration of economic entities, represented by the Law of Ukraine «On Protection of Economic Competition» (hereinafter referred to as the Law) and the Provision on the Procedure of Filing Applications to the Antimonopoly Committee of Ukraine on Pre-Approval of Concentration of Economic Entities (Provision on concentration), approved by the order of the Antimonopoly Committee of Ukraine (hereinafter referred to as the Committee) dated 19.02.2002 No. 33-p (hereinafter referred to as Provision on concentration).

2. The Law specifies that the following shall be deemed concentration:

- the merger of economic entities or the affiliation of an economic entity to another entity;

- the acquisition of control directly or through other persons over one or several economic entities or over parts of economic entities by one or several economic entities, in particular by means of:
  - the direct or indirect purchase or acquisition (by other means) of assets in the form of an integrated property complex of or a structural subdivision of an economic entity; the receipt (for further management), lease (leasing), concession or acquisition (by other means) of the right to use assets in the form of an integrated property complex of or a structural subdivision of an economic entity, in particular the purchase of assets of a liquidated economic entity;
  - the appointment or election of a person — occupying one or several positions of the head, a deputy head of the supervisory board, the board of directors or the mentioned positions at other supervisory or executive boards of other economic entities — as the head, a deputy head of the supervisory board, the board of directors or of other supervisory or executive boards of the economic entity or the creation of a situation where there is the coincidence of more than half of the members of the supervisory board, the board of directors, of members of other supervisory or executive boards of two or more than two economic entities;

- the establishment of such an economic entity by two or more than two economic entities that will independently perform economic activities for a long period, whereas the mentioned formation does not result in the co-ordination of competition behavior between economic entities which established the economic entity or between them and the newly-established economic entity.

- such direct or indirect purchase, acquisition (by other means) or receipt (for management) of shares (stocks) that ensures attaining or exceeding 25 or 50% of the votes at the higher board of management of the relevant economic entity.
3. Besides, the Law specifies threshold values; should such values be exceeded. Concentration may be carried out only on condition that prior authorization for it is granted by the Antimonopoly Committee of Ukraine or an administrative board of the Committee. Such threshold values are:

- the total cost of assets or the total product sales of the participants in the concentration, with relations of control being taken into account, in the last financial year, including those abroad, exceed the sum equivalent to 12,000,000 euros, while:
  - the assets (total assets) or the sales (total sales) of products, including those abroad, of at least two participants in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1,000,000 euros, and
  - the assets (total assets) or the sales (total sales) of products, in Ukraine only, of at least one participant in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1,000,000 euros;
- regardless of total assets or total sales of the participants in the concentration, when:
  - a product share in a certain market of any one participant in the concentration, or the total share of the participants in the concentration, with relations of control being taken into account, exceeds 35%, and the concentration is to take place in this or related commodity market.

4. The Merger notification system is based on the principle of obligatoriness, as economic entities are obliged to receive an authorization for concentration, if the threshold values are exceeded.

5. Payment shall be charged for granting an authorization for concentration in amounts envisaged by the Law.

6. The procedure of submitting applications for authorizing concentration, requirements to the application and documents attached thereto, and the procedure of considering applications and cases for authorizing concentration are determined by the Law and the Provision on concentration.

7. Article 26 of the Law stipulates that participants in concentration shall submit an application for authorizing concentration to the Committee.

8. According to the legislation, the Committee or an administrative board of the Committee shall consider the applications for authorizing concentration within 30 days of its submission for consideration.

9. The following shall be performed in considering applications on concentration:

- determination of the participants in the concentration with relations of control being taken into account;
- determination of affected markets;
- significance analysis of concentration effect on commodity markets, total share of participants in the concentration in the affected market, evaluation of market shares of main competitors, presence and significance of obstacles for market entry, presence of potential competitors;
- analysis of presence and significance of anticompetitive effects of concentration.

10. The laws of Ukraine on protection of economic competition do not envisage any exceptions or special provisions for cases of international merger.
2. Special issues

2.1 Cooperation between competition institutions (international, regional and bilateral)

11. There were no conflicts between the Committee and foreign jurisdictions regarding the regulation of international mergers. However there were cases when a foreign department would authorize concentration, while the Committee, due to certain circumstances, would delay in taking the relevant decision. This can be exemplified with a situation of authorizing SCOR S.A. (Paris, France) to purchase shares of Converium Holding AG (Zug, Switzerland), providing the buyer with exceedance of 50 percent of votes in the company’s supreme management body. Then, due to non-amicable takeover, the applicant failed to provide information on the company being object of takeover according to the legislation in effect, resulting in a necessity for the Committee to send requests to the company being object of takeover to submit information. The application was suspended until receipt of the relevant information. Before the Committee made a decision on the said concentration, SCOR S.A. had taken over Converium Holding AG, due to which the Committee initiated a case on breach of legislation on protection of economic competition and imposed a fine on SCOR S.A. The concentration was authorized.

12. The Committee’s international cooperation in the field of competition protection based on bilateral agreements with competition institutions of EU and CIS member countries, specifically, Slovakia, Hungary, Bulgaria, Latvia, Poland, Austria, Russian Federation, Armenia, Georgia and Azerbaijan. Currently, these agreements were not applied in cases of international merger.

13. The Committee takes into account that decisions made for authorizing concentration in any case affect the interests of its participants, and regarding international merger – other countries’ interests as represented by their residents.

14. However in considering applications for authorizing concentration the priority is always non-admission of monopolization or substantial limitation of competition in Ukrainian markets.

15. The Committee is an active participant in events held by international organizations in the field of competition policy, including in the field of merger control, inter alia: United Nations Conference on Trade and Development (UNCTAD), Organization for Economic Cooperation and Development (OECD), International Competition Network (ICN) and the Interstate council for Antimonopoly Policy (ICAP or the Antimonopoly Council) of CIS member countries. The Committee studies and uses in practice the recommendations and principles developed by international organizations.

16. On 16 January 2003 the Verkhovna Rada of Ukraine ratified the Agreement on harmonized antimonopoly policy, signed at the council meeting of government executives of CIS member countries on 25 January 2000 in Moscow. The main purpose of the Agreement is to discover and terminate transnational limitations of competition.

17. Taking into consideration the positive international experience in the said field, the Agreement is currently a qualitatively new document ensuing competition protection by means of cooperation, effected solely on voluntary basis and under no circumstances, it is viewed as a tool to influence sovereign positions of partner states. Besides, the Agreement does not envisage application of any regional rules in the territory of signatory countries.

18. Developed on a modern concept base, the Agreement determines an interaction procedure for competition bodies, grounded on the principles of harmonized application of the parties’ national legislation and taking into consideration the relevant recommendations of the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), as well as the experience and cooperation principles of countries with stable market traditions. It should be mentioned that the Agreement may be acceded by other non-CIS member countries.
2.2 Legal issues

19. The Law determines threshold values, under which economic entities should obtain the Committee’s authorization for concentration. Information regarding threshold values is provided in item 1.2 of section I.

20. Certainly, the Committee attempted to receive information from non-resident economic entities, being members of international mergers.

21. However, it may be difficult to get responses to various requests of the Committee, so it should obtain support and interact with the Ministry of Foreign Affairs as well as other countries’ competition institutions in order to receive assistance in getting the necessary information.

22. The Committee takes into account decisions made by foreign competition institutions. At the same time, the Committee performs compulsory independent research of the concentration effect on commodity markets of Ukraine.

23. The Law of Ukraine on «the Antimonopoly Committee of Ukraine» stipulates that in considering applications and cases on concentration, effecting other powers in the field of control of observing legislation on protection of economic competition, control of concentration, bodies and officials of the Antimonopoly Committee of Ukraine shall exercise its powers, observing the laws on protection of economic competition irrespective of bodies of power, bodies of administrative and economic government and control, bodies of local self-government, their officials, economic entities, associations of private citizens or their bodies.

24. The interference of central and local bodies of state executive power, bodies of local self-government, their officials, associations of private citizens and their representatives in activities of the Antimonopoly Committee of Ukraine and its territorial offices shall be prohibited, except in cases stipulated by the laws of Ukraine.

25. The Law stipulates that the Cabinet of Ministers of Ukraine may allow a concentration, prohibited by the Antimonopoly Committee of Ukraine as causing monopolization or substantial limitation of competition in the market in general or its major part, if a positive effect on social interests due to such concentration exceeds adverse effects of competition limitation. No such cases occurred lately. No such difficulties arose in practice.

2.3 Additional issues

26. The legislation envisages that a decision of the Antimonopoly Committee of Ukraine and the Cabinet of Ministers of Ukraine for authorizing concentration may be stipulated by fulfillment of certain requirements and obligations by participants in concentration, eliminating or alleviating the adverse effect of concentration on competition. Such requirements and obligations may concern, specifically, restrictions of management, use or disposal of property, as well as an economic entity’s obligation to alienate the property.

27. Example: in September 2009 the Committee decided to authorize a concentration comprising companies located in Great Britain and Cyprus. The said concentration occurred at the condoms market. The relevant decision was stipulated by additional terms fulfilled by participants in concentration in order to alleviate the effect of concentration on competition. Specifically, the Committee imposed obligations on the participants in the concentration regarding price policy, goods sale and purchase terms etc.

28. It should be mentioned that imposition of such additional terms is not sign of special treatment of international mergers.
29. The Committee may adopt additional terms both as certain actions and as attitude adjustment. Specifically, the aforementioned additional terms relate to attitude adjustment (see clause 1 of this section).

30. In the example presented in clause 1 of this section participants in concentration undertook to fulfill the additional terms without any objections, though imposition of additional terms to authorize concentration usually requires lengthy negotiations with the applicant, explanation of the Committee’s position and review of alternative options.

31. In order to control fulfillment of the additional terms imposed by the decision for authorizing concentration, in the example presented in clause 1 of this section, the Committee obligated the participant in concentration being resident of Ukraine, connected by control relations with economic entities, to provide the Committee (for 3 years annually in the 1st quarter) with information regarding volumes and prices for condoms for the preceding accounting period.

32. The national legislation does not envisage the Committee’s duty to reconcile additional terms with other competition institutions. At the same time, international agreements made in the field of competition (accessed to by Ukraine or the Antimonopoly Committee of Ukraine) stipulate the parties’ right for various consultations. These provisions were not applied in practice in considering applications for authorizing concentration.

33. Applications for authorizing concentration recently reviewed by the Committee, where international companies were members:

- In September 2010 the Committee received an application for authorizing Hewlett Packard Company (Palo Alto, USA) to purchase shares of ArcSite Inc. (Cupertino, USA), providing the buyer with exceedance of 50 percent of votes in the company’s supreme management body. Concentration occurred at the services market of complex problem solution, business securing, loss and risk prevention of companies and state agencies. The Committee permitted the said concentration.

- In May 2010 the Committee received an application for authorizing:
  - Zhejiang Geely Holding Group Co., Ltd (Hangzhou, China) and Daqing State Owner Assets Operating Co. Ltd (Daqing, China) to found company Beijing Geely Wanyuan Investment Co., Ltd (hereinafter referred to as Beijing HoldCo) (Beijing, China);
  - Beijing HoldCo and Shanghai GearAirWar Investment Co., Ltd (Shanghai, China) to found company Shanghai Geely ZhaoYuan International Investment Co., Ltd (Shanghai, China);
  - Geely Sweden AB (Stockholm, Sweden) to purchase shares of Volvo Personwagnar Aktiebolag (Goteborg, Sweden), providing the buyer with exceedance of 50 percent of votes in the company’s supreme management body;
  - Meantime North America LLC (Wilmington, USA) to purchase shares of Volvo Cars of North America LLC (Rockly, USA), providing exceedance of 50 percent of votes in the company’s supreme management body.

Concentration occurred at the vehicles market. The Committee permitted the said concentration.

- In May 2010 the Committee received an application for authorizing L’ORÉAL S.A. (Paris, France) to acquire control over a part of ESSIE COSMETICS, LTD. (New York, USA), namely its assets related to activity in development, production, marketing and sale of body and hand care, cosmetic and SPA products (nail polishes, nail care, nail accessories, lip glosses). Concentration occurred at the cosmetic products market. The Committee permitted the said concentration.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING
AND EMERGING ECONOMIES

-- United Kingdom --

1. General points

1.1 Introduction: Summary of UK merger regime

1.1.1 Outline of UK merger regime

1. The UK established a merger control regime in 1965. Since then the regime has been updated,
most recently in 2002 by the Enterprise Act which established a competition based test and made the UK
Competition Authorities (i.e. the Office of Fair Trading (OFT) and the Competition Commission (CC))
determinative.

2. Both anticipated and completed mergers are capable of review by the UK Authorities. UK
merger control law does not require that a qualifying merger (see (b) below)) be notified to the OFT.
However, a voluntary notification system exists which enables firms to obtain legal certainty by informing
the OFT about a prospective merger in advance, a fee being payable for this procedure. The OFT may also
hold discussions with a party prior to the notification being made. In practice the notification system is
seldom used. The OFT also provides a number of opportunities through which the parties may obtain
informal advice.¹ However, the regime contemplates the OFT initiating review of mergers where it
believes that it may have jurisdiction. This is the case whether or not parties have informed the OFT of the
merger and may occur following a complaint from a third party. The OFT is responsible for obtaining and
keeping under review information relating to its functions, including its merger functions. The OFT has a
dedicated Mergers Intelligence Officer responsible for monitoring non-notified merger activity and liaising
with other competition authorities.

3. Mergers that have a ‘Community dimension’ under the EC Merger Regulation (ECMR) (ie
mergers above certain thresholds) fall outside the scope of the Enterprise Act. Instead they must be notified
in advance to the European Commission in Brussels.

4. Subject to some limited exceptions, any qualifying merger (see (b)) that is investigated by the
OFT is subject to a fee irrespective of whether a reference is made to the CC (see (d)). The fees are based
on UK turnover of the value of the enterprise acquired.

5. The remainder of the paragraphs in this section explain which mergers may be reviewed by the
authorities, the statutory test that the Authorities consider and the institutional arrangements. In addition to
the present fee structure being based on the UK turnover (of the value of enterprise acquired), it is notable
that the two jurisdictional tests (see (b)) are also focused on the UK as is the SLC test.

¹ The notification requirements and the OFT’s practice regarding informal advice are described in the OFT’s
published guidance Mergers: Jurisdictional and Procedural Guidance 2009 OFT 527, available on OFT
website.
1.1.2 Qualifying mergers

6. The UK Authorities are able to review qualifying mergers. A qualifying merger is one in which two or more enterprises’ cease to be distinct and which satisfies either the turnover test or the share of supply test or both. The legislation stipulates that ’ceasing to be distinct’ can be brought about through the acquiring company gaining: (i) legal control of the target company; (ii) ‘de facto’ control; or (iii) material influence over the behaviour of the target company despite having a minority shareholding. In addition, the merger must not yet have taken place or (subject to certain exceptions) the merger must have taken place not more than four months before the reference to the CC is made.

7. **Turnover test**: the value of UK turnover of the enterprise which is being acquired exceeds £70 million

8. **Share of Supply test**: the enterprises which cease to be distinct supply or acquire goods or services of any description and after the merger together supply or acquire at least 25 per cent of all those particular goods or services supplied in the UK or in a substantial part of it.

9. The merger must result in an increment to the share of supply or consumption. In practice, therefore, the share of supply test can only be met where the enterprises concerned supply or acquire goods or services of a similar kind.

10. There are no exemptions or special provisions for cross border mergers.

1.1.3 Merger assessment

11. In assessing a merger, the UK Authorities must consider whether:

- a relevant merger situation has been created (or, for anticipated mergers, will be created); and if so,
- whether or not this situation will lead to a substantial lessening of competition within any market or markets in the United Kingdom for goods or services (SLC).

12. Further explanation of the approach the UK Authorities take when assessing mergers is available in published guidelines.

1.1.4 Institutional arrangements

13. The assessment of mergers in the UK is conducted as a two-phase process, giving distinct but interrelated roles to the OFT, the CC and, exceptionally in the case of public interest cases, the Secretary of State for Business, Innovation and Skills.

14. At Phase 1, the OFT obtains and reviews information relating to merger situations. The OFT has a duty to refer to the CC for further investigation any relevant merger situation where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition (SLC). A decision by the OFT not to refer may be made unconditionally or be made subject to the provision of undertakings in lieu of reference.

---

2 The meaning of “enterprise” is defined as the activities, or part of the activities, of a business (section 129 Enterprise Act).

3 Further explanation can be found in *Mergers: jurisdictional and procedural guidance 2009* OFT527, Chapter 3.

4 *Merger Assessment Guidelines* 2010, CC2 (Revised) OFT 1254, available on CC and OFT websites.
15. At Phase 2, the CC investigates mergers that are referred to it by the OFT, the CC having no ability to investigate any merger unless it has been asked to do so. The CC determines the outcome of merger cases referred to it by the OFT. In the event that it finds that the merger will lead to an SLC, the CC decides upon remedies and has powers to implement them.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

2.1.1 Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

16. There have been no conflicts.

2.1.2 Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

17. There are no bilateral agreements of the sort described.

18. However, recently (10th January 2011) the OFT entered into a non binding Memorandum of Understanding on Cooperation with the National Development and Reform Commission of the People’s Republic of China which aims to establish and develop co-operation in the enforcement of competition policy and related matters between the participants.5

2.1.3 If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?

19. UK merger control law stipulates that the UK Authorities examine whether a merger is likely to lead to a substantial lessening of competition within the UK. Mergers capable of review by the UK Authorities therefore include those where one or more of the merger parties is foreign if the firm that is the subject of the merger operates in the UK (and either the turnover or share of supply thresholds are satisfied) whether or not that firm is a UK registered company. It is relatively common for the UK authorities to investigate mergers where one or more of the parties is foreign.

2.1.4 Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?

20. Yes, the UK authorities are very active in international organizations such as the OECD, ICN and EU working groups. We do implement the principles of these where we can. In particular we have regard to the OECD Recommendation of the Council on Merger Review and materials published by the ICN Merger Working Group. The UK Authorities have contributed to many of the ICN materials also (including the Recommended Practices for Merger Notification and Review Procedures, the Merger Remedies Report and Model Confidentiality Waiver).

2.1.5 Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

21. The UK is a member of the European Union and the EU has a mergers working group of which the UK competition authorities are members. The EU mergers working group cannot set rules. However it affords the opportunity for discussion of issues of best practice in international cooperation in merger investigations which result in recommendations for member states.

22. Various provisions of the EC Merger Regulation enable mergers, in some circumstances, to be transferred to/from the European Commission from/to the Member States at the request of either the merger firms or the Member States (which in the case of the UK is the OFT).

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

2.2.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

23. Yes, as explained in Section A, the UK has a voluntary notification regime and mergers capable of review by the Authorities meet either a turnover threshold or share of supply threshold (or both). The appropriateness of these thresholds is periodically reviewed, as is the appropriateness of a voluntary regime.

2.2.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

24. Yes, we quite often seek information from parties involved in cross border mergers. In the large majority of instances parties are cooperative. We have also sought and received information from foreign competition authorities via use of a waiver from the merger parties.

2.2.3 To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

25. We always undertake our own assessment based on the evidence available to us. Previous decision by foreign authorities can be helpful for some aspects of our cases. For example, when developing theories of harm we would consider the issues that the other authority considered, the body of evidence available to the authority and the authority’s understanding of the relevant industry sector. This information may be helpful not only to the theories of harm but also to informing the case teams at an early stage of review and so helping to quickly reach a view on the approach that should be taken when carrying out the review. However, as informative as these decisions may be, the case team is alert to the possibility that the UK market and the issues raised by the merger may be different. Even so, the consideration by the European Commission of such factors as market definition and barriers to entry are often helpful to us, particularly in Phase 1 and the early stage of the Phase 2 investigation.

26. In addition to conducting desk top research, the Authorities will also talk to case teams in foreign authorities if we are investigating the same merger in our respective jurisdictions either in parallel or sequentially or we are believe that it may be useful to discuss with another agency a previous merger review by that other agency.
27. The issues covered in such conversations will vary according to the stage of investigation by the UK Authorities and also the overseas authority. For example, if the UK Authorities are at an early stage, they might wish to explore the functioning of the market. There may be occasions when the Authorities might wish to discuss their analyses and, if remedies are being considered in Phase 2, the teams will typically explore the thinking on remedies in the other jurisdictions (particularly if the reviews are proceeding in parallel or the other jurisdiction is ahead of the CC’s investigation).

28. Such discussions are often helpful and are taken into account in forming our own thinking. They may also influence the design of remedies. Although the possibility of either of the UK Authorities not taking remedial action is not ruled out, the likelihood of no action being taken when either considers that the merger results in an SLC is remote. This is because the UK Authorities’ analysis is focused on the competitive effects of the merger in the UK. The UK Authorities would need to be satisfied both that the remedy advanced by another jurisdiction did remedy the SLC found by the UK Authorities and that it would need to be able to enforce compliance of the remedial action itself. However, UK Authorities would take into account the remedy implemented by the foreign authority when devising its remedy.

29. The UK Authorities are prevented by the Enterprise Act from disclosing sensitive information (including confidential information about the merging parties) unless one of a limited number of gateways apply. Disclosure is permitted, for example, if necessary for the exercise of either of the UK Authorities’ functions. Disclosure is also permitted with the consent of the person to whom the information relates. The UK Authorities have sought consent from the parties on several occasions, and when doing so, the consent often being based on the ICN waiver.

30. The scope for political (or public interest) intervention in qualifying mergers is set out in the legislation. It is confined to areas of media plurality, national security and the stability of the UK financial system. While Ministers may intervene and ultimately decide the outcome of the case taking into account the competition and the public interest issues, Ministers must accept the conclusions of the UK Authorities as to the competitive effects of the merger. If a Minister decides that the merger is against the public interest, the Minister may determine the remedial action to be taken. He may also allow the merger to proceed (i.e. without any remedies being implemented) on public interest grounds notwithstanding the UK Competition Authorities’ decision that the merger will result in an SLC.

31. There are no specific provisions relating to cross-border mergers. There is limited scope for scope for non-competition issues to be considered are in the public interest intervention cases (see II Q4 above).

32. The issues the UK Authorities face are common across jurisdictions.
2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

33. The Authorities have implemented remedies following review of such mergers. Recent examples include:

- Transocean/GlobalSantaFe (offshore drilling rigs)\(^6\)
- Air France / VLM Airlines (airport slots)\(^7\)
- Nufarm / AH Marks (herbicide products)\(^8\)
- Dräger/AirShields (neonatal warming therapy products)\(^9\)

34. In Nufarm/AH Marks the CC decided that the merger did result in an SLC and considered whether to require divestment of a factory that was situated in the UK. However, the CC decided to accept a package of behavior remedies. While the CC did not think that divestiture would have been disproportionate, it did take into account the effects of the merger and the expected duration of these, and the fact that, in comparison to the divestiture remedy, the behavioural package of remedies would be more closely targeted at the SLC (ie the fact that the UK based factory manufactured goods for export).

35. In Dräger the location of the manufacturing assets (i.e outside the UK) limited the CC in its choice of remedies. Undertakings which included a commitment to supply and put in place price controls for 4 years were accepted from both the German parent and the UK subsidiary. Additionally the CC made to buyers to address the harmful effects on competition in the longer term.

2.3.2 If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.

36. Both the UK Authorities have a strong preference for structural remedies.\(^10\) The OFT is able to implement remedies through undertakings. If it anticipated that implementing a structural remedy might be difficult (this is a possibility for some completed merger cases) it would be likely to refer the merger to the Competition Commission for Phase 2 investigation rather than to implement a behavioural remedy.

37. The CC guidance on merger remedies sets out three circumstances in which CC may select behavioural remedies rather than structural remedies.\(^11\) The first of these circumstances is that “divestiture and/or prohibition is not feasible ...” Dräger/Airshields (see III Q1) is an example where divestiture was not feasible.

2.3.3 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

38. Enforceability is a relevant consideration when determining the effectiveness of a particular remedy. An additional issue to consider, when accepting undertakings from a company registered in

---


\(^7\) [http://www.of.t.gov.uk/OFTwork/mergers/decisions/2008/airfrance](http://www.of.t.gov.uk/OFTwork/mergers/decisions/2008/airfrance)


\(^10\) CC guidance of remedies in mergers.

\(^11\) *Merger Remedies* 2008 CC 8, para 2.16
another jurisdiction, is whether the proposed execution of the undertakings (usually by a director or another official of the company) is sufficient for the UK Authorities to be satisfied that undertakings are entered into with full authority.

2.3.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

39. The UK Authorities have not relied on other countries to assist in the monitoring of remedies. This is most likely the case because care is taken that the remedy addresses the adverse effects of the merger on competition in the UK and also because when designing a remedy, the ability for the UK Authorities to monitor compliance is a relevant factor (whether that involves a formal compliance programme actively monitored by the Authorities or reliance upon third parties bringing potential issues to their attention).

40. An advantage of structural remedies is that they seldom require long term monitoring. If the CC requires a divestment, it will monitor compliance with the undertakings or Order put in place until such point as the divestiture has been completed and the undertakings discharged or Order complied with. It does this usually by receiving reports from the party subject to the Order or who gave the undertakings (the obligation to provide reports and information is one of the standard obligations of the remedy). In many situations, compliance is also monitored by a Monitoring Trustee who reports regularly to the CC on the progress with the divestiture as well as ensuring hold separate arrangements remain in place. In unusual circumstances where parties have not been able to divest the business/assets with sufficient speed, a Divestiture Trustee may also be appointed.

41. The OFT has the statutory responsibility for monitoring compliance with remedies and does so via third party comments. Additionally, if the CC puts in place remedies that require ongoing monitoring, it may consider it necessary to require the merger parties to appoint and remunerate a third-party monitor who reports to the OFT. Remedies (i.e. behavioural) may be varied or revoked if there is a material change of circumstance so that they are no longer appropriate. Parties will draw to the OFT’s attention the possibility that the remedy should be varied (in turn this will be referred to the CC if the remedy at issues followed a Phase 2 review).

2.3.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

42. Both Authorities recognize that coordination may be helpful when considering they are considering remedies to be put in place. In practice it is more likely that that such coordination would occur in Phase 2. As explained, (see III Q 4) such co-ordination would likely be for the purpose of appreciating the overseas’ authorities proposed remedy. An example of coordination by the CC.

43. In Nufarm / AH Marks the merger (see III Q 1) several agencies, including the CC, were reviewing the merger. The CC held discussions with the Federal Trade Commission, the Competition Bureau, Canada and the ACCC at a number of points during its investigation. This included discussion while the CC was considering the type of remedy to impose.

44. The CC has developed its practice in respect of remedy design and implementation having regard to the experiences of other jurisdictions, drawing on lessons learnt from the reviews of US agencies, DG Comp and its own work on the effectiveness of past remedies. The CC has published its review of past remedies, Understanding past merger remedies.12

12 http://www.competition-commission.org.uk/our_role/analysis/understanding_past_merger remedies.pdf
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- United States --

1. Introduction

1. Recognizing the growth in the number of merger review regimes and the number of multi-jurisdiction merger reviews over the past two decades,¹ the United States antitrust agencies (the U.S. Federal Trade Commission and the Antitrust Division of the Department of Justice) have increasingly cooperated and coordinated with counterpart agencies reviewing the same merger, and worked with sister agencies both bilaterally and through multilateral organizations, to promote cooperation and convergence toward sound merger review policies and practices internationally. We describe below our merger review processes and approaches to cooperation, coordination and, as appropriate, convergence. We discuss cross-border merger review, addressing guiding principles and efforts at convergence, and then describe our approaches to cooperation and coordination during the three main phases of a merger review: the notification, the investigation, and the development of effective remedies to alleviate anticompetitive concerns raised in individual transactions.

2. Merger review in the United States

2. The principal statute governing mergers and acquisitions in the U.S. is Section 7 of the Clayton Act, which prohibits such transactions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”² The U.S. antitrust agencies enforce Section 7, and benefit from the pre-merger notification requirements of the Hart-Scott-Rodino Act (“HSR Act”),³ which provides for mandatory pre-merger notification with a waiting period for certain transactions above thresholds relating to the size of the transaction (and, in some instances, the size of the parties).⁴ These thresholds capture the majority of transactions likely to have an impact on a relevant market in the U.S. A filing fee set at levels depending on the size of the transaction is payable upon notification. The U.S. agencies can also challenge under Section 7 transactions that are not subject to the HSR Act’s notification and waiting

---

² 15 U.S.C. § 18. Mergers may also be challenged under the Sherman Act as unreasonable restraints of trade or as monopolization or attempts to monopolize (15 U.S.C. §§ 1, 2), but such challenges are rare.
⁴ Notification thresholds are adjusted annually to reflect changes in the Gross National Product. In addition, certain types of transactions are exempt from filing requirements, such as acquisitions of certain real property or assets located outside the U.S. that generated sales in or into the U.S. falling below certain dollar thresholds. See 16 C.F.R. Parts 802.2, and 802.50.
period requirements.\textsuperscript{5} There are no special rules for cross-border transactions, although jurisdiction is dependent on effects within the territory of the United States.

3. As noted below, the U.S. has a number of bilateral antitrust cooperation agreements that have been used in merger cases, but is not a member of any regional competition organization. The U.S. agencies have been actively involved in merger-related work of both the ICN and OECD, and merger review procedures in the U.S. are consistent with the recommendations of these organizations. Non-competition considerations and political intervention do not play a role in merger review in the U.S.

3. Cross-border merger review: Guiding Principles

4. The goal of any merger review program is to identify mergers that may harm competition in the reviewing jurisdiction, and prevent them from going through in that harmful format. We have found that the vast majority of mergers reviewed by the U.S. antitrust agencies do not harm competition: approximately 95 percent of transactions notified to the U.S. agencies have not resulted in further investigation.\textsuperscript{6} For transactions requiring more in-depth investigation, the agencies have developed policies and procedures to identify and remedy competitive issues as quickly as possible,\textsuperscript{7} and have shared their experience with other antitrust enforcement agencies, new and old.

5. Now that over 100 jurisdictions have merger laws, it is particularly important that agencies seek to ensure that their processes do not create conflicts or impose inconsistent demands for parties that are before more than one agency. As Assistant AG Varney noted recently, “In today’s world, competition agencies can no longer cooperate on investigations with only one or two other jurisdictions and call it a day.”\textsuperscript{8} In addition, learning from the experience of others in handling similar issues can, in some cases, help to identify best practices.

6. Through our technical cooperation work, the U.S. agencies have had the opportunity to send our attorneys and economists to work side-by-side with our counterparts in many agencies in Central and

\textsuperscript{5} The notification thresholds are based primarily on the size of firm and the size of transaction. Accordingly, smaller mergers, which may pose competitive problems in smaller markets, are often not reviewed before they occur. The agencies, however, also may challenge consummated mergers, and will challenge them if they suspect that a transaction has harmed or is likely to harm competition. Since challenging consummated mergers requires undoing a completed deal, it poses particular difficulties with regard to remedies and coordination with other nations’ enforcers.

\textsuperscript{6} Such experience is consistent with that of other OECD members. See OECD, Analysis and Discussion of Selected Responses to the Questionnaire on Harmonisation of Merger Control Procedures (DAFFE/COMP/WP3(2002)14) (January 10, 2003).

\textsuperscript{7} Any person filing a merger for review by the U.S. antitrust agencies may request “early termination”, i.e. that the waiting period be terminated before the statutory period expires. See http://www.ftc.gov/bc/earlyterm/2008/11/index.shtml. Statistics show that most filers now request early termination of the waiting period. 84% of mergers filed in the U.S. in 2009 were subject to early termination requests, which were granted in 69% of these cases – see the 2009 Hart-Scott-Rodino Annual Report available at http://www.ftc.gov/os/2010/10/101001hsrreport.pdf at p. 5; see also the same report at p. 16 (“a)lways cognizant of the program’s impact and effectiveness, the enforcement agencies continue to seek ways to speed up the review process”).

Eastern Europe, South and Central America, Africa, and Asia over the past two decades.  

7. Multilateral organizations such as the OECD and the International Competition Network (ICN) have provided further opportunities for older and newer agencies to share their experiences with each other to the benefit of all. Several multilateral organizations facilitate dialogue and convergence toward sound competition policy and enforcement, particularly the OECD and the ICN, the United Nations Conference on Trade and Development (UNCTAD) and regional organizations such as the Asia-Pacific Economic Cooperation (APEC). The United States antitrust agencies participate in each of these fora. Recently, the U.S. Federal Trade Commission, together with competition agencies from Mexico, Chile and Panama, led the founding of the Inter-American Competition Alliance to foster enforcement cooperation in the Americas. The Alliance plans to cover merger practice in a future conference call, and both U.S. agencies have actively participated in previous calls.

8. Sharing merger review experience among competition agencies has led to the development and publication of international best practices in this area. These include the OECD Council Recommendation on antitrust enforcement cooperation (“OECD Cooperation Recommendation”), the OECD 2005 Council Recommendation on Merger Review, the ICN’s Guiding Principles and Recommended Practices on Merger Notification and Review Procedures, and the ICN’s Recommended Practices on Merger Analysis. Exchange of views and experience, bilaterally and through multilateral organizations, also has allowed the U.S. agencies to help sister competition agencies to work with other institutions, such as the legislature, regulators, courts and other government bodies, to build a “culture of competition” in their jurisdictions. Antitrust agencies can also benefit from undertaking competition advocacy within their jurisdictions.

---

9 See, then FTC Chairman, Deborah Platt Majoras, Looking Forward: Merger and Other Policy Initiatives at the FTC, Remarks at the ABA Antitrust Section Fall Forum (November 18, 2004) available at http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf (“with antitrust regimes continuing to spread around the globe, the FTC will continue to devote significant resources to assisting new agencies as they strive to formulate and implement sound competition policy”).


11 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, available at http://www.justice.gov/atr/public/international/docs/council_recs.htm. The Recommendation was first adopted in 1967, and has been revised several times since.

12 Available at http://www.oecd.org/dataoecd/3/41/40537528.pdf. The Department of Justice chairs the OECD Working Group that drafted this recommendation.


15 See, for example, Promoting a Culture of Competition, Remarks by then-FTC Chairman, Deborah Platt Majoras, Before the Chinese Academy of Social Sciences (April 2006) available at http://www.ftc.gov/speeches/majoras/060410chinacompetitionadvocacy.pdf.
own governments to help legislators understand the benefits of efficiency and consumer-welfare focused merger review. The need for such advocacy may be more pronounced in jurisdictions with relatively new competition regimes, in which the concept of competition is not yet an integral part of the social and legal culture, though similar challenges are faced by all enforcement agencies. The U.S. agencies also host visitors from other agencies that wish to learn about U.S. antitrust experience or to study specific sectors or enforcement methods. Similarly, through the FTC’s International Fellows program, officials and staff of many sister agencies have worked with FTC case teams for three to six month periods to experience first-hand how FTC competition investigations are structured, conducted and managed. The focus of the U.S. cooperation with other Competition Agencies on merger review is on the development of sound competition policy principles and institutions, recognizing that no single model is suitable for all circumstances, given different legal, market and economic conditions.

Under these formal agreements, as well as through informal cooperation under the auspices of the OECD Cooperation Recommendation, the United States agencies may notify other nations of their enforcement actions that implicate other nations’ important interests, coordinate parallel investigations, and/or provide investigative assistance. This type of cooperation enables the agencies to identify issues of common interest, share their competitive analyses, and seek to avoid inconsistent outcomes. There have been few cases of “conflict” between decisions of one of the U.S. antitrust agencies and the decision of a non-U.S. agency reviewing the same merger (e.g., Boeing/McDonnell Douglas; GE/Honeywell; Sun/Oracle); those rare instances of conflict have led to increased efforts at mutual understanding, consultation, and cooperation. For example, in 2001, following GE/Honeywell, the European Commission and the U.S. agencies formed a bilateral working group that concentrated its efforts on several aspects of merger analysis including efficiencies and vertical and conglomerate effects.


17 See Wilson, supra note 1, p. 52.

18 See e.g., the FTC 2009 PERFORMANCE AND ACCOUNTABILITY REPORT, available at http://www.ftc.gov/opp/gpra/2009parreport.pdf, p. 14, demonstrating that during the years 2007-2009, the FTC cooperated with non-U.S. competition authorities in 61, 79, and 87 cases, respectively. The DOJ has a similar record of cooperation.


20 Available at http://www.ftc.gov/os/2009/11/091110usrussianou.pdf. To date, the agreements have been between the governments of the U.S. and these respective countries, while the Memorandum was signed between the U.S. antitrust agencies and the Russian antitrust agency.
11. Below, we outline the specific measures in place for U.S. agencies to cooperate in cross-border merger review, including notification, contact with other agencies to share information and analysis, and the development of remedies, with recent examples of cooperation.

4.1 Making contact: The beginning of cooperation

12. Once an agency opens a merger investigation, its staff determines whether its enforcement action may affect non-U.S. interests -- for example, because one of the parties is based outside the U.S., or relevant U.S.-owned assets are located outside the U.S. Pursuant to a bilateral agreement or the OECD Recommendation, the U.S. agency will notify the relevant jurisdictions; notification can also occur where appropriate in the absence of a bilateral agreement or OECD obligation. Historically, such notifications were formally conveyed from the U.S. government to the other government. However, given review timetables and the relations developed between the antitrust agencies, agency case teams when appropriate will contact each other informally, e.g., via e-mail or telephone, to determine whether they will be reviewing the transaction concurrently. Some of our arrangements, e.g., the Brazil and Mexico bilateral agreements, have enhanced communication by providing for direct contacts between antitrust agencies.

13. We believe it is useful for antitrust agencies reviewing mergers with cross-border implications to ask the merging parties to identify all other reviewing jurisdictions, as recommended in the OECD’s 1994 Wood-Whish report. For example, a preliminary item on the HSR Notification and Report Form asks filers to list voluntarily any international competition authorities that have been or will be notified of the proposed transaction. Further, in instances in which FTC or DOJ decide to investigate a transaction, staffs routinely follow up with the parties to identify other reviewing agencies and consult with them to determine whether the merger raises common concerns. Early notification is useful in allowing the respective agencies time to address mutual concerns before the review process of one agency has concluded.

4.2 Cooperation during investigations

14. Many transnational mergers entail review of the same or similar competitive issues in more than one jurisdiction. Cooperation, including the sharing of information, permits more complete communication among the reviewing agencies and the coordination of their respective investigations, with the aim of improving the analysis and achieving consistent results, where appropriate. Agencies routinely share non-confidential information, such as public information, and what is referred to as “agency confidential” information -- information that the agency does not routinely disclose publicly but as to which there are no statutory disclosure prohibitions. Examples of “agency confidential” information include general staff views on market definition, competitive effects, and remedies. This type of consultation can entail frequent contact between U.S. staff and their international counterparts and helps to identify common areas of concern. The United States and the EU antitrust agencies have established a specific set of Best Practices on Cooperation in Merger Investigations (available at http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm) to govern the frequent simultaneous review of the same transaction. In keeping with the 1991 US-EC bilateral agreement, these best practices are designed to further enhance cooperation in merger review and to avoid conflicts in the enforcement of our respective competition laws. They are also intended to

---

21 To avoid internal conflict or duplication, only one U.S. agency investigates a particular antitrust matter under an informal “clearance process” whereby the other agency defers to the relative expertise of the investigating agency in the affected markets.

22 Over the years, the United States has provided notice of antitrust actions to dozens of jurisdictions.


24 The United States and the EU antitrust agencies have established a specific set of Best Practices on Cooperation in Merger Investigations (available at http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm) to govern the frequent simultaneous review of the same transaction. In keeping with the 1991 US-EC bilateral agreement, these best practices are designed to further enhance cooperation in merger review and to avoid conflicts in the enforcement of our respective competition laws. They are also intended to
Recommendation, the information is shared on the condition that the recipients maintain the information in confidence. The U.S. agencies often seek information located outside the U.S. from parties involved in cross-border mergers; parties often provide such information on a voluntary basis, in an effort to expedite the process of reviewing the merger.

15. **Waivers.** U.S. law generally prohibits the agencies from sharing confidential business information obtained during a merger investigation unless the submitter voluntarily waives its confidentiality rights. The parties to a proposed merger (as well as third parties) can facilitate consistent resolution of parallel investigations by granting reviewing agencies limited waivers of confidentiality regarding particular documents or information. A waiver allows the authorities to discuss information that has been submitted to one of the reviewing agencies, and could also permit joint interviews, which saves time for both the reviewing agencies and business personnel, but would not permit wider disclosure to third parties or the public. The sharing of confidential business information pursuant to a waiver facilitates the identification of competitive concerns in each reviewing jurisdiction and thus reduces the risk of inconsistent outcomes. Parties are encouraged to voluntarily waive the protection of confidentiality restrictions to allow agencies to share confidential information with each other (recognizing that this is up to the parties to decide).

16. In some cases, cross-border cooperation among competition agencies has led a U.S. agency to close its investigation in light of remedial action taken elsewhere. For example, in the *Cisco/Tandberg* acquisition, reviews by the U.S. Department of Justice and the European Commission (EC) were aided by waivers from the parties and industry participants. As a result, the agencies shared information and assessments of likely competitive effects and potential remedies in the worldwide videoconferencing market. The DOJ concluded that the transaction was not likely to be anticompetitive in light of enhancing the efficiency of the agencies’ respective investigations, reduce burdens on merging parties, and increase the overall transparency of the merger review process.

25 In the United States, absent a waiver, most of the information submitted by the merging parties or third parties during an antitrust investigation cannot be disclosed, including the HSR forms and materials responsive to a request for additional information. This practice comports with the confidentiality provisions of the OECD Cooperation Recommendation and ICN Guiding Principles and Recommended Practices on Merger Notification, supra notes 11 and 13. See art. 10 of the OECD Recommendation and art. IV.F of the ICN Guiding Principles and Recommended Practices. Disclosure of confidential business information also may be expressly permitted by an Antitrust Mutual Assistance Agreement under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-6212. This law allows the United States government to enter into agreements with other governments that enable its antitrust agencies to share otherwise confidential antitrust evidence (although not HSR material) with non-U.S. antitrust authorities, to use their investigative powers to collect evidence for use by the non-U.S. authority, and to withhold from public disclosure any antitrust evidence obtained from the other authority. The United States currently has only one such agreement, with Australia, which has been used rarely.


27 These materials are protected from disclosure by law and the penalties for unlawful disclosure are severe. See 15 U.S.C. § 50.

28 See Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at http://www.justice.gov/atr/public/speeches/255189.htm (“we should use all the tools available to us to encourage the parties to work with the agencies in parallel, and to make clear to them that they have nothing to gain from trying to game the system”).
commitments made by Cisco to the EC facilitating interoperability between its products and those of other companies. Taking account of Cisco’s commitments to the EC, along with market factors such as the evolving nature of the videoconferencing market, led the DOJ to close its investigation.29

4.3 Fashioning effective merger remedies

17. Under U.S. merger law, the antitrust enforcement agencies may seek to remedy the likely anticompetitive effects of a proposed merger by requesting a federal court order blocking the merger.30 In practice, because many transactions have aspects that do not raise competitive concerns, the parties often negotiate a divestiture of less than all the transaction assets, to allow the non-problematic portions of the transaction to proceed. This approach has become routine, and is in line with the general principle that merger remedies should be tailored to resolve the competitive problems created by the merger but should not block the parts of the transaction that are unlikely to substantially reduce competition.31

18. Frequently, mergers that threaten competitive harm can be modified in ways that avoid the threatened harm yet preserve the procompetitive or competitively neutral aspects of the transaction. Indeed, it has been the case for many years that settlements occur in the vast majority of merger matters where the U.S. antitrust enforcement agencies find threatened harm to competition. The majority of these settlements involve structural remedies -- which typically involve the sale of physical assets by the merging firms -- although in appropriate circumstances the U.S. antitrust enforcement agencies obtain behavioral remedies -- which limit the merged firm’s postmerger business conduct. In all cases, the agencies seek to fashion effective relief that “fixes” the particular harm that would likely occur from the merger. The purpose of a merger remedy is to preserve (in the case of a proposed merger) or restore (in the case of a consummated merger) competition in the market, not to enhance it.

19. With regard to transnational mergers, the timing and procedures for negotiating merger remedies typically differ among the reviewing jurisdictions.32 As a result, cooperation and communication among reviewing agencies help to avoid inconsistent obligations and manage different timetables for decision, e.g., with regard to divestiture packages or upfront buyers.33 As with all merger remedies, the agencies are careful in transnational mergers to monitor the remedies imposed on the parties and ensure that they are properly implemented. Cooperation and coordination with other reviewing jurisdictions extends to this phase of the merger process as well; for example, the agencies may coordinate with another reviewing


30  Of course, a permanent injunction from a federal court is not available if the merger has already occurred. In such cases, divestiture may be ordered.


32  There are also some procedural differences between the FTC and the Antitrust Division, although both agencies enforce the same legal standard and are governed by the same timing constraints under the HSR Act. For a fuller discussion of the processes of each agency, see Naomi Licker and Jeanine Balbach, “Best Practices for Remedies in Multinational Mergers,” Competition Law International, vol. 6 No. 2 (September, 2010), pp. 22-28.

agency in the choice of a common divestiture or monitoring trustee and in approving the purchaser of assets divested as part of a remedy.34

20. Cross-border mergers may often require cross-border remedies in order to effectively prevent anticompetitive effects. Consequently, cooperation between competition agencies is often key in such scenarios.35 We have learned this through experience. In 1990, Institut Merieux, the dominant U.S. seller of rabies vaccine, sought to acquire Connaught BioSciences, a Canadian firm. Connaught was one of two potential entrants into the market. Failing to consult or coordinate with Canadian counterparts, the FTC staff negotiated a consent order that required Institut Merieux to lease Connaught’s Canadian-based rabies vaccine business to an FTC-approved buyer for 25 years. Had the agencies coordinated, the FTC staff would have learned that the remedy was problematic for the Canadian authorities. The Canadian government protested that the remedial order would reduce availability of rabies vaccine in Canada. In response, the FTC modified its order to require Canadian government approval of the lessee.36 This case serves as an example of the importance of coordinating with international counterparts, as antitrust remedies may have unintended harmful consequences in other jurisdictions.

21. Inter-agency cooperation in the Panasonic/Sanyo merger presents a case in point. This merger between two Japanese companies was reviewed by several competition authorities, and close cooperation among the EC, the Japan Fair Trade Commission (“JFTC”), Canada, and the FTC was made possible through bilateral agreements and waivers from the parties to allow the sharing of confidential information. The FTC staff identified competitive concerns in the worldwide market for portable nickel metal hydride (NiMH) batteries, which led to an FTC consent order requiring divestiture of Sanyo’s NiMH manufacturing facility in Japan. The EC identified competitive concerns in two additional battery markets, leading to the divestiture of an additional production facility for these batteries. One of these markets was also of concern to the JFTC, which subsequently cleared the merger based on the undertakings with the FTC and the EC.37


22. The review last year of the merger between Ticketmaster and Live Nation is another recent example of effective cooperation, this time between the Antitrust Division and the Canadian Competition Bureau. The Division coordinated closely with the Bureau at the investigative stage, and the two agencies worked closely together to obtain a remedy, announced the same day, that preserved competition across North America.\(^{38}\) The proposed relief in Ticketmaster/Live Nation is both structural and behavioral. It is designed to give concert venues more choice for their ticketing needs and promote incentives for competitors to innovate and discount. In particular, Ticketmaster -- the world’s largest ticketing company -- is required to divest ticketing assets. Ticketmaster must also license its ticketing software to AEG, providing AEG the opportunity and incentive to compete in primary ticketing both in its own venues and third-party venues, thereby opening the door for AEG to become a vertically-integrated competitor with incentives similar to the merged firm. In addition, Ticketmaster was required to subject itself to ten-year anti-retaliation provisions that prohibit anticompetitive bundling.

5. Conclusion

23. Cross-border merger review presents challenges even for antitrust agencies with well-established policies and procedures for international cooperation. The U.S. antitrust agencies will continue to work to develop strong relationships with counterpart agencies, seeking to promote and deepen cooperation with both established and younger competition agencies in the area of merger review, with the goal of promoting efficient and effective cross-border merger review. We also will continue to work to identify appropriate areas of convergence on best practices as regards the substantive review of mergers, through organizations such as the OECD. Such best practices are valuable tools for both newer and established antitrust agencies alike.

CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Uzbekistan ¹ --

1. Introduction

1. The procedures of the implementation of the competition law, such as merger control are strictly implemented usually in large economies. Smaller economies, such as Uzbekistan do not engage in significant merger control, because there is an assumption that large firms are better able to compete in international markets. Nevertheless, structural concentration in the weak merger control policy eventually raises competition concerns, and the most recent proposals for changes and additions to the laws on competition (e.g. in Canada, the United Kingdom, France, Spain and other EU countries) have sought to focus more on merger control issues. Active merger control requires mandatory notice, because the costs of breaking the illegal transaction ex post facto usually make it more inefficient and costly.

2. Antimonopoly regulation in the Republic of Uzbekistan is aimed to protect competition in the commodity markets of Uzbekistan and requires business entities that want to merge or acquire significant part (share, etc.) of another competitor (entity):

- to obtain a preliminary consent of State Committee of the Republic of Uzbekistan on Demonopolization and Development of Competition (later in the text as AMC – Antimonopoly Committee) for accomplishing transactions on:
  - Reorganization or liquidation of commodity markets’ participants which lead to occurrence of commodity market’s participant holding dominant position.
  - Purchase of assets of a commodity market participant by another participant, including transactions on:
    - Acquisition by an individual (group of individuals) of voting shares (participatory shares) of the commodity market’s participant entitling the purchaser to dispose of more than thirty five (35) per cent of indicated shares (participatory shares);
    - Acquisition by an individual (group of individuals) of rights allowing to define terms of conduct of business by commodity market’s participant or to perform functions of its executive body.

3. The above mentioned transactions require a preliminary filing consent from the AMC. The waiting period for clearance shall not exceed thirty (30) days from the moment of submission of necessary documents from the applicant.

¹ Prepared by the Director of Antimonopoly Policy Improvement Center of Uzbekistan – Dr. G. Kholjigitov.
4. There is also ten (10) days *post factum* notification of the AMC in the event of change of value of the charter capital of corporate entity if it results in the increase of shareholding of a shareholder already holding more than thirty five (35) per cent of total shares in the charter capital.

- To inform the antimonopoly body of the following facts:
  - Merger and association of business entities;
  - Participation of individuals in executive bodies or supervisory boards of two or more business entities which total book cost of assets exceeds two thousand times amount of minimum wage, or business entities entered the register on the same commodity group or entered the register on groups of commodities of different stages of the same production-distribution process.

5. The M&A transactions in Uzbekistan have deadlines for their filing. There is a 15-day term for notification of the AMC relating to mergers and accessions. The notification must be filed by either founders of the related companies or bodies or individuals making a decision on the merger or accession. The above mentioned notification is a *post factum* notification.

2. **Main normative acts of the Republic of Uzbekistan regulating antimonopoly issues**

  - covers relationships influencing competition in commodity markets of Uzbekistan;
  - also applies in cases when actions and agreements made outside the Republic of Uzbekistan lead or may lead to limitation of competition or entail other negative consequences in commodity markets of the Republic of Uzbekistan3;
  - prohibits activity of entities occupying dominant position in commodity market of the Republic of Uzbekistan, i.e. holding a share of thirty five (35) and more per cent in definite market aimed at:
    - the abuse of competition conditions (including establishment of monopoly high or monopoly low prices, intrusion of unfair terms on concluding agreements to contractors, creation of obstacles to access to commodity market for other individuals);
    - making cartel agreements (including agreements aimed at establishment and maintenance of fixed prices or establishing price limitations for resale of goods or prohibiting sale of goods produced by competitors);
  - regulates issues of merger and takeover of business entities;
  - contains other regulations.

- Instruction “On order of control over acquisition of more than thirty five (35) per cent of business entity’s shares” (approved by the resolution of the State Committee on Demonopolization; registered by the Ministry of Justice of the Republic of Uzbekistan No.1896 of 05.02.2009), which establishes the order of AMC’s control over acquisition by investor of more than thirty five (35) per cent of business entity’s shares as well as of each next acquisition.
3. Recent analysis of current merger control practices in Uzbekistan has identified a number of problems that adversely affect the efficiency of regulation in this sphere. In this regard, the merger control is about to:

- Introduce specific criteria of the merger transaction under consideration and to include them within the scope of all mergers and acquisitions of business entities;
- Improve, supplement and unify all types of economic concentration (merger, takeover, acquisition) of the mandatory pre-notification, and the order of cases on them, dramatically changing the provisions of Articles 14, 15 of the Law on Competition;
- Lower the bar the acquisition of 35% to a blocking stake of 25% and significantly increasing the notification threshold;
- Provide a legislative mechanism in which AMC reserves the right to review mergers, which are below the threshold level, but raise serious concerns / suspicions of the possibility of providing a significant impact on the competition;
- Implement a flexible system of review of applications for merger, developing a mechanism for granting exceptions and conditional consent, as well as monitoring and taking actions on the deals that were given the conditional agreement;
- Change the mechanism for raising questions (issues) on the merger of economic entities, establishment of associations of various types (holding companies, associations, companies, etc.) on the initiative of the government of Uzbekistan;
- Implement the provisions on the deadline of the AMC’s decision regarding the merger control and time period for the AMC’s possible claims to the M&A parties.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- BIAC ¹ --

1. Introduction

1. The author and the Business and Advisory Committee (BIAC) to the OECD appreciate the opportunity to submit these comments to the OECD Global Forum on Competition concerning the challenges faced by developing and emerging economies in the area of cross-border merger control.

2. The Global Forum’s consideration of this topic is particularly timely. New enforcement agencies continue to proliferate, and this expansion in competition law enforcement—most often accompanied by merger control—shows no sign in abating. Concurrently, there has been a recent increase in cross-border mergers and acquisitions, as part of a broader increase in M&A activity in general and as a consequence of the increasing pace of globalization of business, as many OECD Members and other countries gradually emerge out of recession.

3. As an initial observation, the challenges arising from cross-border mergers are not limited to competition agencies in developing and emerging economies. The coordination of cross-border merger control is complex for all competition law enforcement agencies, regardless of their size and experience. These complexities are likely to be most attenuated, however, with smaller or relatively inexperienced competition law agencies, due to fewer resources and less relevant experience in merger review. Not all of these smaller or relatively inexperienced competition law enforcers come from developing and emerging economies. Similar challenges may be faced by relatively newly established competition law enforcers in transition economies (such as Russia, Ukraine, or China) and new competition law enforcers in relatively developed economies (such as Jersey or Mauritius). Thus, the proper focus of this discussion should be on challenges in cross-border merger control faced by developing and emerging agencies, which are not necessarily limited to developing and emerging economies.

4. On the whole, great strides have been made in the past decade in identifying the common problems associated with the review of mergers by new and evolving competition regimes. Numerous jurisdictions have built their regimes or made changes to their existing notification and merger review mechanisms in light of best practice recommendations authored initiated by the OECD Competition Committee and carried forward in more detail by the ICN Mergers Working Group. These have sometimes necessitated amendments to laws, regulations and rules of practice and reflect the dedication and commitment of agency officials to improve the efficiency and effectiveness of their process. These efforts are to be commended. With regard to other jurisdictions, however, enough has not been done by way of implementation of best practices, largely as a result of a failure of many jurisdictions to consider the externalities of their systems with respect to multi-national mergers. In some cases, there is a failure to

¹ This paper is submitted by John M. Taladay as a panelist for this session and on behalf of the Business and Industry Advisory Committee of the OECD. Special thanks are made to Chuck Webb, a partner at Howrey LLP and former Executive Director of the Jersey Competition Commission, who provided significant assistance in the preparation of these comments.
realize that their practices are not “best” or a dismissal of such best practices as inconsequential to an efficient global scheme for merger review.

5. In other cases, the cause of the shortfall stems instead from a fundamental capacity problem. Small economies and developing agencies often do not have the resources necessary to identify and adopt a comprehensive merger review mechanism in view of a global economy. These jurisdictions need help from more established agencies and experts and need the opportunity to observe and share in the experience of other agencies – not just developed agencies – that have faced similar problems and successfully have undertaken efforts to implement and amend their procedures to reflect best practices.

6. In addition to training provided by more experienced agencies, smaller agencies may take a number of steps to conserve their resources engaged in merger review. These steps include focusing their analysis exclusively on the potential economic effects arising from the transaction in local markets (while ignoring other, noneconomic considerations); cooperating with larger, more experienced agencies that may be reviewing the same transaction; and, potentially, free-riding on remedies imposed on the transaction by more experienced agencies, if these remedies are sufficient to address competition concerns in local markets.

7. It is important that jurisdictions representing economies and agencies at all levels of development undertake the challenge posed by the process of implementing merger review schemes that are compatible with the scores of established merger regimes already in operation around the world. Like other areas of competition law enforcement in the field of dominant-firm conduct or cartel conduct, a poor review system can have far-reaching effects that can slow or deter efficiency enhancing conduct, including cross-border mergers. It is in the interest of all who participate in the global economy, including consumers and workers, to ensure that this does not occur.

2. Challenges faced by newer competition agencies in cross-border merger control

8. This is not the first time the Global Forum has considered the challenges faced by younger competition law agencies. In February 2009, the Global Forum considered the challenges faced by younger agencies in competition law enforcement in general. Many of the common challenges considered in that Roundtable included “meager resources for the new agency, limited indigenous expertise on the subject, tepid support for competition policy (what today is called “competition culture”), deficient judicial systems and limited access to business information.”

9. Unlike other areas of competition law enforcement such as cartels or dominance, merger control relies predominantly on an ex ante assessment of likely economic effects. This sometimes requires a complex legal and economic assessment of competitive conditions in the affected sector before and after the proposed merger or acquisition. In addition, unlike other areas of competition law enforcement, with merger review timing is of the essence, often as a matter of statutory imperative. Enforcement agencies most often have to conduct their investigations and make decisions under strict timeframes set out in national laws or agency guidelines. These time-frames reflect the business reality of the pressure the parties are under in financial markets to conclude the merger or acquisition. In light of these broader ramifications, the challenges faced by younger competition enforcers, and the consequences of their action (or inaction), can be particularly acute for cross-border merger control.


3 Id. at 3.
10. One of the main challenges to younger competition law agencies identified in the February 2009 Roundtable was a lack of capacity, in terms of financial and human resources. Jurisdictions establishing competition law enforcement systems may have limited domestic expertise in competition law enforcement. Often, as a newer agency’s staff gains relevant experience through casework and training, the agency faces the additional pressures of retaining its key, experienced staff members. These problems are made worse if the agency lacks the financial resources necessary to recruit and maintain qualified and experienced staff. In the February 2009 Roundtable several newer competition law agencies cited challenges arising from inadequate financial resources contributing to high staff turnover.

11. Problems in capacity can be made worse for a younger competition law agency by a lack of a competition culture in the jurisdiction. A lack of a competition culture can also increase the risk that local political interests may interfere with effective competition law enforcement and potentially favor local interests or noneconomic considerations – risks discussed in more detail below. Insufficient awareness of competition law concepts, precedents and analytical tools may also plague a country’s judiciary, giving little comfort to both the reviewing agency and the parties. The February 2009 Roundtable found a lack of a basic competition culture to be a problem in virtually every country implementing a new competition law.

12. The potential problems of a lack of resources and a sufficient competition culture are typical across all areas of effective competition law enforcement for newer agencies. However, these challenges become greater in the context of cross-border merger review, which as noted above is typified by complex ex ante legal and economic assessments made under strict time pressures. In this regard, the following observations can be made:

- The review and approval of mergers and acquisitions within strict time-frames is greatly facilitated by both established procedures and case handling experience. Newer competition enforcement agencies may not have detailed case handling procedures, or may be in the process of developing them. Even if procedures exist on paper, agency staff may have a lack of experience in dealing with them in actual merger cases. While training from bilateral exchanges with more experienced agencies, as well as best practices learned from forums such as the OECD and ICN are extremely valuable, they are no substitute for actual case handling experience.

- Newer agencies may also lack industry-specific experience that can greatly facilitate merger review. Merger reviews in industries such as pharmaceuticals, airlines, e-commerce, and other industries, which often are cross-border, often involve very complex and detailed questions of fact, many of which are peculiar to the industry. It is largely for this reason that more established

---


5 Id. at 1093 (“Transition economy competition agencies often find that professionals who have become experts in antitrust economics or law become extremely attractive to private sector employers.”).

6 These included competition law agencies from Argentina, Brazil, Chile, Estonia, Latvia, Mexico, Peru, Russia, and Ukraine. See supra note 2, at 4.

7 See International Competition Network (“ICN”), Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies at 35 (2003) (“If there is one common concern expressed across the diverse jurisdictions that responded to the questionnaire, it is directed at the perceived difficulty of the judiciary to come to grips with competition law.”)

8 See supra note 2, at 4, 16.
competition law and antitrust agencies have dedicated “shops” that regularly handle merger reviews arising in particular industries. With limited resources and experience, younger agencies often do not have this luxury of specialization.

- In their efforts to learn about the facts of an industry, newer agencies may have limited access to relevant information, compared to more established agencies in larger jurisdictions. For smaller jurisdictions in particular, major suppliers in their markets may conduct business through imports or agents only, and have no subsidiaries or on the ground presence in the jurisdiction— even if their sales are substantial for the jurisdiction in question. While, for more established agencies, the ability to conduct joint investigations on each other’s behalf may be facilitated by formal interagency cooperation agreements; the Background Note recognizes such agreements are relatively rare between more established and newer agencies.

- Finally with respect to cross border merger reviews, there are potential challenges associated with prioritization of a newer agency’s limited resources. Even with limited resources, a developing competition agency will almost always have various and potentially conflicting priorities. These include, in the competition law field, enforcement efforts against cartels and abuses of dominance as well as competition advocacy efforts. In addition, newer agencies often have non-competition law responsibilities, such as consumer protection or sector-specific regulatory responsibilities.

13. In addition to potential challenges faced by younger competition agencies in cross-border merger review arising from a lack of sufficient resources and insufficient competition culture, effective merger review may also be impeded by complex and multifaceted institutional arrangements. Brazil, for example, has a tripartite merger control system, with responsibility for merger investigations and decisions split among the Secretariat of Economic Law, the Secretariat for Economic Monitoring, and the Administrative Council for Economic Defense. Challenges arising from multi-agency jurisdiction over merger decisions are not unique to newer competition law agencies, nor are they unique to merger review. Given the

---

9 To take one example, both the US DOJ and the EC have merger teams dedicated to the energy sector.

10 See supra note 4, at 1095 (“Transition economy antitrust agencies typically must operate with limited access to data that offers an accurate view of existing market conditions and the competitive significance of individual firms.”)


12 For example, in Jersey the Jersey Competition Regulatory Authority (“JCRA”) is responsible for telecommunications and postal regulation in addition to competition law enforcement. Similarly, in Barbados, the Fair Trading Commission is responsible for telecommunications and electricity regulation and also consumer protection, in addition to being a competition law enforcer.

13 In the UK, for example, there currently is a two-stage process for merger review, with the OFT conducting the initial assessment and referring cases that raise potentially serious competition concerns to the Competition Commission for a detailed assessment. In the US, battles for so-called “clearance” between the DOJ and FTC can occur and result in duplication of effort, delay and additional expense to the merging parties.
potential challenges identified above; however, the effects of such institutional challenges may be more pronounced in merger enforcement.

3. **Potential challenges for companies in dealing with developing and emerging competition agencies in cross-border mergers**

14. Corresponding to the challenges faced by younger competition agencies in dealing with cross-border merger control are the challenges faced by companies seeking to engage in cross-border mergers and acquisitions. Multinational companies and their legal representatives make large investments in understanding and complying with the laws of the jurisdictions in which they operate.

15. Companies engaging in cross-border mergers and acquisitions must identify jurisdictions where their transaction is subject to merger control. This task has become immensely more complex over the past decade with the proliferation of national competition laws that incorporate some form of merger control (either mandatory or voluntary). In less than 20 years the number of countries with competition regimes has grown from less than 30 to more than 100. Determining whether or not a merger requires notification and approval in these jurisdictions typically requires the merging parties to receive localized legal advice, which can add considerably to a transaction’s costs. The difficulty and complexity of this task can have other important adverse effects. For example, where there are competing bidders seeking control of a business enterprise or an important collection of productive assets, the relative merits of a transaction will be experienced due to merger notification obligations. The inability to identify and assess the extent and nature of these obligations for each bidder clearly and promptly often creates uncertainty in the process of evaluation. The resulting burden and uncertainty can delay a transaction, significantly enhance the burden and expense of assessing competing bids, and even lead to the choice of a specific transaction that ultimately is not in the best of interests of competition and consumers, to say nothing of the transacting parties and their shareholders.

16. This task is made more complicated by the widely diverging jurisdictional thresholds among countries with merger control systems. While the ICN Recommended Practices calling for notification thresholds to be based on objectively quantified criteria and to have an appropriate jurisdictional nexus have been widely adopted, their implementation is not complete, particularly in countries with newer competition law systems. Some countries still rely on market share or share of supply based merger thresholds, while others still incorporate global turnover thresholds.

17. Even for countries with jurisdictional thresholds that do comply with ICN Recommended Practices, turnover or asset-based thresholds for the country in question are often set at very low levels. This means that, in practice, multinational companies operating in those countries may have to file for merger approval simply by virtue of their presence in jurisdiction for a merger or acquisition that has de minimus or no actual or potential local effect.

18. If a cross-border merger or acquisition requires merger control filings in multiple countries, merging parties face additional challenges in dealing with differing filing requirements, filing deadlines, information requirements and waiting periods. While such problems are not specific to merger control in small or developing agencies, they have been made much more complex by the proliferation of merger control systems.

---

14 See, e.g., Barbados, Israel, Jersey, Spain, Turkey.
15 See, e.g., Austria, China, Denmark.
16 See, e.g., Faeroe Islands, Germany, Norway, Ukraine.
Furthermore, parties engaging in cross-border mergers often face different substantive standards for merger review. The main focus of merger control is to prevent the creation, enhancement or exploitation of market power through a substantial lessening of competition arising from the transaction under review. However, there are still instances—in both developing and developed economies—where noneconomic considerations are either explicitly or implicitly incorporated into merger review.\(^{17}\) While common to both developing and developed economies, the risk associated with including potential noneconomic considerations in merger review may be greater in jurisdictions with a limited competition culture, where outside political influences can come into play, or where competition has to be balanced against other perceived national interests, such as a merger’s potential effects on domestic companies or national champions, domestic employment, or regional dislocations or development opportunities within a country.

Even if a jurisdiction follows sound economic analysis in its approach to merger assessment, there is still a risk of inconsistent outcomes in merger assessment by distinct jurisdictions. Given its ex ante nature, the risk of inconsistent outcomes among jurisdictions is perhaps more pronounced in merger control compared to cartel enforcement and possibly compared to other areas of competition law enforcement.\(^{18}\) The risk of inconsistent outcomes among different jurisdictions reviewing the same cross-border merger is not particular to younger competition agencies—as evidenced by differing outcomes between U.S. and E.U. competition enforcers in transactions such as GE/Honeywell or Boeing/McDonnell Douglas. The risk of potential divergence in outcomes, however, increases with the greater diversity of agencies and jurisdictions engaging in merger control. Merger analysis is a highly fact-dependant inquiry, and the facts that exist in markets of different sizes or in different states of development may differ substantially. Therefore, “[t]wo different national agencies may reach legitimately different conclusions on the basis of the same data, simply because standards are imprecise, the evidence is uncertain, and the core biases are different—or even because factual evidence of adverse market effects is different in different geographic markets. Thus, having a common substantive standard (especially one that was a vague compromise between opposing viewpoints) does not seem a likely or promising form of harmonization.”\(^{19}\)

At the same time, there are situations in which differing outcomes are difficult to justify, particularly where the merger involves commodity goods sold in a global geographic market. In such situations, divergent outcomes create a level of uncertainty that can have a chilling effect on cross-border mergers and can highlight some of the “non-economic” interests that risk the credibility of competition law enforcement on the whole. Although few actual mergers fall into this category, there are a number of attempted mergers, frequently involving China either as a buyer or reviewing agency, that have been shouted down or rejected, calling the objectivity of the process into question.

---

17. In South Africa, for example, a merger is reviewed based on public interest considerations, in addition to whether or not it substantially lessens competition. These public interest considerations include the impact of the merger on employment, small businesses, and the ability of national industries to compete in international markets.

18. See Donald Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects, in Policy Directions for Global Merger Review* at 72 (Global Forum for Competition and Trade Policy 1998) (“Merger review is an unusual activity because it requires ex ante judgments on often imponderable questions concerning the medium- or long-term future of markets and enterprises . . . . Thus, there is more room for inconsistency and controversy in merger review than when more than one antitrust agency prosecutes a global cartel.”).

19. *Id.* at 75, accord Charles Webb, *One Size May Not Fit All – Merger Control in Small Market Economies*, Concurrences 3/2008 at 11 (“[W]hile large and small economies may engage in the same type of merger analysis, economic circumstances that exist in smaller economies may materially influence the outcome of the assessment.”).
These challenges of adhering to the merger notification requirements of scores of jurisdictions can add immensely to the costs of cross-border mergers and acquisitions. These increased costs arise from the out-of-pocket expenses for legal and economic advice for the merging parties, as well as costs associated with delayed implementation of efficiencies arising from mergers and acquisitions, and the diversion of management time to the regulatory process. A 2003 PricewaterhouseCoopers Study, commissioned by the American Bar Association and International Bar Association, estimated that an average transaction involving competition filings in eight jurisdictions had external merger review costs of approximately €3.3 million. These estimated costs most likely have increased further as a result of the greater proliferation of merger control systems since 2003. Given that a merger of €100 million would trigger the notification requirements (as a “size of transaction”) of many jurisdictions, these costs are not insubstantial to a significant number of mergers.

In addition to increasing costs, the proliferation of merger control, and the potential delays associated with it, may actually deter cross-border mergers and acquisitions that are procompetitive. This could be particularly true in rapidly changing industries such as the software industry, which is typified by collaborating development efforts, the need to adapt to rapid changes in technologies, and cross-border operations. As stated by a witness before the U.S. Antitrust Modernization Commission in 2005:

Here, even more than in other industries, a procompetitive merger transaction that is delayed may be derailed altogether. Whether delay results from procedural overload or duplication, or from the sincere regulatory pursuit of an aggressive but unverifiable theory of competition, the additional time spent in the regulatory process may be the largest and most important transactions cost of all—and the one that thwarts the most potentially procompetitive transactions. Product design decisions occur on short cycles in the software industry. When a transaction is held up for many months, product design decisions—and thus, to a substantial extent, innovation in the merging companies—may be frozen to a significant extent because the companies cannot predict which resources from each company will be at their disposal when the product ultimately reaches market.

While this general concern with the pace of regulatory investigations has many hidden costs, our principal specific concern pertains to the fragmentation of antitrust enforcement among dozens of different sovereign states around the world. Because the nature of their business does not depend on significant physical facilities, new economy companies often conduct operations in a large number of jurisdictions. The wide divergence in rules, procedures and standards produces a multiplicity of traps for the wary and unwary alike, while increasing transactions costs and deal risk sufficiently to deter procompetitive alliances and consolidations.

### 4. Practical suggestions for improvement

Cross-border mergers potentially raise a number of serious challenges, both for younger competition agencies and for the merging companies that appear before them. To reduce these challenges for both younger competition agencies and private parties, consider the following recommendations.

---


21 Testimony of Daniel Cooperman, Senior Vice President, General Counsel and Secretary, Oracle Corporation, before the Antitrust Modernization Commission at 1-2 (Nov. 8, 2005); see also Simon J. Evenett, *How Much Have Merger Review Laws Reduced Cross-Border Mergers and Acquisitions?*, *INTERNATIONAL MERGER CONTROL: PRESCRIPTIONS FOR CONVERGENCE* (William J. Rowley ed., 2002) (estimating that mandatory merger control laws reduce cross-border M&A activity by almost half).
4.1 Implement ICN recommended practices on merger notification procedures

25. As an initial matter, all jurisdictions enforcing competition law – both developing and developed – should adopt and implement the ICN Recommended Practices for Merger Notification and Procedures. Notification thresholds should be based on objectively quantifiable criteria (not on market shares or similar measures) and have an appropriate jurisdictional nexus (not based on global levels of turnover). Even when complying with these recommendations, jurisdictions should attempt to set their thresholds at levels high enough to not capture mergers and acquisitions that may be of no competitive consequence in the jurisdiction’s markets. Following these recommendations can both reduce an agency’s workload associated with the review of mergers and acquisitions (a factor that may be particularly important to younger or smaller agencies with limited resources) and reduce compliance burdens for companies engaging in cross-border mergers and acquisitions.

26. This recommendation applies equally to developing agencies as well as developed agencies. Many developed agencies have concluded that they are in compliance with ICN Recommended Practices despite clear indications that they are not. This applies frequently to the recommendation that agencies rely on objectively identifiable information in their initial notification form. Many significant agencies observe this recommendation only in the breach and should undertake a realistic self-examination of this point, as well as other recommended practices, in order to set the example for developing jurisdictions.

4.2 Focus exclusively on local competitive effects

27. If a merger is reportable in a jurisdiction, the reviewing agency should focus exclusively on the local competitive effects potentially arising from the merger. That is, the reviewing agency should focus its attention on defining relevant markets; assessing pre- and post-merger concentration levels within those markets; determining whether the merger will result in the combined entity being in a position to exercise market power or substantially lessen competition in the jurisdiction; and whether other factors such as entry, potential repositioning, or the merger’s efficiencies counteract a risk of anticompetitive effects arising from the merger.

28. Focusing an agency’s review solely on competitive effects in local markets corresponds with both OECD and ICN Recommended Practices concerning merger review. As stated by the ICN’s Recommended Practices for Merger Analysis: “The legal framework for competition law merger review should focus exclusively on identifying and preventing or remedying anticompetitive mergers. A merger review law should not be used to pursue other goals.”

Focusing exclusively on identifying and preventing or remedying anticompetitive mergers should facilitate a younger or smaller agency’s review of cross-border mergers, as all other potential considerations that local interests may wish to bring (such as the protection of local competitors, local employment, or regional disparities in development) become irrelevant to the question of the merger’s potential effect on consumer welfare. The agency’s review of a

---


cross-border merger should focus solely on potential effects in local markets, taking into account potential competition from imports and international competition.24

29. In conducting a substantive merger review, a younger agency should match its criteria of assessment to its resources and capabilities. In particular, recently issued Horizontal Merger Guidelines by the U.S. Department of Justice and Federal Trade Commission, which incorporate advanced techniques such as reliance on the “upward pricing pressure” index, may be difficult to apply – considering both the sophistication of the technique as well as the numerous caveats and qualifications that are necessary when attempting to use it – even for experienced antitrust lawyers and economists. Given their inherent complexity and difficulty, such concepts may not be particularly useful to younger agencies with less resources and limited experience in merger review. More standard analysis, such as that set out in the ICN’s Recommended Practices for Merger Analysis, may be more useful for younger agencies to frame their merger analyses.

4.3 Seek international inter-agency cooperation in information sharing and substantive assessment

30. As noted above, younger competition agencies may potentially face challenges in collecting information from merging parties located outside its jurisdiction. Less experienced agencies may also lack experience in dealing with particular industries. In addition, parties engaging in cross-border mergers may face added and unnecessary expense in satisfying duplicative or closely analogous information requests from different countries.

31. To reduce these challenges, younger agencies should seek to cooperate with more experienced agencies in reviewing the same merger, and potentially coordinate their reviews with the more experienced agency. In turn, more experienced agencies should provide assistance to younger agencies in mergers reportable in both countries.

32. Such cooperation among younger and more experienced agencies in merger review is consistent with both ICN and OECD recommended practices.25 The ability to share information between agencies can facilitate the merger review process and lower compliance burdens. A younger agency with less experience in a particular industry may be able to gain valuable insight into the industry in question through cooperation with more experienced agencies. It may even be efficient for younger agencies to base their own assessment of a merger’s competitive effects in a jurisdiction on a more experienced agency’s analytical framework, if the competitive conditions in the two countries correspond. Doing so can both reduce compliance burdens and facilitate consistent outcomes across jurisdictions.26

---

24 See Michal Gal, Competition Policy for Small Market Economies 237 (2003) (“If entry barriers are low and importers enjoy a significant cost advantage over domestic producers, contestability might provide sufficient checks on the exercise of market power, even in highly concentrated markets.”).

25 See OECD, supra note 22 (“Member countries should, without compromising effective enforcement of domestic laws, seek to co-operate and to co-ordinate their reviews of transnational mergers in appropriate cases.”); ICN, Recommended Practices for Merger Notification Procedures, ¶ X.A, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf (“Competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern.”).

26 See Michal Gal, Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions, 33 Fordham Int’l L.J. 1, 41 (2009) (“the type of evidence gathered and the economic and legal analysis may be common to all countries, large and small, developed and developing. This might save resources for small and developing countries wishing to bring cases and provide a better prospect for reaching a similar legal outcome.”).
33. The exchange of information in merger reviews often depends on the willingness of the merging parties to give consent. Such consent is routinely given by merging parties when they have assurance that that the confidentiality of their information will be protected. Thus, younger agencies should ensure that appropriate safeguards exist under their national laws to ensure the protection of confidential information and thereby facilitate inter-agency cooperation.  

4.4  **Apply flexibility on timing**

34. There may be instances where a particular agency’s statutory time-frame for review may not correspond to the timing of a merger or acquisition. This can be particularly true for public tender offers, where the timing of the acquiring party gaining beneficial control over the acquired party’s shares may be externally driven by national stock exchange rules. This type of situation could place merging parties in a difficult situation: such parties want to comply with all national merger control laws but they also need to consummate their acquisition by a particular date. Even newer agencies should strive to complete merger review within a reasonable timeframe that allows a multi-national transaction, unless anticompetitive, to be completed in a timely manner. At times, however, this may not be possible.

35. To resolve such difficulties, merging parties are often willing to consider “hold separate” arrangements with respect to particular countries. Countries with younger competition agencies should consider this alternative in individual cases. Such an arrangement allows the parties to consummate the acquisition abroad while maintaining the local businesses as separate and preserving the domestic agency’s ability to impose remedies concerning the local effects of the merger, if appropriate:

- In Jersey, Kraft Foods entered into such an arrangement with the Jersey Competition Regulatory Authority (JCRA) to facilitate that agency’s review of the acquisition of Cadbury plc under national competition law. Pursuant to that agreement, while Kraft was required by relevant stock exchange rules to assert beneficial control over a majority of Cadbury’s shares, Kraft agreed to not integrate its business associated with Jersey until after the JCRA completed its review. Kraft also agreed to supply the JCRA with all information necessary to complete its investigation, and to agree to any remedies the JCRA may wish to impose to prevent a substantial lessening of competition arising from the acquisition in Jersey.  

- While not reported publicly, similar procedures have been utilized in merger reviews in other countries, such as South Africa and Brazil.

4.5  **Apply flexibility in remedies**

36. Finally, younger competition agencies should remain flexible in their imposition of merger remedies.

37. The Background Note observes that, while structural remedies may be preferred internationally over behavioral remedies, in practice the ability of a younger agency to impose structural remedies on a cross-border merger may be limited. The Background Note states that this is particularly the case when the merging parties maintain no relevant assets within the jurisdiction in question, or when the merging parties...
parties may have the “upper hand” in dealing with the authority. With respect to smaller economies in particular, Dr Michal Gal has observed that seeking to impose disproportionate merger remedies, such as attempting to prohibit the consummation of a cross-border merger, may not be a practical alternative:

The main problem is that small economies can rarely make a credible threat to prohibit a merger of foreign firms. Given that trade in the small economy is usually only a small part of the foreign firm’s total world operation, were the small jurisdiction to place significant restrictions on the merger, the foreign firm would most likely choose to exit the small economy and trade only in other jurisdictions. That is, the foreign firm will exit the small economy if its loss of revenue from terminating its trade there is smaller than the increase of revenues it anticipates as a result of the proposed merger elsewhere.

38. Given the potential practical difficulties in seeking to block cross-border mergers or impose structural conditions on them concerning assets located abroad, younger agencies may have greater need to consider the use of behavioral remedies. Such remedies can include conditions that seek to maintain competitive conditions in local markets. An example is the Israeli Antitrust Authority’s disposition of the merger between Unilever and Best Foods. This transaction concerned the acquisition of Best Foods, an American-based food company, by Unilever, based in the Netherlands and UK. The acquisition of Best Foods by Unilever had been cleared by both the Federal Trade Commission and the European Commission. However, the merger risked a substantial lessening of competition in some Israeli food markets. To remedy this situation, the Israeli Antitrust Authority conditioned its approval of the merger on behavioral remedies. These included limiting information transfer between the local operating companies and maintaining structural or personnel separation between them.

39. Another option that agencies may want to consider is coordination on remedies – in other words to ensure that the remedy of another jurisdiction is sufficient and then “free ride” on that remedy. This could be a useful application of positive comity in a cross-border merger context. In particular, an agency should consider if, in light of the remedies imposed on a merger by other reviewing jurisdictions, the imposition of additional remedies by the agency serves any additional purpose to avoid a substantial lessening of competition in the country in question. Examples of this occurring in practice are the following:

- In its review of the proposed acquisition of the Instrumentarium Corporation by the General Electric Company (“GE”), the Canadian Competition Bureau determined that the proposed acquisition risked a substantial lessening of competition for patient monitors used in high acuity areas of hospitals and healthcare facilities in Canada. However, the Bureau noted that, to resolve competition concerns already raised in Europe and the U.S., GE had already agreed to divestitures and behavioral remedies. At the Bureau’s request, GE confirmed that the behavioral remedies required by the European Commission would apply globally, and the divestiture also applied to the worldwide business. The Bureau therefore concluded that the remedies applied by

---

30 See id.
31 Gal, supra note 24, at 242-43.
32 See Webb, supra note 19, at 12 (“Another enforcement consideration is the potentially greater opportunity to consider behavioural remedies, compared to larger economies.”).
33 The following summary of the Unilever/Best Foods case is based on summaries of that case provided in Gal, supra note 26, at 6-7; and Gal, supra note 24, at 246.
34 In the U.S., the HSR statutory waiting period expired with respect to the acquisition. In Europe, the Commission’s approval was conditioned upon certain divestitures to remedy competition concerns in Nordic, UK and Irish markets. See European Commission, Case No. COMP/M.1990, 2000 O.J. (C 311) 6.
enforcers in other jurisdictions resolved the potential competition concerns arising in Canada, and determined that additional remedies in Canada were not necessary to clear the acquisition.  

- In Jersey, the JCRA considered the proposed acquisition of the worldwide body care business of the Sara Lee Corporation by Unilever. As a result of its examination of potential market effects in Jersey, the JCRA concluded that the proposed acquisition would substantially lessen competition in Jersey with respect to certain types of deodorants. The JCRA also concluded, however, that the market conditions in Jersey with respect to these products were highly analogous to market conditions in the UK, which the European Commission was already investigating. Thus, the JCRA considered that “it would be more efficient for the Applicants, relevant third parties and the JCRA itself, if the JCRA and the EC coordinated their investigations.” The remedy commitments the parties eventually reached with the European Commission applied to Jersey as well. On that basis, the JCRA determined that it could approve the proposed acquisition without the need for additional conditions.

- An earlier example of positive comity concerned the WorldCom/MCI merger, the investigation of which involved a high degree of cooperation between the DOJ and European Commission, and in which the DOJ followed the Commission’s required remedy of MCI divesting its Internet backbone business to Cable & Wireless.

40. If a younger agency decides that structural remedies must be imposed, they should be targeted to address the perceived substantial lessening of competition arising from merger in the markets in question. For smaller and developing economies, this may be possible without the agency seeking to block the consummation of the cross-border merger. An example of targeted structural remedies is the consideration of the acquisition of Financière Franklin Roosevelt SAS by the German company Südzucker AG by the Hungarian Competition Authority (GVH). This acquisition of a French-incorporated company by a multi-national company based in Germany resulted in a change of control among domestic sugar producers in Hungary. The European Commission approved the acquisition with conditions to address potential competition concerns in sugar markets in southern Germany and in Belgium. The merger also had potential competitive effects in the sugar market in Hungary, however, there were “serious doubts regarding whether a national competition authority could examine the exercising of controlling rights in a foreign jurisdiction, and whether the GVH has enough bargaining power against the companies

---


36 JCRA, Decision M597/10, Proposed Acquisition of the worldwide body care and European laundry care businesses of Sara Lee Corporation by Unilever (Nov. 30, 2010).

37 Id. at 2.


39 See Baker, supra note 18, at 77 (“Where a merger involves a number of local operations (e.g., distribution and retail facilities), it is quite possible to agree on locally-tailored relief in the settlement process. The same may also be true where the merging companies have local manufacturing facilities and patents in different countries; these may be divested without barring the overseas merger of the parent companies.”).

40 See European Commission, Case No. COMP/M.2530, 2003 O.J. (L 103) 1.
concerned.”41 As a practical alternative to attempting to seek prohibition, the merger was approved in Hungary conditioned on the divestment of a controlling interest in a sugar manufacturing facility in Hungary.

5. Conclusion

41. Developing agencies face a formidable task in implementing a merger review mechanism that meets the needs of their local consumers while at the same time comporting with a global business environment. The task need not be daunting, however, as tools exist to assist developing jurisdictions to strike the right balance. Meeting international norms requires looking outside one’s own borders to the best practices developed by the international community. With these practices in place, the challenge is now for developing – and also developed – agencies to implement these practices in a thorough manner. Doing so will preserve the ability of firms to consummate efficient mergers without imposing costs that will undermine the very efficiencies sought to be achieved.

---

1. Introduction

1. Globalisation, characterized by trade liberalisation, reduction of restrictions on finance and investment, regional integration, deregulation and to some extent privatization, saw the world being reduced to one geographic market. One essential outcome of this phenomenon was competition from companies located beyond the national borders. Globalisation also opened up new markets in those areas of the world where certain products and technology were yet to be adopted. While such markets could be served through exports, the competitive pressure from local companies imitating production of similar or competing products rendered this option unviable. Thus, it has lead to companies seeking establishment of their operations in all strategic markets around the world.

2. This could be done through two channels; greenfield investment or merger/acquisition with companies already present in these countries. Greenfield investments are time consuming, given the need to construct infrastructure and obtaining operational licences, a process which could also take time. One way of reducing the time between decisions to enter a market and setting operations which found a lot of takers was through cross border mergers and acquisitions (M&A), which facilitated faster entrance into the market. Big companies preferred the latter course and the world market has been witnessing a deluge of cross border M&As.

3. It is estimated that total M&A transactions completed worldwide grew at an average annual rate of 42% since 1980, to reach $2.3 trillion in 1999 (Desai M, 2005). The M&A activities took place mostly in two waves during this period: during the late 1980s (1988-1990) and from 1995 onwards, the periods both characterised by relatively high economic growth and industrial restructuring (Desai M, 2005). It is also estimated that M&A activities also surpassed greenfield investment and other forms of foreign direct investment (FDI); it is estimated that around 80% of investment in the developed countries consists of cross-border M&A (Lall S, 2002). M&A reached a peak in 1998 at about $70 billion in the developing world, which represented about 40% of total FDI inflows., with the highest share (nearly 90% of FDI) being in Latin America, with Africa at 31% and Asia at about 19% (Lall S, 2002). It was also observed further that after a short period of decline following the 1999 peak, the volume of M&A activity gradually went up from about $1.1 trillion, in 2002, to more than $5.5 trillion in 2007 (Onal B, 2009).

---

1 This document was written by Mr. Pradeep S Mehta, Secretary General of CUTS International (psm@cuts.org). Cornelius Dube and Vikas Kathuria of CUTS contributed to this paper.

2 A Greenfield Investment is the investment in a manufacturing, office, or other physical company-related structure or group of structures in an area where no previous facilities exist. The name comes from the idea of building a facility literally on a "green" field, such as farmland or a forest. Greenfield Investing is usually offered as an alternative to another form of investment, such as mergers and acquisitions, joint ventures, or licensing agreements. Greenfield Investing is often mentioned in the context of Foreign Direct Investment.
4. Cross border M&A activity has had an impact in developing countries and economies in transition after facilitating the expansion of trans-national corporations (TNC) into these economies. They have also given rise to serious concerns, the key one being the observation that competition in these economies was adversely affected by the entry of TNCs, (see section 2). It is normally observed that local companies have neither the capital nor the know-how to effectively compete with TNCs. Another concern, which is more serious, is that the TNCs would not in most cases be obliged to notify their acquisition of companies in the developing countries in their home countries, which implies that they would have escaped from the jurisdiction of the more experienced and better resourced competition enforcement institutions in their home countries. Thus they would feel less restrained to engage in anti-competitive behaviour in the countries with lesser resourced and experienced competition watchdogs. TNCs would find it easier to do so either because the competition authorities in developing countries would lack the necessary effective legislative framework, experience and resources to handle concerns at this level, or simply because competition regimes in the countries are not yet established. Clarke and Evenett (2002), found evidence that after the formation of the vitamins cartel in 1990, exports from countries where the cartel conspirators were located to those nations in Africa, Europe, and Latin America that did not have anti-cartel laws tended to grow faster than to those nations that did have such laws.

5. Many transnational companies have also adopted clever strategies to enter into developing and emerging economies markets through cross border mergers. A Lafarge representative for example was quoted in the press in 2002 agreeing that the group had given high priority to emerging markets, because in 2001 more than 40 percent of Lafarge’s profits were realized in emerging markets. The strategy had also given very good results in South Africa, Jordan, Morocco, Honduras, Venezuela, Brazil, Chile (Jenny, F 2008).

6. In the Indian pharma sector, in recent times, there was a wave of TNCs acquisition of local entities. Examples include Abbot Labs (which purchased Piral Healthcare), Sanofi-Aventis (which purchased Shantha Biotech), Fresenius Kabi (through Dabur Pharma) and Daiichi Sankyo (which bought Ranbaxy). The hold of TNCs on the Indian pharmaceutical market is increasing; the top four firms now include only one local company (Cipla), a complete contrast to the situation in 2008 when GSK (now ranked fourth in terms of market share) was the only TNC in the top 10. Collectively, TNCs have now cornered about 25 percent share of the Indian market. What is worrying is that none of these mergers were analysed in terms of possible competition concerns as because, the enforcement provisions relating to regulation of mergers and other forms of combinations under the Indian Competition Act, 2002, as amended in 2007, have not yet been notified.

7. In the COMESA region, the merger between Coca Cola Company and Cadbury-Schweppes affected almost all countries, although the merger was only analysed in two countries, namely Zambia and Zimbabwe, both of which approved the international merger with conditions after noticing a lot of competition concerns. The transaction took place in 2000, when the competition authorities in both Zambia and Zimbabwe had just been made operational and most countries in the region were yet to embrace competition laws. Such concerns were not taken care of in other countries where such mergers were examined.

---

(i) The Coca Cola Company, in addition to acquiring the Cadbury-Schweppes beverages brands, undertook to purchase Schweppes Zimbabwe Limited as a going concern and to establish an appropriate shareholding structure (to include indigenous shareholders) to oversee the operations of the new company to be formed;
(ii) that The Coca Cola Company undertook to maintain the local Mazoe and Calypso brands on the Zimbabwean market and develop them into regional brands with wider circulation; and (iii) that the Coca Cola Company undertook to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials necessary to produce the finished product brands.
8. It is therefore worrying that developing and emerging economies are finding it difficult to establish fully effective merger control competition regimes to deal with cross border issues. These challenges also include social and political reasons in addition to economic ones. This paper takes a look at some of the challenges faced by developing and emerging economy competition enforcement agencies in dealing with cross border mergers and acquisitions as well as possible measures that can be taken to deal with them.

9. The rest of the paper is organised as follows. Section 2 discusses the major challenges imposed by cross border mergers in the markets. Section 3 explains why it is necessary for competition authorities to find a common approach for dealing with cross border mergers, with possible approaches given in section 4. Section 5 then concludes.

2. Major competition concerns imposed by cross border mergers

10. Cross border mergers, especially those involving big transnationals are always treated with suspicion. The fear being that they might cause competition distortions in the market by facilitating anticompetitive behaviour. One area of concern for transnationals coming into local market is the ease at which they can easily out-compete their locally owned counterparts. In addition, mergers involving big TNCs also create dominant institutions which can easily influence competitors.

11. A good example is the cement market in Egypt where many transnational companies bought Egyptian companies and entered the market. Between 2000 and 2002 there was a spate of merger activities in the Egyptian cement market. Suez Cement Company, a local company bought Tourah Cement Co and managed to account for 31 percent of Egyptian cement production. Lafarge, a French company, which owned Beny Sueif Co, bought Blue Circle Co which produced 75.6 percent of the cement in Alexandria, which mounted to 25 percent share of the total Egyptian cement production. Cemex, a Mexican company bought 90 percent shares of Assyut Cement and accounted for 14 percent of the Egyptian cement market. Simbura Company, a Portuguese firm, also followed suit by buying El Amreya Company.

12. A fierce race to secure a place in the market ensued, and the newly established firms began lowering the price of their goods, sometimes selling them at the break-even point to ensure a market share. When the Egyptian Cement Company started exporting its production to the Spanish Canary Islands at much lower prices than that offered by Cemex, the Mexican cement producer, Cemex and other foreign companies are alleged to have retaliated by pushing prices to their lowest levels to prevent local companies from exporting by burdening them with losses (an allegation Cemex denied). Local players complained, pointing out that they could not influence the practices of foreign companies since they are affiliates of international cement heavyweights; hence they could afford losses for one or two years till they achieve their aims in the market (Jenny, F 2008).

13. TNCs are also known to use cross border mergers as tools for manipulating supplies in the region so as to influence prices. This was a concern noted when Portland Holdings Limited (Porthold), the holding company of Zimbabwe’s largest cement manufacturers, was acquired by the Pretoria Portland Cement Company Limited (PCC) of South Africa. There was a strong likelihood of PCC, after acquiring Porthold, closing down the cement plant in Zimbabwe to supply from its operations in South Africa as a way of influencing prices. The merger was therefore approved on condition that PCC gave the competition authority an undertaking to honour its commitment to maintain Porthold’s cement plant and to continue producing cement in Zimbabwe.

---

14. Similar concerns were raised by the Zambia Competition Commission when Pan African Cement registered its intention to sell its 50.1 percent shareholding in the Chilanga Cement PLC, the sole producer of cement in Zambia, to Lafarge SA. Information gathered by the Commission pointed to the fact that Lafarge also owned plants in neighbouring countries of Tanzania, Malawi and Zimbabwe, at a time when Chilanga Cement appeared to be engaged in production and pricing strategies that made Zambian export cement less competitive compared to cement from the plant in Mbeya, Tanzania. Lafarge could therefore divide the regional market (through market allocation and territorial restrictions) whereby Zambian exports would be targeted to the DR Congo, while the Burundian and Rwandese markets were to be supplied from its Tanzanian plant rather than the Zambian plant. Such conduct was likely to make the Zambian plant less competitive by restricting its production capacity (Jenny, F 2008).

15. The merger of Tanzania Breweries Limited (TBL) and Kenya Breweries Limited (KBL) is also a good example of cross border mergers creating distortions in the market. In the merger, the holding companies of TBL and KBL, which are respectively South African Breweries International (SABI) and East African Breweries Ltd (EABL), reached an arrangement on beer business in Kenya and Tanzania. Under the arrangement, TBL acquired KBL based in Moshi. In exchange, KBL acquired SABI Castle Breweries, Kenya in Thika. By the merger, TBL was to be able to command 98 percent share of the beer market in the country. Although the merger is reported to have been rejected by the Fair Competition Commission of Tanzania, it is alleged that the firms submitted a request to the Ministry to allow the acquisition, which subsequently complied by overruling the competition authority’s decision and allowed the merger to go ahead.

16. A race by TNCs in the same business in one country is also likely to result in cartelisation, particularly in a country with a very weak competition regulatory environment. An increase in foreign shareholding in the Indian cement companies occurred in India during the post 1991 period, including the taking over of Tisco's cement plant/s by Lafarge during 1997-99. Swiss cement company Holcim also entered into the picture, through buying a stake in Gujarat Ambuja Cement, before the two companies took up a 50 percent stake in Associated Cement Companies (ACC). While consumers could have been happy that international players were entering into the market to give more competition and hopefully price reductions, the opposite occurred. In March 2008, the media was awash with news that cement companies ACC, Lafarge Cement and four other top cement producers were found guilty of cartelisation by the MRTP Commission, having acted in concert to raise prices in the market through the Cement Manufacturers Association.

17. Again in India, the tyre industry has also seen remarkable involvement of transnational companies over the previous years. JK Tyres for example has a technical tie-up with Continental AG of Germany. In 1993 Goodyear formed a 50-50 joint venture with South-Asian Tyres Ltd (SATL) and in 1998 SATL became a fully owned Goodyear Company. Apollo Tyres bought South Africa registered Dunlop Tyres International in 2006, which it later renamed Apollo Tyres SA. With consumers expecting to fully benefit through stable prices as a result of competition, in May 2008 media reports indicated that the MRTP Commission had issued notices to half-a-dozen leading tyre makers including JK Tyres, Ceat Tyres, Goodyear India, MRF Tyres and Apollo Tyres, accusing them of indulging in price fixing cartelisation. In a recent case in South Africa, Apollo Tyres were hauled up for participating in a cartel along with Goodyear and Continental Tyre, and their association: South African Tyre Manufacturers Conference Ltd. Bridgestone escaped any penalty because it cooperated with the authority under a leniency policy.

18. There are also other examples from India to show the extent to which the absence of merger regulations which saw TNCs entering without any control facilitated anticompetitive behaviour. There were many allegations brought to the MRTP Commission involving abuse of dominance against firms that became dominant through acquisitions. Examples include Hindustan Lever Limited, a subsidiary of Anglo-Dutch multinational company, Unilever, which appeared at the MRTPC to answer allegation of abuse of dominance, following a series of acquisitions in the Indian market. The most significant was its take over of Tata Oils Mills Company. Examples also include Coca Cola India which has faced some allegations of abuse of dominance, including two complaints to the MRTP Commission against Coca Cola’s Indian subsidiaries Hindustan Coca Cola Beverages in Hyderabad and Hindustan Coca Cola Beverages, New Delhi. Some deals also went unchecked in the Indian market such as merger of Lipton & Brooke Bond into Unilever. While in Pakistan, the competition authority succeeded in getting Unilever to withdraw one of its brands and reduce its shareholding in Brook Bond Pakistan.

3. Need for a rationalization of approach

19. Cross border mergers, particularly those involving two players with a multi-country presence often result in simultaneous investigation by different competition authorities. However, given that each competition agency would be applying its own law, it is likely that the resulting decisions would be different. This becomes a matter of grave concern, given that those relatively young competition authorities lacking the necessary experience, resources and skills might allow potentially harmful mergers which have been stopped or conditionally approved in fairly experienced regimes to go ahead. Even those competition authorities at the same stage in terms of experience could also come up with different decision, depending on the factors considered. For example the competition authorities of Zimbabwe and Zambia both handled a global merger of Rothmans of Pall Mall and British American Tobacco, which had regional effects. The competition authority of Zimbabwe approved the merger with stringent conditions, some of which went on to bring immense benefit to the economy, while in Zambia the transaction was unconditionally approved. Apparently, they did not talk to each other on this merger to enable them to take a coordinated approach. They did speak to each other at a later stage on cement mergers and that really helped (see below).

20. Global mergers also call upon competition authorities to be more careful in their analysis as some competition authorities may end up simply rubber stamping some mergers, on the fear that rejecting a merger that has been approved in other more advanced jurisdictions would result in their competences being questioned. Merging parties are also quick to remind competition authorities that the merger, they are dealing with, has been approved elsewhere, as a way of putting pressure on the competition authorities. The challenges brought about by these global mergers can be understood more by focusing on some few examples.

21. One international merger that was hardly handled in any developing country, although it also had impacts in those countries, is the Gillette/Wilkinson merger, which was conditionally approved by the European Commission and United States in 1990. This involved the acquisition of the consumer product division of Stora AB by Gillette through a company called Eemland Holdings NV. Wilkinson Sword had manufacturing facilities in UK, Germany, Zimbabwe and Brazil. The parties were also found to have been very careful in their approach; they structured the transaction differently in EU and non-EU jurisdictions in line with perceived competition authority strength; in the EU, Eemland acquired the Wilkinson Sword business but Gillette ensured that its minority holding in Eemland was composed of non-voting equity shares and debt while outside the EU, Gillette purchased the entire Wilkinson Sword business by an outright acquisition.

22. Interestingly, although the merger was found to be giving rise to competition concerns in EU and US warranting imposition of conditions, the competition authority in Brazil approved it unconditionally
In Zimbabwe there was no competition law as yet so there was no need for the parties to notify the competition authority and consumers were not cushioned against possible competition harm. This shows the extent to which aspects of investigations between competition authorities differ.

23. Another interesting global merger, which involved two global pharmaceutical companies, was between Glaxo Wellcome and Smithkline Beecham (SKB). These companies merged to become Glaxo-Smithkline Beecham (GSK), with headquarters in the UK, supplying about 140 markets in the world. The merger was conditionally approved by the EC while the South Africa competition authority had initially prohibited the merger but subsequently approved it conditionally, after some consultations had been made with the EC. In India, the case was never investigated due to lack of merger provisions in the MRTP Act, while in Pakistan; investigations into the merger were reported to have been abandoned due to lack of resources. In Sri Lanka, after investigations had been initiated based on the effects doctrine, the Board of the competition authority felt otherwise and ordered the investigations stopped, although it later turned out that the two companies actually had a commercial presence in the country. (Sarah George, 2008). Thus it is quite possible that consumers in India, Sri Lanka and Pakistan were not shielded from the potential competition harm that was avoided in other countries.

4. **Possible rationalisation in cross-border mergers**

24. As observed, cross border mergers involve different competition authorities with different expertise, experience and resources dealing with cases simultaneously. It therefore follows, as has been seen from the discussion, that consumers in those countries where competition authorities are more advanced gain a lot compared to those in countries with young competition authorities. Unless young competition regimes benefit from the expertise of advanced competition regimes, the scenario will continue, with different decisions being undertaken. This form of assistance can happen in a number of ways, which can extend even beyond cross border mergers but just ordinary mergers and other anticompetitive practices such as cartels and abuse of dominance.

25. Firstly, the sharing of information between agencies is suggested and it has also been found to yield results. As has been discussed, the exchange of information between the South Africa Competition Commission and the EC helped the competition authority in coming up with a better position than originally adopted. The competition authorities of Zambia and Zimbabwe have also exchanged information which have helped them make informed decisions with notable impact on the ground, for example on mergers in the cement industry involving Lafarge of France, Blue Circle of the United Kingdom and Pretoria Portland Cement of South Africa, which ensured continuation of cement production in their territories. This is particularly in the context of Lafarge having closed some of its cement plants in other COMESA countries not protected by national competition laws, ostensibly for ‘viability’ reasons but more likely for market sharing purposes (Kububa, A 2008).

26. Cooperation mechanisms can also be done by having competition authorities affected by the cross border merger teaming up with a more advanced competition authority and giving it a leading role in designing the *modus operandi* for the whole process and refer to it any unclear issues. This approach is known as the ‘lead jurisdiction approach’. The competition agencies can also adopt a ‘co-coordinating agency model’, where a lead jurisdiction can co-ordinate a review of the merger for all affected countries and reach on a decision with respect to its own jurisdiction and merely make findings and recommendations for all other countries (Sarah George, 2008).

27. However, one challenge is the confidentiality clause in most competition laws, which limits the amount of information provided by the parties that can be disclosed. In most cases, such information which is considered confidential is the information through which hidden intentions of the merging parties would be camouflaged.
28. An alternative model, which has already been successfully tested in Europe and is already at advanced stages of being replicated in other regions, is the creation of regional competition authorities with both investigative and adjudicative functions. This would also help other countries in the region which are yet to benefit from competition reforms due to inertia on the part of their countries. In Sub-Saharan Africa for example the BAT/Rothmans and the Total/Mobil cross border mergers were not investigated in the bulk of the countries.

29. The need for a regional competition law was recognized and appreciated in COMESA for example after some problems had been noticed. It was found that national competition laws lacked the adequacy and the necessary jurisdiction of dealing with anti-competitive practices of foreign companies. For example some COMESA member States had been threatened by multinational corporations with relocations to other member States if they (states) challenged the corporations’ anti-competitive practices (Kububa, A 2008). ECOWAS and the East African Community have also embraced the aspect of a regional competition authority and the operationalisation of these is now at an advanced stage. The WAEMU already has an operation regional competition body but this is being hampered by several challenges, including the lack of clear separation of mandates between the regional body and national competition authorities.

30. Lastly, competition authorities can just be subjected to the necessary training to empower them to make use of the extra-territorial provisions in their national competition laws to take action on cross border mergers having an impact on their jurisdiction. If competition authorities get enough expertise and confidence in dealing with competition cases, there is nothing for example to stop the Competition and Tariff Commission of Zimbabwe from investigating a merger that is being effected in Europe but whose effects could be felt in Zimbabwe.

31. However it is worrying that not all competition authorities, particularly in developing countries have extra-territorial provisions that are water tight in giving mandates to review cross border mergers outside their boundaries. In a CUTS study under the 7Up project, it was found that Sri Lanka’s Fair Trading Commission Act was silent on whether the law has extra-territorial reach, although the wording of the Act’s provisions could allow the competition authority to apply the ‘effects’ doctrine. This was also true for competition laws of Kenya, Pakistan and Tanzania (CUTS, 2003).

5. Conclusion

32. With closely knitted markets, as an outshot of globalisation, physical boundaries of nation-states have been rendered porous by the economic forces. In theory, free trade among the nations has the potential to achieve scintillating results for the economies. However, there are factors which have to be guarded against to fully realise the benefits of free trade. Cross border mergers and acquisitions have been acknowledged as a challenge for a long time now. Ruefully, it appears as if nothing much has been done to ensure that proper paradigms are put in place to control them. While this problem is not serious in developed countries, developing countries continue to be hamstrung by several challenges.

33. Considering the impacts of cross border M&As and the behemoth investigations thereto, competition authorities in developed countries can therefore do more to ensure that they carry their counterparts with them in their progress towards effective competition enforcement. A holistic enforcement of all tenets of competition law world over only, will make the professed growth of free trade equitable and inclusive.

---

6 Kenya and Tanzania have since changed their competition laws.
REFERENCES


CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- UNCTAD --

1. Introduction

1. Over the last 30 years, countries have liberalised and reduced policy impediments on foreign direct investment (FDI) and trade, speeding up the rate of globalization. This has resulted in the increased propagation of cross-border mergers, acquisitions and concentrations that impact multiple markets around the world.

2. FDI in developing countries has largely taken the form of M&A activity and is closely linked to efforts by developing states to privatize industry and create viable and competitive market economies. Unfortunately, in most developing nations this liberalization has not necessarily been coupled with appropriate and complementary regulatory measures to curb potential anticompetitive and other activities that harm markets. As the primary tool available to mitigate potential anticompetitive effects of mergers on both domestic and cross-border levels, competition law and policy (including merger control) is more important than ever before.

3. The domestic nature of merger control presents significant challenges for enforcement on cross-border transactions, particularly for developing countries and emerging economies. Increased cooperation between competition authorities in different jurisdictions has proved useful to tackle these challenges and further such cooperation should be encouraged, both among competition authorities in developing countries and between competition authorities in developed and developing countries.

2. Challenges arising from cross-border mergers

4. Merger control regimes of developing countries and economies in transition should have the capacity to deal with the following two kinds of cross-border mergers:

- Mergers directly involving local firms; and
- Mergers between major foreign Transnational Companies (TNCs) that have a bearing on the domestic market of a third country.

2.1 Cross-border mergers involving local firms

5. Cross-border mergers involving local firms may have a positive effect on competition if, for example, the target domestic firm is ailing and would otherwise exit the market; a very welcome state of affairs for developing countries particularly during or in the wake of a recession. Furthermore, they may challenge established domestic oligopolies by strengthening smaller domestic firms, thereby introducing more effective rivals to the market. Cross-border mergers may also increase competitive pressure on domestic firms leading to an increase in product quality, variety and innovation in host economies (UNCTAD, 2000).
6. On the other hand, cross-border mergers of this sort may reduce competition and increase market concentration and have an adverse social impact. Such circumstances include, inter alia:

- Where the acquiring firm was exporting substantially to a market before it acquires a competing firm in that market, thus reducing import competition;
- Where a foreign firm with an affiliate already in the market acquires another, thereby acquiring a dominant market position;
- Where an investing foreign firm acquires a market leader with which it has previously competed;
- Where the acquisition is intended to suppress rather than develop the competitive potential of the acquired firm; and
- Where parent firms of foreign affiliates located in a host country merge, increasing concentration and reducing local competition (UNCTAD, 2000).

7. Analytically, this type of cross-border merger should not present competition authorities of developing countries with any further challenges than those posed for the regulation of domestic mergers. This is because in relation to such mergers national laws apply as there is a clear nexus between the transaction’s effects and the domestic jurisdiction. However, various other considerations unique to developing countries make the regulation of mergers challenging in this context.

8. In the first instance, merger control regimes do not always exist in developing and transitioning countries, even where there are laws regulating other forms of anticompetitive behaviors. This clearly makes regulation of anticompetitive effects of cross-border and any other mergers nearly impossible. Mergers affect market composition and structure and thus have a significant impact on policy areas beyond competition. As mentioned above, cross-border mergers make up a large proportion of FDI and are often encouraged by governments, particularly in developing countries seeking growth and stability. As such, merger control is often not prioritised despite the potential long-term detriments arising from anticompetitive mergers to growth and development.

9. The challenge for developing countries is to examine and reform their broader regulatory frameworks in such a way that complements the principles of competition and merger control. This involves the creation of a competition culture, whereby the benefits of competition are well known and accepted in government and policy making circles and the perils of excessive State intervention are understood. This is particularly pertinent in the context of mergers which have a long-term effect on market structure and are difficult to reverse. Increased consciousness of potential anticompetitive effects of a merger in political and government circles will ensure that long-term and permanent positions are not applied to short-term problems in a manner that limits future options.

10. That being said, it is important to recognize the valid and unique needs of developing countries in relation to mergers. It may be appropriate for developing countries in relation to specific sectors for example, to tailor merger rules in such a way that they are able to co-exist with other policy objectives without compromising fundamental competition principles. Public interest exceptions resorted to in relation to the banking sector during the recent financial crisis such as the UK’s Lloyd’s TSB/HBOS merger, present useful examples of limited and sector specific exceptions to merger rules. The open and transparent manner in which the Lloyds/HBOS exception was carried out should not go unnoticed (See UNCTAD, 2010).
11. Where merger control regimes do exist in developing countries and economies in transition, there are often difficulties with effective enforcement of the merger rules. This is due in part to substantial power asymmetries existent between small economies and large TNCs. Developing economies, which usually present a small part of foreign TNCs’ total world operations, cannot always make a credible threat to prohibit such mergers. Attempts by competition authorities of developing economies to place significant restrictions on the mergers of TNCs could result in their exit from the market altogether potentially causing significant detrimental effects to the developing country’s welfare (UNCTAD, 2007). Such considerations only compound the existing comparatively weak internal systems of protection of competition in many developing countries and transitioning economies usually due to social, political and financial restraints. Furthermore, it should be noted that most of these challenges are not unique to the issue of merger regulation but are faced in relation to almost all other governmental regulation particularly in developing countries.

2.2 Foreign-to-foreign mergers

12. In today’s globalized world, mergers involving TNCs (typically from developed nations) may impact competition in numerous jurisdictions. For example, where two foreign suppliers merge, this may result in oligopsony or even monopsony situation in a third country’s market whose firms were previously reliant on both suppliers.

13. In order to deal with such cross-border anticompetitive effects, competition law agencies (primarily in the developed world) reach beyond their borders and apply national merger control laws to concentrations between companies based abroad. This position is justified by the “effects doctrine” under public international law, which allows such extraterritorial application of domestic rules when it is foreseeable that a proposed concentration will have a substantial effect in a given State’s territory.2

14. A recent example of unilateral merger control enforcement on a foreign-to-foreign cross-border merger can be found in Brazil. In its ordinary session of 4 October 2006, Cade (Conselho Administrativo de Defesa Economica) approved with restrictions a merger in pharmaceutical sector between two European companies, Axalto Holding (Netherlands) and Gemplus International (Luxembourg). The companies produce plastic security cards and commercialized software, hardware and related services and the analysis was mainly based on the impact of the dominance of technological resources on competition. Cade imposed commitments upon the companies obliging them to license their patents related to subscriber identity module (SIM) cards that are deposited in Brazil to any interested parties operating in the Brazilian market in a fair, reasonable and non-discriminatory manner (UNCTAD, 2008)(2).

15. However, this seemingly tidy solution to the potential anticompetitive effects of cross-border mergers does not always play out so easily in practice. Competition law agencies of developing countries in particular, struggle to unilaterally enforce their domestic laws on an international scale again owing to their limitations in relation to financial and human resource scarcity, a lack of competition culture, and political economy constraints, amongst other reasons. In fact competition authorities in the developing world are often impotent in the face of global mergers and acquisitions for fear of retaliatory action by some large firms’ home country, political interference, and again fear of frightening way FDI (UNCTAD, 2001). This is particularly problematic in light of the often vulnerable status of the markets of developing countries. Given their comparatively small size and limited market diversity, markets in developing countries are more keenly affected by large cross-border mergers; be they positive or negative. Any negative impact, including anti-competitive effects, is therefore compounded by low levels of effective regulation.

1 The Cocoa industry presents a useful example of this, see UNCTAD 2008 (1).

3. **Possible Solutions**

16. As a first priority, developing countries and economies in transition must strive to establish well-functioning competition law and policy regimes as well as credible enforcement institutions, in order to effectively regulate cross-border mergers.

17. Three activities that can contribute to this end are as follows.

- **Implementation of competition laws and policies and creation of competition institutions**

18. There are now over 112 countries with competition laws around the world, many of which are developing countries and economies in transition. However, although fundamental, this is just the first step. Developing countries and countries in transition are at varied levels of actual implementation and effective application of competition rules and merger regulations. This is fundamentally because establishing and maintaining an effective competition authority is not easy. Considerable political, human resources and financial investments are required as well as mechanisms of monitoring and enforcement. In addition, it is essential that competition laws and institutions of developing countries are independent and command the respect of both market and political players at home and abroad if they are to be effective in their enforcement activities. Again, this is not easily achieved.

19. Developing countries must therefore be proactive and seek financial and technical assistance wherever available. Robust domestic advocacy campaigning is also essential in this respect (see point 3 below).

- **Engage in cooperative activities on bilateral, regional and international levels to achieve greater convergence on application of merger rules, share experiences and exchange information**

20. As merger control is implemented at the domestic level, different jurisdictions conduct independent analyses simultaneously leaving room for discrepancies in the quality and standards of merger control enforcement among different jurisdictions in relation to the same cross-border merger. In addition, such duplication of regulatory effort increases costs for both competition authorities and businesses and creates uncertainty for businesses.

21. In the absence of a binding multilaterally agreed framework for competition law and policy, national competition authorities have chosen instead to enter into regional and bilateral cooperation agreements in a bid to achieve convergence on merger control rules. Such agreements often incorporate provisions on the exchange of information and a requirement to consider any anticompetitive impact of a given merger on another jurisdiction. For example, under the Cooperation Protocol for Merger Review between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, the agencies agree to inform each other of proposed merger transactions that may involve trans-Tasman operations or impact the other country’s market.

22. Although a number of regional groups in the developing world, such as Caribbean Community (CARICOM) and East African Community (EAC), have developed regional competition law regimes, they continue to struggle with effective enforcement (Stewart, 2005). On the bilateral level, few bilateral agreements exist either among competition authorities in the developing world or between competition authorities of developed countries and developing countries (Stewart, 2005). In relation to the latter, this is partly due to the focus of developed countries on cooperation with authorities from other developed economies, whose anticompetitive activities have greater potential to cause harm on their domestic markets. A combination of limited resources, low levels of confidence and conflicting political objectives...
between countries and competition agencies also dampens incentive to enter cooperation agreements, which require authorities to relinquish a degree of power and autonomy, particularly in the exchange of (sometimes confidential) information.

23. Nonetheless, increased cooperation among competition authorities reduces inefficiencies and inconsistencies, raises the bar on the quality of merger analysis and improves merger control enforcement. Such cooperation should not be limited to official agreements but should include informal interactions and relationships which competition authorities have found to be equally or even more valuable than official agreements (UNCTAD, 2007). Developing countries should also seek capacity building and technical assistance from competition authorities of developed countries and international organizations in order to assess the likely impact of individual mergers on the market structure in their countries.

24. It is also in the interests of developed countries to make efforts to cooperate with competition authorities in developing countries and countries in transition given the changing dynamics of cross-border merger activities. There are an increasing number of mergers originating from larger developing countries and targeting businesses and markets in the developed world. The recently announced joint venture between China’s oil and gas producer, PetroChina and INEOS, a leading British chemical company in relation to trading and refining activities at INEOS’s refineries in Scotland and France is one example of this.

25. However, it should be noted that cooperation will be most likely and beneficial where national perspectives coincide and where cooperation is well managed. For developing countries therefore, it would be beneficial to focus merger control on shared issues with nearby and like-minded countries.

- Develop a competition culture by engaging in advocacy (domestically and internationally) and participating in international forums on competition such as the OECD Global Forum, UNCTAD and the ICN to raise awareness and seek technical assistance

26. The role of advocacy cannot be overemphasised for the effective regulation of cross-border mergers. On the national level, policy makers should be made aware of the potential long term adverse effects on domestic markets if anticompetitive cross-border mergers are not prevented. On the international scale, developing countries should endeavour to apprise more advanced agencies of the effects of cross-border mergers on developing countries’ markets and express a need for more cooperation. This will also require greater openness from competition authorities of developed countries. International forums such as UNCTAD, the ICN and the OECD Global Forum present ideal opportunities to facilitate such interaction and dialogue and also allow for exchange of best and relevant practice, encouraging convergence and cooperation even without bilateral or regional agreements.
REFERENCES


UNCTAD, (2007) “Ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling these countries to introduce and enforce competition law and policy consistent with their level of economic development”, TD/B/COM.2/CLP/46/Rev.3.


PRESENTATIONS
Multi-Jurisdictional Merger Review: Issues from the other side of the fence

OECD Paris – February 2011
Marcelo Calliari
Summary

- Deciding where to file: navigating the labyrinth of different criteria
- Holding up the rest of the world: mandatory waiting periods
- Designing remedies: inefficiency in multiple conditions

Deciding where to notify

- Navigating the labyrinth of different criteria
- Production of country specific data
- Criteria:
  - Market shares
  - Turnover: which, where, whose?
- Need for clear rules and/or guidance
Bar on closing

- Holding up the rest of the world

- Need for authority deadlines:
  - That are clear and respected
  - That are somewhat consistent with most other jurisdictions

- Mandatory waiting period
  - Local / worldwide?
  - Possibility of carve-out?

Designing remedies

- Different effects lead to different solutions

- But need not to be contradictory or cumulative/excessive
  - Risk of sub-optimal / inefficient solution

- Take into account other jurisdictions
  - Contacts with other agencies
  - Consider the impact of their decisions
The increase in significance and geographical scope

- Merger control exists in some developing and emerging economies
- Notification of cross-border mergers occurs
- Examples:
  - Panasonic/Sanyo
  - Coca-cola/Cadbury Schweppes
  - Coca-cola/Huiyuan Juice Group

Although this amounts to a significant and even dramatic development, it is not a representative picture!
- Merger control rules remain absent in many DEEs
- Notification of cross-border mergers not occurring in some cases
- Or where occurring, no action is taken (see the position in Egypt). So, no effective merger control
The challenges faced

- Challenges are many, diverse and even unique to individual DEEs...
- Some also apply to developed economies
- So, prudence is called for!
- No list of these challenges can be exhaustive

The challenges mentioned in the Background Paper

- The absence of a proper competition culture;
- The difficult transition towards a market-based economy;
- The dominance of industrial policy;
- The lack of resources, whether human, expertise or financial;
- The inadequacy or absence of legal framework;
- Problems of implementation;
The challenges mentioned in the Background Paper… CONT>

- The desire to attract foreign direct investment and to accommodate foreign interests;
- The superiority of business firms involved in cross-border mergers; AND
- The lack of ability to take specific enforcement actions in merger cases (whether unilaterally or through bilateral cooperation)

Some reflections

- The presumption in favour of merger control in DEEs…
  - Evidence does support this presumption
- What needs to be done to overcome the challenges?
  - Must have proper legal framework
  - Need to have a comprehensive approach based on simultaneous actions
The need for comprehensive approach

- The three different themes in the Background Paper: jurisdiction; cooperation (bilateral, regional and multilateral); and remedies
- Cross-border merger control is a multi-faceted topic
- The interaction between competition policy and industrial policy:
  - See the Korean experience (Re: the Hyundai group)

Thank you very much!

Maher M. Dabbah
m.dabbah@qmul.ac.uk
www.icc.qmul.ac.uk
OUTLINE

1. Introduction

2. The JFTC’s experiences of investigating cross-border mergers
   (1) Agilent-Varian case
   (2) BHP-RT case

3. Lessons and Implications

1. Introduction

- Increase of mergers between two firms in a foreign country which affect competition in home country

- Competition agency faces difficult problems when it tries to control them
  - legal problems
  - practical problems
2. The JFTC’s experiences of investigating cross-border mergers

(1) Agilent-Varian case
• Two analytical instruments manufacturers based in the U.S. planned a merger and notified the JFTC
• Their products are both widely used in Japan
• The JFTC collaborated with the U.S. FTC
• Remedy

(2) BHP-RT case
➢ Two large Anglo-Australian mining companies planned a joint venture and notified the JFTC
➢ Japanese steel manufacturers depend on them for supply of iron ore and coal
➢ Other competition authorities in Korea, Germany, EC, and Australia examined the case
➢ The two companies announced they abandoned the plan to create the JV
3. Lessons and Implications

(1) Domestic law should be put in place to handle cross-border mergers

(2) Inter-agency collaboration is important

(3) Costs for merging parties to deal with many agencies should be contained
Cross-Border Merger Control: Challenges for Developing and Emerging Economies

OECD Global Forum on Competition – Paris, France

John M. Taladay
February 17, 2011
Mergers and Merger Review

- Purpose of mergers: growth, innovation, synergies, cost savings.
- Since 1990, the number of countries with competition regimes has grown from less than 30 to more than 100.
- Most jurisdictions clear 90%+ of notified transactions.

Potential Challenges for Companies

1) Transactions increasingly complicated by the number of jurisdictions requiring evaluation.
2) Widely diverging jurisdictional thresholds.
3) Differing filing requirements, filing deadlines, information requirements and waiting periods.
4) Differing substantive standards for merger review.
5) Notification requirements can add immensely to the costs.
Potential Challenges for Agencies

1) Resources
2) Capacity
3) Procedures
4) Experience
5) Precedent
6) Industry Expertise
7) Competition Culture

Sources of Assistance

1) Organizations
2) Sister Agencies
3) Agencies of Other Jurisdictions
4) Consultants

- No such thing as “one size fits all”
- Key is finding the right tools to fit your agency
What Are The Right Tools?

Ferrari 690 GTO

Not Everyone is Ready for a Ferrari
Path to a More Efficient Merger Review

Eliminating Inefficiency in Merger Review by Implementing Key ICN Recommended Practices

1) Reduce the Burden of Determining Whether a Notification is Required
2) Eliminate Unnecessary Notifications
3) Eliminate Unduly Burdensome Initial Notification Requirements
4) Eliminate Unduly Burdensome Post-Notification Information Requests
5) Speed Clearance of Transactions that Do Not Raise Material Competition Concerns

Practical Suggestions for Improvement

1) Implement ICN Recommended Practices on Merger Notification Procedures
2) Focus Exclusively on Local Competitive Effects
   -- Most important mandate
   -- Free Ride
3) Seek International Inter-Agency Cooperation in Information Sharing and Substantive Assessment
4) Flexibility on Timing
5) Flexibility in Remedies
Cross-Border Merger Control:
Challenges for Developing and Emerging Economies
by
Han Li TOH
Assistant Chief Executive, Competition Commission of Singapore
**Key Features of Singapore’s Economy**

- Small domestic population (5 million), small size (710 sq km) and lack of natural resources
- Highly dependent on trade => Open economy
- Singapore’s total trade is typically 3 times its GDP

**Cross-Border Mergers & Singapore**

- As a small and open economy, Singapore has been frequently exposed to cross-border mergers
- 22 mergers notified to CCS since the merger control regime began on 1 July 2007, with 17 having a cross-border dimension
- Of these 17 mergers, one merger application was withdrawn and another is currently in Phase 2 review. The remaining 15 were cleared.
Are Small Jurisdictions Less Prone to Prohibiting International Mergers?

- “While the antitrust authorities of small or developing countries often review international mergers, they seldom attempt to prohibit a merger between international firms”

- “…given the inability to discipline such mergers, some small and developing countries simply relinquish their power to block mergers among international firms that do not have local subsidiaries”
  - Prof Michal Gal, Haifa University, Israel

Challenges Faced by Small Jurisdictions

- Lack credible threat in prohibiting the conduct of a foreign firm

- Difficulties in obtaining information from foreign firms

- Limited resources; difficulties in enforcing and monitoring remedies
Singapore’s Merger Control Regime
How the challenges affect Singapore’s choice of merger regime

Voluntary merger regime
- Need to optimise use of limited resources
- Promote a pro-business environment - Singapore ranked #1 in the world out of 183 economies in “Doing Business” survey by the World Bank
- Avoids over-deterrence effect (noting that only a handful of jurisdictions actually regulate international mergers that harm their jurisdictions)
- Focus on mergers that are more likely to raise competition issues

Notification thresholds
CCS encourages parties to consider making an application where:

a) the merged entity will have a market share of 40% or more; or

b) the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms (CR3) is 70% or more.
Singapore’s Merger Control Regime

- Prohibits mergers or anticipated mergers that substantially lessen competition ("SLC") or are likely to substantially lessen competition.

- ‘Effects’ doctrine applies – CCS may exercise jurisdiction over extraterritorial activities which produce economic effects within Singapore.

CCS’ Experience With Cross-Border Mergers

Case Study #1: Thomson-Reuters merger

- Merger between the Thomson Corporation ("Thomson") and Reuters Group PLC ("Reuters").

- Both are global providers of financial information products and services.
Case Study #1: Thomson-Reuters merger

- This was a global merger which was reviewed by the European Commission ("EC") and the United States Department of Justice ("US DOJ"), amongst other jurisdictions.

- The US DOJ and the EC had approved the merger, subject to commitments offered by the parties to the US DOJ and the EC.

CCS’ assessment indicated that the merger might have resulted in a SLC in Singapore.

CCS considered that the commitments to the DOJ and the EC would have worldwide effect and would sufficiently address Singapore’s competition concerns.

The merger was eventually cleared by CCS on the basis of the accepted commitments overseas.
Case Study #1: Thomson-Reuters merger

- Was CCS free riding on the commitments obtained by DOJ and EC?
- Commitments accepted by overseas competition authorities do not necessarily imply that CCS will allow the merger to proceed in Singapore.
- Overseas commitments must be examined to see if they are capable of addressing competition concerns arising within Singapore.
- In this case, CCS was satisfied that the overseas commitments did address the competition concerns in Singapore in that they had a worldwide effect.

Case Study #2: Prudential-AIA merger

- This was a joint notification to CCS made in relation to a proposed acquisition by Prudential plc (“Prudential”) of AIA Group Limited (“AIA”).
- The relevant good/service involved was the provision of insurance products in the life and health insurance business in Singapore.
- The only overlap between AIA’s and Prudential’s business was in Asia.
Case Study #2: Prudential-AIA merger

- This acquisition would allow Prudential to improve its strategic position in Asia and develop the market in Asia, which was seen as a strong growth market.
- 40% of global life-insurance premium growth will be in Asia in the next five years – McKinsey study.
- With about 700,000 agents throughout Asia, merged entity will have a dominant position in most of its Asian markets and will be the leading life insurance firm in at least eight Asian countries, including the Philippines, Vietnam, Thailand, Malaysia and Indonesia.

Case Study #2: Prudential-AIA merger

- For AIA, the transaction would help AIG, the parent company, to raise funds to finance a bailout by the US government during the financial crisis in 2008.
- The parties had sought antitrust approvals from various jurisdictions/authorities.
- Clearance was received from the KFTC on 13 April 2010.
Case Study #2: Prudential-AIA merger

- CCS assessed that the competition matters arising from the merger would be specific to Singapore.
- Life insurance is catered uniquely to each individual country’s needs.
- Further, there are also regulatory requirements that are specific to individual countries.

In the end, the merger did not proceed as it was rejected by the Prudential shareholders and the application to CCS was withdrawn.
Comparison of Case Studies #1 and #2

<table>
<thead>
<tr>
<th>Case study #1 (Thomson-Reuters merger)</th>
<th>Case study #2 (Prudential-AIA merger)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relevant product</td>
<td>Relevant product</td>
</tr>
<tr>
<td>- Financial information products and services</td>
<td></td>
</tr>
<tr>
<td>- Fairly homogeneous</td>
<td>- Life insurance</td>
</tr>
<tr>
<td>- Not homogeneous across countries</td>
<td>- Specific to Singapore</td>
</tr>
<tr>
<td>Competition issues</td>
<td>Competition issues</td>
</tr>
<tr>
<td>- Relatively global in nature</td>
<td>- Relatively global in nature</td>
</tr>
<tr>
<td>- Common to all jurisdictions</td>
<td>- Common to all jurisdictions</td>
</tr>
<tr>
<td>Remedies / assessments by overseas jurisdictions</td>
<td>Remedies / assessments by overseas jurisdictions</td>
</tr>
<tr>
<td>- Remedies imposed by larger competition agencies had worldwide effect</td>
<td></td>
</tr>
<tr>
<td>- Not applicable in Singapore’s context</td>
<td></td>
</tr>
<tr>
<td>Significance for CCS</td>
<td>Significance for CCS</td>
</tr>
<tr>
<td>CCS could follow the lead of the US DOJ and the EU</td>
<td></td>
</tr>
<tr>
<td>Necessary for CCS to independently assess the Singapore-specific facts and circumstances</td>
<td></td>
</tr>
</tbody>
</table>

International and regional cooperation on cross-border mergers

- In light of the common difficulties faced by competition authorities of small economies, CCS believes that ongoing international and regional cooperation among competition authorities is important.

- “Undoubtedly, small and developing jurisdictions stand to benefit from international cooperation and coordination”
  - Prof Michal Gal, Haifa University, Israel
International and regional cooperation on cross-border mergers

International and regional cooperation

- Singapore has ongoing cooperation with overseas competition authorities and international competition networks.
- Where competition concerns do arise in smaller merger jurisdictions, cooperation among these jurisdictions could include coordinating a suitable response to create an aggregate credible threat, but concerns must be aligned.

Regional cooperation

- CCS was both the inaugural Chair of AEGC in 2008, as well as the Chair of the working group on Regional Guidelines. CCS also participated actively as a member of the Handbook working group.
- To date, no official ASEAN supranational competition authority has been established. Nevertheless, Singapore endeavours to continue to work with other ASEAN member states to develop a regional platform facilitating cooperation between competition regulatory bodies.
Singapore’s open economy makes it highly sensitive to international merger activities.

Small jurisdictions can benefit from remedies imposed by larger ones where competition concerns are similar globally.

International and regional cooperation can help small jurisdictions develop an aggregate credible threat but only if concerns are aligned.

At times it may be necessary to work independently if competition concerns, and hence remedies, are country-specific.
Challenges with international cooperation on cross-border merger cases

Joseph Wilson
Member, Competition Commission of Pakistan
10th Meeting of the OECD Global Forum on Competition
17 February 2011, Paris
Why Need for Cooperation & Coordination?

“We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale.”


- Age of international commerce achieved through liberalization of the international trade regime – transforming national markets into one global market.
- Thus, relevant geographic market is bigger than one competition agency’s territorial limits.

Need for Cooperation

- Boeing – McDonnell Douglas (1997)
  - The merger was cleared by US antitrust authorities but faced fierce opposition from the European Commission
- GE – Honeywell (2001)
  - EU blocked the merger
- Sun – Oracle (2009)
  - In all the three cases, the merging parties were US-based.
  - EU’s review jurisdictions based on “effects” doctrine, and notification thresholds
Effects Doctrine

- Inward Effect
  - Conduct (anti-competitive or mergers) outside national boundaries affecting competition within national boundaries; therefore competition agency takes jurisdiction over the matter.

- Outward Effect
  - To ensure that there is no negative effect flowing in the national borders, the competition agency thus devise remedies taking into account the competition concerns outside the national borders.

Effects Doctrine: Limits/extends national merger control laws

- Paradoxically, disparate review of transnational merger by multiple jurisdictions, based on effects test, results in both a limit on and an extension of the reach of national merger control laws.
2005 OECD Recommendations

- **B. Coordination and Cooperation**
  - 1. Member countries should, . . . , seek to cooperate and to coordinate their reviews of transnational mergers in appropriate cases. When applying their merger laws, **they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions.**
  - **Implicit bilateral regime of coordination.**

Bilateral Coordination

- 2. Member countries are encouraged to facilitate effective co-operation and co-ordination of merger reviews, and to consider actions, including national legislation as well as bilateral and **multilateral agreements** or other instruments, by which they can **eliminate or reduce impediments to** co-operation and co-ordination.

  - **Summary: Domestic concerns and bilateral coordination; if multilateral coordination is envisaged, then there is no guidance for that.**
ICN Recommended Practices for Merger Notification and Review

X. Interagency Coordination

A. Competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern.

E. Reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.

Summary: Common concerns and bilateral coordination.

Common Concerns are not Common

More often the competition concerns of competition agencies are NOT Common, in that case the coordination may fail.

“Pursuant to the bilateral agreement of 1991 on antitrust cooperation between the European Commission and the United States of America, the European Commission and the Antitrust Division of the U.S. Justice Department have been collaborating and will continue to do so, especially if and when the two authorities identify common competition concerns that might require a jointly pursued remedial action.”

- Press Release by the European Union in the matter of GE-Honeywell merger
Common Concerns are not Common

- The competition concerns of the US DOJ and European Commission were not Common.
- DOJ looked at the horizontal business of the merging parties.
- Whereas, the European Commission analyzed all three dimensions of the merger: horizontal, vertical and conglomerate.
- Failure to identify “common concerns” paralyzed the cooperation under the US/EU bilateral agreement.

Elements for cooperation and coordination

- Harmonization of procedural elements
- Harmonization of substantive law
- Multilateral procedure for cooperation and coordination
  - The lead jurisdiction model.*

Identifying the Lead Jurisdiction

Jurisdiction which:
1. is likely to be most adversely affected by the proposed merger;
2. is in a position to commit resources to the investigation;
3. is the principal place of business of the merging parties;
4. has expertise in mergers involving specific industry issues; and
5. Can coordinate effectively with other notified/affected jurisdictions.

Promoting Global Consumer Welfare

- Consumer welfare, which is the primary objective of most competition regimes, is a public good.
- Two problems often arise in the supply of public goods: the free-rider problem, and the prisoner’s dilemma.
- In the context of cross-border merger review, promotion of national champion gives rise to free-rider problem, where the loss to global consumers outweighs the benefits that may accrue to national consumers;
Global Consumer Welfare

- Prisoner’s dilemma is created by provision of asymmetric information by merging parties to different antitrust agencies.
- Even if antitrust authorities require information about a firm’s global operation, their ability to test the quality of information is limited.
- Such limited capacity focuses the attention of the antitrust agency on the impact of the merger within is domestic markets, in so doing the agency fails to consider the merger’s impact on the world’s consumers, and prevents global consumer welfare.

Concluding Remarks

- Just as “Inward effect” creates a right to review a cross-border merger, the “outward effect” creates an obligation to ensure competitive markets beyond national border
- Multilateral coordination avoids free-rider and prisoner’s dilemma
- OECD and ICN may consider revising recommendations, and may consider the idea of adopting multilateral coordination and global consumer welfare
SESSION III

CRISIS CARTELS
Global Forum on Competition

CRISIS CARTELS
FOREWORD

This document comprises proceedings in the original languages of a Roundtable Crisis Cartels by the Global Forum on Competition in February 2011.

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 ententes de crise qui s'est tenue en février 2011 dans le cadre du Forum Mondial sur 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".

Visit our Internet Site -- Consultez notre site Internet

http://www.oecd.org/competition
<table>
<thead>
<tr>
<th>Title</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competition Policy and Environment</td>
<td>OCDE/GD(96)22</td>
</tr>
<tr>
<td>Failing Firm Defence</td>
<td>OCDE/GD(96)23</td>
</tr>
<tr>
<td>Competition Policy and Film Distribution</td>
<td>OCDE/GD(96)60</td>
</tr>
<tr>
<td>Efficiency Claims in Mergers and Other Horizontal Agreements</td>
<td>OCDE/GD(96)65</td>
</tr>
<tr>
<td>The Essential Facilities Concept</td>
<td>OCDE/GD(96)113</td>
</tr>
<tr>
<td>Competition in Telecommunications</td>
<td>OCDE/GD(96)114</td>
</tr>
<tr>
<td>The Reform of International Satellite Organisations</td>
<td>OCDE/GD(96)123</td>
</tr>
<tr>
<td>Abuse of Dominance and Monopolisation</td>
<td>OCDE/GD(96)131</td>
</tr>
<tr>
<td>Application of Competition Policy to High Tech Markets</td>
<td>OCDE/GD(97)44</td>
</tr>
<tr>
<td>General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises</td>
<td>OCDE/GD(97)53</td>
</tr>
<tr>
<td>Competition Issues related to Sports</td>
<td>OCDE/GD(97)128</td>
</tr>
<tr>
<td>Application of Competition Policy to the Electricity Sector</td>
<td>OCDE/GD(97)132</td>
</tr>
<tr>
<td>Judicial Enforcement of Competition Law</td>
<td>OCDE/GD(97)200</td>
</tr>
<tr>
<td>Resale Price Maintenance</td>
<td>OCDE/GD(97)229</td>
</tr>
<tr>
<td>Railways: Structure, Regulation and Competition Policy</td>
<td>DAFFE/CLP(98)1</td>
</tr>
<tr>
<td>Competition Policy and International Airport Services</td>
<td>DAFFE/CLP(98)3</td>
</tr>
<tr>
<td>Enhancing the Role of Competition in the Regulation of Banks</td>
<td>DAFFE/CLP(98)16</td>
</tr>
<tr>
<td>Competition Policy and Intellectual Property Rights</td>
<td>DAFFE/CLP(98)18</td>
</tr>
<tr>
<td>Competition and Related Regulation Issues in the Insurance Industry</td>
<td>DAFFE/CLP(98)20</td>
</tr>
<tr>
<td>Competition Policy and Procurement Markets</td>
<td>DAFFE/CLP(99)3</td>
</tr>
<tr>
<td>Competition and Regulation in Broadcasting in the Light of Convergence</td>
<td>DAFFE/CLP(99)1</td>
</tr>
<tr>
<td>Relations between Regulators and Competition Authorities</td>
<td>DAFFE/CLP(99)8</td>
</tr>
<tr>
<td>Buying Power of Multiproduct Retailers</td>
<td>DAFFE/CLP(99)21</td>
</tr>
<tr>
<td>Promoting Competition in Postal Services</td>
<td>DAFFE/CLP(99)22</td>
</tr>
<tr>
<td>Oligopoly</td>
<td>DAFFE/CLP(99)25</td>
</tr>
<tr>
<td></td>
<td>Title</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>26</td>
<td>Airline Mergers and Alliances</td>
</tr>
<tr>
<td>27</td>
<td>Competition in Professional Services</td>
</tr>
<tr>
<td>29</td>
<td>Mergers in Financial Services</td>
</tr>
<tr>
<td>30</td>
<td>Promoting Competition in the Natural Gas Industry</td>
</tr>
<tr>
<td>33</td>
<td>Competition Issues in Joint Ventures</td>
</tr>
<tr>
<td>34</td>
<td>Competition Issues in Road Transport</td>
</tr>
<tr>
<td>35</td>
<td>Price Transparency</td>
</tr>
<tr>
<td>36</td>
<td>Competition Policy in Subsidies and State Aid</td>
</tr>
<tr>
<td>38</td>
<td>Competition and Regulation Issues in Telecommunications</td>
</tr>
<tr>
<td>40</td>
<td>Loyalty and Fidelity Discounts and Rebates</td>
</tr>
<tr>
<td>41</td>
<td>Communication by Competition Authorities</td>
</tr>
<tr>
<td>42</td>
<td>Substantive Criteria Used for the Assessment of Mergers</td>
</tr>
<tr>
<td>43</td>
<td>Competition Issues in the Electricity Sector</td>
</tr>
<tr>
<td>44</td>
<td>Media Mergers</td>
</tr>
<tr>
<td>45</td>
<td>Universal Service Obligations</td>
</tr>
<tr>
<td>46</td>
<td>Competition and Regulation in the Water Sector</td>
</tr>
<tr>
<td>47</td>
<td>Regulating Market Activities by Public Sector</td>
</tr>
<tr>
<td>51</td>
<td>Predatory Foreclosure</td>
</tr>
<tr>
<td>52</td>
<td>Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling</td>
</tr>
<tr>
<td>53</td>
<td>Enhancing Beneficial Competition in the Health Professions</td>
</tr>
<tr>
<td>54</td>
<td>Evaluation of the Actions and Resources of Competition Authorities</td>
</tr>
<tr>
<td>55</td>
<td>Structural Reform in the Rail Industry</td>
</tr>
<tr>
<td>56</td>
<td>Competition on the Merits</td>
</tr>
<tr>
<td>57</td>
<td>Resale Below Cost Laws and Regulations</td>
</tr>
<tr>
<td>58</td>
<td>Barriers to Entry</td>
</tr>
<tr>
<td>60</td>
<td>The Impact of Substitute Services on Regulation</td>
</tr>
<tr>
<td>61</td>
<td>Competition in the Provision of Hospital Services</td>
</tr>
<tr>
<td>63</td>
<td>Environmental Regulation and Competition</td>
</tr>
<tr>
<td>64</td>
<td>Concessions</td>
</tr>
<tr>
<td>65</td>
<td>Remedies and Sanctions in Abuse of Dominance Cases</td>
</tr>
<tr>
<td>67</td>
<td>Competition and Efficient Usage of Payment Cards</td>
</tr>
<tr>
<td>68</td>
<td>Vertical Mergers</td>
</tr>
<tr>
<td>69</td>
<td>Competition and Regulation in Retail Banking</td>
</tr>
<tr>
<td>70</td>
<td>Improving Competition in Real Estate Transactions</td>
</tr>
<tr>
<td>71</td>
<td>Public Procurement - The Role of Competition Authorities in Promoting Competition</td>
</tr>
<tr>
<td>72</td>
<td>Competition, Patents and Innovation</td>
</tr>
<tr>
<td>73</td>
<td>Private Remedies</td>
</tr>
<tr>
<td>75</td>
<td>Plea Bargaining/Settlement of Cartel Cases</td>
</tr>
<tr>
<td>76</td>
<td>Competitive Restrictions in Legal Professions</td>
</tr>
<tr>
<td>77</td>
<td>Dynamic Efficiencies in Merger Analysis</td>
</tr>
<tr>
<td>78</td>
<td>Guidance to Business on Monopolisation and Abuse of Dominance</td>
</tr>
<tr>
<td>81</td>
<td>Taxi Services Regulation and Competition</td>
</tr>
<tr>
<td>83</td>
<td>Managing Complex Mergers</td>
</tr>
<tr>
<td>84</td>
<td>Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations</td>
</tr>
<tr>
<td>85</td>
<td>Market Studies</td>
</tr>
<tr>
<td>86</td>
<td>Land Use Restrictions as Barriers to Entry</td>
</tr>
<tr>
<td>88</td>
<td>Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates</td>
</tr>
<tr>
<td>89</td>
<td>Fidelity and Bundled Rebates and Discounts</td>
</tr>
<tr>
<td>90</td>
<td>Presenting Complex Economic Theories to Judges</td>
</tr>
<tr>
<td>91</td>
<td>Competition Policy for Vertical Relations in Gasoline Retailing</td>
</tr>
<tr>
<td>Page</td>
<td>Title</td>
</tr>
<tr>
<td>------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>93</td>
<td>Refusals to Deal</td>
</tr>
<tr>
<td>95</td>
<td>Experience with Direct Settlements in Cartel Cases</td>
</tr>
<tr>
<td>96</td>
<td>Competition Policy, Industrial Policy and National Champions</td>
</tr>
<tr>
<td>97</td>
<td>Two-Sided Markets</td>
</tr>
<tr>
<td>98</td>
<td>Monopsony and Buyer Power</td>
</tr>
<tr>
<td>99</td>
<td>Competition and Regulation in Auditing and Related Professions</td>
</tr>
<tr>
<td>100</td>
<td>Competition Policy and the Informal Economy</td>
</tr>
<tr>
<td>101</td>
<td>Competition, Patents and Innovation II</td>
</tr>
<tr>
<td>102</td>
<td>The Standard for Merger Review, with a Particular Emphasis on</td>
</tr>
<tr>
<td></td>
<td>Country Experience with the change of Merger Review Standard from</td>
</tr>
<tr>
<td></td>
<td>the Dominance Test to the SLC/SIEC Test</td>
</tr>
<tr>
<td>103</td>
<td>Failing Firm Defence</td>
</tr>
<tr>
<td>104</td>
<td>Competition, Concentration and Stability in the Banking Sector</td>
</tr>
<tr>
<td>105</td>
<td>Margin Squeeze</td>
</tr>
<tr>
<td>107</td>
<td>Generic Pharmaceuticals</td>
</tr>
<tr>
<td>108</td>
<td>Collusion and Corruption in Public Procurement</td>
</tr>
<tr>
<td>109</td>
<td>Electricity: Renewables and Smart Grids</td>
</tr>
<tr>
<td>110</td>
<td>Exit Strategies</td>
</tr>
<tr>
<td>112</td>
<td>Competition, State Aids and Subsidies</td>
</tr>
<tr>
<td>113</td>
<td>Emission Permits and Competition</td>
</tr>
<tr>
<td>114</td>
<td>Pro-active Policies for Green Growth and the Market Economy</td>
</tr>
<tr>
<td>115</td>
<td>Information Exchanges between Competitors under Competition Law</td>
</tr>
<tr>
<td>116</td>
<td>The Regulated Conduct Defence</td>
</tr>
<tr>
<td></td>
<td>Enforcement Proceedings</td>
</tr>
<tr>
<td>118</td>
<td>Competition in Ports and Port Services</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

**EXECUTIVE SUMMARY** .................................................................................. 9  
**SYNTHÈSE** ................................................................................................. 13  
**BACKGROUND NOTE** ........................................................................... 19  
**NOTE DE RÉFÉRENCE** ........................................................................... 55  

**CONTRIBUTIONS**

- Bulgaria ........................................................................................................... 95  
- Colombia ......................................................................................................... 99  
- Croatia ............................................................................................................ 105  
- European Union ............................................................................................ 109  
- Germany ......................................................................................................... 121  
- Greece ........................................................................................................... 125  
- Ireland ........................................................................................................... 139  
- Japan ............................................................................................................... 153  
- Jordan ............................................................................................................ 157  
- Korea ............................................................................................................. 161  
- Mongolia ....................................................................................................... 169  
- Norway .......................................................................................................... 173  
- Peru ............................................................................................................... 179  
- Philippines ................................................................................................... 181  
- Russian federation ....................................................................................... 185  
- Senegal .......................................................................................................... 189  
- Sénégal ......................................................................................................... 195  
- Singapore ...................................................................................................... 201  
- South Africa .................................................................................................. 205  
- Chinese Taipei ............................................................................................... 207  
- United Kingdom ............................................................................................ 211  
- United States ................................................................................................. 215  
- Zambia .......................................................................................................... 219  

and

- Mr. Ian Christmas (English) .......................................................................... 225  
- M. Ian Christmas (French) ........................................................................... 231  
- Mr. Steve McCorriston (English) .................................................................. 237  
- M. Steve McCorriston (French) .................................................................... 255  
- Mr. Andrew Sheng (English) ........................................................................ 273  
- M. Andrew Sheng (French) .......................................................................... 295
OTHER

Colombia ........................................................................................................................................................................ 323
Indonesia ........................................................................................................................................................................ 331
Mr. Frédéric Jenny .......................................................................................................................................................... 335
Mr. Ian Christmas ........................................................................................................................................................... 353
Mr. Simon Evenett ............................................................................................................................................................ 359
Mr. Steve McCorriston ...................................................................................................................................................... 363
Mr. Andrew Sheng ........................................................................................................................................................... 369

SUMMARY OF DISCUSSION ................................................................................................................................................. 389
COMPTE RENDU DE LA DISCUSSION ................................................................................................................................ 403
EXECUTIVE SUMMARY

By the Secretariat

A discussion on Crisis Cartels from a competition perspective took place during the third session of the 2011 Global Forum on Competition. To prepare this discussion, a background paper, three additional papers prepared by experts and twenty-one contributions from official delegates were circulated. A number of important points regarding this topic were made and are summarised below.

(1) Should resorting to crisis cartels ultimately become widespread then it would go against the two decade-long trend of tougher enforcement of price-fixing and other forms of cartels in developing and industrialised countries.

The term crisis cartel has been used in two ways: to a cartel between private firms that is not approved by the state or to an agreement between firms that a government body sanctions during a period of economic distress. The first type of crisis cartel may contravene the competition law of the jurisdiction in question, while the second type of crisis cartel may well require an exemption from that law.

Widespread toleration of crisis cartels would go against two decades of tougher enforcement against cartels in both developing and industrialised countries. If the policymaking community were to accept that there are circumstances under which crisis cartels could be justified then this would mark a significant point of departure from prevailing views on cartel enforcement. Many country contributions to this session made specific references to the significance that a policy shift would imply by a greater resort to crisis cartels. Cyclical and structural overcapacity is better dealt with by other means available to firms and to governments.

(2) Although the arguments for crisis cartels have few supporters, and the historical and contemporary evidence that such cartels are the best way to tackle crisis-era problems is thin, as a practical matter governments should have the means and transparent procedures to evaluate proposals for such cartels during economic crises. Any exempted cartel should be granted a finite lifetime and be subject to review according to pre-specified criteria.

The economics of crisis cartels is contested. The dominant view among the competition policy community is at odds with that of certain development economists, who argue that the institutions and circumstances of developing countries warrant a different approach. The first view is that crisis cartels - as with other cartels - raise prices above incremental costs and so harm customers, limit output, and distort market outcomes away from efficient outcomes.

In contrast, the heterodox view emphasises a different set of factors. Cartels facilitate the closure of excess capacity. Moreover, some have argued that one purpose of cartels was to prevent crises resulting in
the monopolisation of a sector by the lowest cost firms in an industry. Cartels were seen as a way to constrain the most efficient firms, although this begs the question as to why the latter would voluntarily agree to or comply with any cartel accord.

More recent defences of crisis cartels point to the importance of comparing the following two costs: the cost of market power created by a cartel and the cost of forgone economies of scale if the total output in an industry is allocated across a large number of smaller firms instead of being spread over a small number of large firms as a result of the cartel accord. Some have argued that the former are smaller than the latter, and so conclude that cartel-encouraged rationalisation is to be supported.

Turning to the evidence, there is relatively little quantitative evidence of the impact of crisis cartels. Still, five findings were discussed. First, it is sharp price falls—rather than other features of crises—that appear to trigger the creation of crisis cartels. Second, when a government intervenes to create or allow a crisis cartel, the government’s intervention rarely stops there. Over time there is a strong tendency for other regulations to be sought by incumbent firms and policymakers to pursue their own objectives through additional interventions. Third, in sectors facing competition from imports, the creation of a crisis cartel is often associated with measures to curb or eliminate those imports. Crisis cartels, therefore, frequently involve an international trade dimension. Fourth, although studies have shown that crisis cartels have raised prices and limited output, not a single estimate of the harm done to customers could be found. An important piece of information for policymaking is, therefore, missing. Finally, none of the alleged benefits of crisis cartels—mentioned above—have ever been estimated. So there is no way of knowing if the losses to customers that follow from the creation of a cartel are offset, partially or fully, by benefits to other parties.

Even though the available empirical evidence makes it hard to sustain an argument in favour of crisis cartels, governments still face the practical matter of how to respond to requests for the creation of cartels during times of extreme sectoral, national, or global economic dislocation. Competition authorities can play an important role here, using evidence-based and transparent procedures that follow specific criteria stated in their jurisdiction’s respective competition law.

One criteria discussed was that the industry in question should demonstrate that its woes could only be rectified by the creation of a cartel and not by some other private sector action. In this regard, it was noted that firms have alternatives to cartelisation including mergers, joint ventures, and engaging in other forms of legal co-operation.

Should a competition agency or other government body decide to allow the creation of a crisis cartel, it was recommended that the cartel be allowed to operate for a specified limited time frame and should be subject to periodic review. Concerns were expressed, however, that even the temporary granting of a cartel exemption would have longer term consequences as firms got used to co-operation.

(3) The very fact that there are alternative public policy measures available to governments that can improve market outcomes more effectively than crisis cartels points to an important role for competition advocacy by competition authorities, as they seek to influence governmental decision-making during economic crises.

Evidence presented in the background paper plus statements in many of the country contributions suggest that resort to crisis cartels has been rare in recent years. This conclusion is subject to the caveat that some crisis cartels remain undetected. Instead of resorting to crisis cartels many governments have engaged in subsidisation of firms in difficulties.

In at least one important respect, injections of liquidity are more effective than cartels because financial infusions impact firms that are facing demands to pay for supplies and staff immediately before
revenues are received. In contrast, the creation of a cartel takes time to affect prices, sales, and revenues of cartel members. An important implication for policymaking is that it is not that subsidisation is the optimal policy response to firms in distress, but that proponents of crisis cartels must show that their proposals are less harmful than other available policy instruments, including subsidies.

In this regard it is important to point out that developing countries may not have the resources to offer subsidies from their state budgets. However, it should be noted that some developing countries have directed their banking systems to advance loans to distressed firms, which is an indirect form of subsidisation. In industrial and developing countries, there are plausible alternatives to crisis cartels and so the case for the latter should not be made without reference to the former.

Furthermore, competition advocacy by competition authorities should involve identifying and highlighting plausible alternatives to crisis cartels. Such advocacy need not be confined to those government bodies responsible for the evaluation of requests for exemptions for cartel law, but also to the press and to other opinion formers that might be influential.

(4) In markets where prices are volatile or where the consequences of volatility are severe (possibly for poor producers as well as for consumers) crisis cartels are an option but, again, not necessarily the only practical option. Financial market and other innovations should be considered as well, if they are available.

Transitory shocks in these development-sensitive sectors can jeopardise the survival of marginal market participants threatening, for example, farmer’s livelihoods when prices are very low and the welfare of poor customers when prices are very high. Given the substantial increases in the level and volatility of food and associated commodity prices in recent years, the question of whether the creation of cartels might have pro-development consequences has arisen.

A case study concerning the production and international trade in coffee from the 1950s through to 1989 was presented. Much production of coffee then took place in developing countries while most consumption was undertaken by industrialised countries. Concerns about the volatility of coffee prices led 37 governments to sign the International Coffee Agreement (ICA) which was in effect from 1962 to 1989. A noteworthy feature of this accord is that it was supported by the largest buyer of coffee, apparently on foreign policy grounds and seeking to stabilise the economies of producer nations.

An assessment of the ICA noted four findings of potential contemporary relevance. First, the lack of diversification of production in many developing countries meant that the volatility of coffee prices has developmental implications, not least through affecting the incomes of vulnerable farmers and the like. Second, the international cartel that existed between 1962 and 1989 did maintain prices and reduce price instability and so met the objectives of the ICA signatories.

Third, while certain financial instruments could have insured producers against price volatility, they were not available at the time this cartel was in operation. Other alternatives, such as mergers, would not have been feasible on a large enough scale without generating huge concentrations of land ownership in developing countries. Fourth, while a niche strategy was an alternative for some producers, whether it is a generalised solution remains to be established.

Still, for all the benefits of this international agreement, concerns were raised that the adaption to market and technological developments might have been faster in its absence. This case study demonstrates that even if a national or international cartel stabilises prices there may be unintended side-effects that are detrimental to development. Financial instruments or production innovations may be able to smooth fluctuations in prices - thereby stabilising prices paid by and to the poor - without generating
adverse side effects. Once again evaluating the merits of crisis cartels must make reference to alternative interventions available to policymakers and international development organisations.

(5) The competition perspective has much to offer on important contemporary deliberations of development-sensitive matters such as food security. Creating crisis cartels cannot tackle some of the competition-impeding practices that exacerbate food insecurity.

Producers of certain commodities as well as consumers can face poverty in developing countries. Moreover, such market participants are affected by the level as well as the volatility of prices. A competition policy perspective typically privileges customer welfare over producer welfare, while a developmental perspective would consider the impact of changes (firm-led or policy-led) in agricultural and commodity markets on poor producers as well.

Understanding of the factors determining the intensity of competition in development sensitive markets sheds light on other interventions by governments that might advance development goals. The extent to which shocks in global markets influence national prices may speak to the level of competition in the distribution sector, for example. Moreover, trade in agricultural and commodities, and in the inputs necessary to make them, can be affected by cross-border anti-competitive practices. Reference was made in this regard to recently proposed - but failed - international takeover that would have had implications for the prices charged in world fertiliser markets. Likewise, an export cartel for rice involving certain Asian governments, implemented during the recent global economic downturn and associated with the recent price spikes on world commodity markets, highlights how competition-related factors can shape market outcomes in these development-sensitive markets.

(6) Experience reveals that the tension between competition and stability in the financial sector is more apparent than real.

Whether higher levels of concentration in certain segments of global financial markets leads to greater financial stability is contested. In principle, since every concentrated financial player is a counterparty to most, if not all, other major players in the same market, concentration is in reality associated with greater potential global financial instability. Should one such firm fail the financial viability of all of its counterparties is called into question.

Given the takeovers and exit of certain financial firms that occurred during the recent global economic and financial crisis, the resulting greater concentration in certain financial segments of the global financial system is associated with the twin ills of greater pricing power and the higher likelihood of another financial crisis. These concerns are reinforced by adverse non-competition-related factors such as poor internal risk management practices by the financial firms themselves, government guarantees to depositors, and moral hazard.

The experience of some industrialised countries during the recent global financial crisis points to the positive contributions that competition authorities and financial regulators have played in avoiding the adverse consequences of greater financial concentration. The prices charged by banks and other consumer-facing practices should fall under the remit of the competition authority while another body is concerned with the degree of risk-taking by financial institutions large enough to pose a systemic threat to the economy and the national payments system. In this manner, incentives to compete without threatening financial stability can be presented to banks and other financial institutions.
SYNTHÈSE

Par le Secrétariat

La troisième session du Forum mondial sur la concurrence de 2011 a été l’occasion d’un débat sur les ententes de crise du point de vue de la concurrence. Une note de référence, trois autres documents d’experts et vingt-et-une contributions de délégués ont été diffusés en préparation à ce débat. Des considérations importantes ont été soulevées sur ce sujet dont voici la synthèse :

(1) Accepter que les ententes de crise deviennent une pratique courante irait à l’encontre de deux décennies de durcissement progressif de la mise en œuvre de la législation sur la fixation des prix et autres formes d’ententes dans les pays en développement comme dans les pays industrialisés.

L’expression « entente de crise » a deux acceptions : une entente entre entreprises privées constituée sans autorisation de l’État ou une entente entre entreprises autorisée par une autorité en période de récession économique. Le premier type d’entente peut être en contravention avec le droit de la concurrence de la juridiction concernée, tandis que le second peut exiger une exception du droit applicable.

Les autorités de la concurrence doivent décider quelle priorité accorder à l’application de la législation contre les ententes et si ce degré de priorité doit évoluer sur la durée du cycle économique. D’autres autorités peuvent être amenées à décider si elles doivent intervenir, permettre, voire encourager la formation d’ententes. Il est apparu à certains que ces questions revêtent davantage de pertinence pour les pays en développement qui disposent d’un arsenal plus réduit d’instruments de politique publique en période de récession.

Une tolérance générale des ententes de crise irait à l’encontre de deux décennies d’application renforcée de la législation contre les ententes dans les pays en développement comme dans les pays industrialisés. Si les décideurs publics venaient à accepter qu’il existe des circonstances dans lesquelles les ententes de crise pourraient se justifier, cela représenterait une rupture considérable avec le point de vue dominant sur l’application de la législation contre les ententes. De nombreuses contributions de pays soumises à cette session font spécifiquement référence à la signification du changement de politique publique qu’impliquerait un recours plus étendu aux ententes de crise. Les entreprises et les pouvoirs publics disposent d’autres instruments plus appropriés pour gérer les surcapacités cycliques et structurelles.

(2) Bien que les arguments en faveur d’ententes de crise trouvent peu de partisans et que les justifications historiques ou contemporaines soient rares qui tendent à démontrer que ces ententes sont le meilleur moyen de résoudre les difficultés qui se font jour en période de crise, il conviendrait, d’un point de vue pratique, que les pouvoirs publics disposent de moyens et de procédures transparentes pour évaluer les propositions visant à mettre en place de telles ententes en période de crise économique. Toute exemption à la législation contre les ententes devra être accordée pour une durée déterminée et être soumise à réexamen selon des critères prédéfinis.

Le bilan économique des ententes de crise est sujet à contestation. Le point de vue dominant parmi les autorités de la concurrence s’oppose à celui de certains économistes du développement qui considèrent que
Les institutions et les situations des pays en développement justifient une approche différente. Les autorités de la concurrence estiment que les ententes de crise, à l’instar des autres ententes, ont pour effet d’augmenter les prix au-delà des coûts marginaux au détriment des consommateurs, de limiter la production et de créer des distorsions sur les marchés et, partant, des inefficiences.

Le point de vue hétérodoxe met en avant un bilan différent. Les ententes facilitent la fermeture des surcapacités. Certains considèrent en outre que l’un des avantages des ententes est de prévenir les crises induites par la monopolisation d’un secteur par les entreprises du secteur produisant au coût le plus faible. Les ententes sont considérées comme un moyen de contrôler les entreprises les plus efficientes, encore que l’on soit fondé à se demander ce qui pourrait les pousser à accepter de se plier à toute entente.

Des arguments plus récents en faveur des ententes de crise s’appuient sur une comparaison de deux coûts : le coût de la puissance commerciale induite par l’entente et le manque à gagner en termes d’économies d’échelle si la production totale d’un secteur est répartie entre un nombre plus important d’entreprises plus petites au lieu d’un nombre réduit de grandes entreprises, ce que favoriserait une entente. Certains estiment le premier inférieur au second et ils concluent par conséquent en faveur d’une optimisation par l’encouragement d’ententes.

Si l’on considère les données disponibles, on ne dispose que de relativement peu de données quantitatives sur l’impact des ententes de crise. Cinq conclusions ont tout de même été tirées. Premièrement, c’est l’effondrement des prix, plus qu’aucun autre effet des crises, qui semble déclencher la création d’ententes de crise. Deuxièmement, lorsque les pouvoirs publics interviennent pour créer ou autoriser une entente de crise, leur intervention s’arrête rarement là. Avec le temps, il arrive fréquemment que les entreprises en place demandent que d’autres aspects soient réglementés ou que les autorités poursuivent leurs objectifs propres par d’autres interventions. Troisièmement, dans les secteurs concurrencés par les exportations, la création d’ententes de crise est souvent associée à des mesures visant à freiner ou à éliminer ces importations. Les ententes de crises ont donc souvent des implications du point de vue du commerce international. Quatrièmement, même si les études montrent que les ententes de crise ont pour effet d’augmenter les prix et de limiter la production, on n’a trouvé aucune estimation du dommage causé aux consommateurs. Les décideurs publics sont par conséquent privés d’informations importantes. Enfin, aucun des avantages supposés des ententes de crise évoqués plus haut n’a jamais fait l’objet d’une estimation. On ne dispose donc d’aucun moyen de savoir si le préjudice induit pour les consommateurs par la création d’une entente est compensé, partiellement ou en totalité, par les avantages bénéficiant à d’autres.

Même si les données dont on dispose étayent difficilement le point de vue des partisans des ententes de crise, les pouvoirs publics restent confrontés dans la pratique à la nécessité de répondre aux demandes de création d’ententes en période de dislocation économique extrême, sectorielle, nationale ou mondiale. Les autorités de la concurrence peuvent jouer un rôle important à cet égard, en appliquant des procédures transparentes et fondées sur des données probantes, adhérant à des critères spécifiques définis par le droit de la concurrence de leur juridiction.

L’un des critères évoqués est que le secteur concerné démontre qu’une entente est le seul moyen de remédier aux difficultés qu’il connaît, à l’exclusion de toute autre mesure privée. À cet égard, on a pu remarquer que les entreprises disposent d’autres outils, tels que les fusions, coentreprises et autres accords juridiques de coopération.

Lorsqu’une autorité de la concurrence ou une autre autorité décide d’autoriser la création d’une entente de crise, il a été recommandé de limiter cette autorisation à une durée déterminée et de la soumettre à des réexamens périodiques. On s’est toutefois inquiété de ce que l’autorisation d’une exception, même
temporaire, à la législation contre les ententes, aurait des conséquences à long terme, les entreprises ayant pris l’habitude de coopérer.

(3) *Le fait même que les pouvoirs publics disposent d'autres outils de politique publique que les ententes de crise pour améliorer le fonctionnement des marchés montre l'importance de l'action de sensibilisation des autorités de la concurrence dans leurs efforts pour influencer les décisions des pouvoirs publics en période de crise économique.*

Les données probantes de la note de référence et les informations contenues dans de nombreuses contributions de pays permettent de penser qu’on a rarement eu recours aux ententes de crise ces dernières années. Il convient toutefois de tempérer cette affirmation, car certaines ententes de crise ne sont pas détectées. Plutôt que de recourir aux ententes de crise, les pouvoirs publics ont souvent préféré accorder des subventions aux entreprises en difficulté.

À au moins un égard important, les injections de liquidité sont plus efficaces que les ententes parce qu’elles touchent les entreprises qui sont contraintes de payer leurs fournitures et de rémunérer leurs collaborateurs immédiatement, avant de percevoir du chiffre d’affaires. En revanche, la création d’une entente met du temps à affecter les prix, les ventes et les revenus des membres concernés. Il s’ensuit une implication importante pour les décideurs publics, à savoir non pas que les subventions sont la réponse optimale pour les entreprises en difficulté, mais que les partisans des ententes de crise doivent démontrer que leurs propositions causeront moins de préjudice que d’autres instruments disponibles et notamment les subventions.

De ce point de vue, il est important de souligner que les pays en développement peuvent ne pas disposer des ressources budgétaires qui leur permettraient de proposer des subventions. Il convient toutefois de remarquer que certains pays en développement ont donné pour instruction à leur système bancaire d’avancer des fonds aux entreprises en difficulté, ce qui constitue une forme de subventions indirectes. Dans les pays industriels et en développement, il existe des mesures alternatives possibles aux ententes de crise et il convient donc de les prendre en compte lorsque l’on envisage d’y recourir.

En outre, l’action de sensibilisation des autorités de la concurrence doit consister notamment à identifier et faire connaître les mesures alternatives possibles aux ententes de crise. Cette action de sensibilisation ne doit pas s’adresser exclusivement aux autorités chargées d’étudier les demandes d’exemption de la loi contre les ententes, mais aussi à la presse et aux autres vecteurs d’opinions susceptibles d’exercer une influence.

(4) *Sur les marchés où les prix sont volatils et où la volatilité des prix a des conséquences graves (éventuellement pour les producteurs pauvres et pour les consommateurs), les ententes de crise constituent une option, mais ne sont pas là encore nécessairement la seule option pratique. Les innovations des marchés financiers et autres devraient aussi être envisagées, lorsqu’elles existent.*

Les chocs transitoires dans ces secteurs sensibles au développement peuvent mettre en danger la survie des acteurs économiques les plus faibles, menaçant par exemple les moyens d’existence des agriculteurs lorsque les prix sont très bas et le bien-être des consommateurs défavorisés lorsqu’ils sont très élevés. Compte tenu de l’augmentation substantielle du niveau et de la volatilité des prix des denrées alimentaires et des produits de base associés ces dernières années, la question se pose de savoir si la création d’ententes peut avoir des conséquences positives pour le développement.

Une étude de cas a été présentée sur la production et le commerce international de café depuis les années 50 jusqu’en 1989. Les pays en développement ont produit beaucoup de café à cette époque, qui a
été consommé principalement par les pays industrialisés. Des inquiétudes quant à la volatilité des prix du café ont conduit 37 gouvernements à signer un Accord international sur le café (AIC) qui a été en vigueur de 1962 à 1989. L’un des aspects intéressants de cet accord est qu’il a bénéficié du soutien du principal acheteur de café, apparemment pour des raisons de politique étrangère et dans le but de stabiliser les économies des pays producteurs.

Une évaluation de l’AIC met en évidence quatre conclusions qui peuvent paraître pertinentes aujourd’hui. D’abord, l’absence de diversification de la production dans de nombreux pays producteurs signifiait que la volatilité des prix du café avait des implications pour le développement, notamment parce qu’elle affectait les revenus des agriculteurs vulnérables et d’autres personnes dans des situations similaires. Ensuite, l’entente internationale qui a existé entre 1962 et 1989 a permis de soutenir les prix et de réduire leur instabilité et donc d’atteindre les objectifs des membres signataires de l’AIC.

En troisième lieu, si certains instruments financiers auraient pu couvrir les producteurs contre la volatilité des prix, ils n’existaient pas au moment où cette entente était en vigueur. D’autres solutions alternatives, comme les fusions, n’étaient pas réalisables à une échelle suffisante sans crêer d’énormes concentrations de propriété terrienne dans les pays en développement. Quatrièmement, si certains producteurs pouvaient envisager comme alternative une stratégie de niche, il n’est pas certain que cette solution ait pu être généralisée.

Toutefois, malgré tous les bienfaits de cet accord international, on s’est inquiété de ce qu’il aura pu ralentir l’adaptation au marché et les évolutions technologiques. Cette étude de cas montre que même si une entente nationale ou internationale stabilise les prix, elle peut avoir des effets secondaires fortuits préjudiciables au développement. Les instruments financiers ou les innovations de production peuvent être capables de lier les fluctuations de cours et donc de stabiliser les prix payés par ceux qui ont peu de moyens et ceux qui leur sont payés, sans générer d’effets secondaires négatifs. Une fois encore, l’évaluation des bienfaits des ententes de crise doit prendre en compte les alternatives à la disposition des décideurs publics et des organisations internationales de développement.

(5) Le point de vue de la concurrence a beaucoup à apporter aux importantes délibérations actuelles sur les sujets sensibles au développement comme la sécurité alimentaire. La création d’ententes de crise ne peut prévenir certaines pratiques qui restreignent la concurrence et aggravent l’insécurité alimentaire.

Les producteurs et les consommateurs de certaines denrées peuvent connaître la pauvreté dans les pays en développement. En outre, ces acteurs économiques sont affectés par le niveau et la volatilité des prix. Une perspective de concurrence privilégie généralement le bien-être des consommateurs à celui des producteurs, alors qu’une perspective de développement prend également en compte l’impact sur les producteurs pauvres des évolutions (induites par les entreprises ou par les pouvoirs publics) sur les marchés des denrées agricoles et des produits de base.

La compréhension des facteurs qui déterminent l’intensité de la concurrence sur les marchés sensibles au développement met en lumière d’autres interventions des pouvoirs publics susceptibles de faire progresser les objectifs de développement. L’impact qu’exercent sur les prix nationaux les chocs sur les marchés mondiaux peut par exemple fournir une indication du niveau de concurrence dans le secteur de la distribution. Le commerce des denrées agricoles et des produits de base, et celui des intrants nécessaires à leur production, peuvent en outre être affectés par des pratiques anticoncurrentielles transfrontières. Il a été fait référence à cet égard à un projet d’OPA internationale (qui n’a pas abouti) qui aurait eu des implications sur les prix des engrais sur les marchés mondiaux. De la même façon, une entente sur les exportations de riz mise en œuvre entre plusieurs gouvernements d’Asie durant la récente crise économique mondiale et associée à la récente flambée des cours sur les marchés mondiaux de denrées
montre comment les facteurs liés à la concurrence peuvent affecter le fonctionnement de ces marchés sensibles au développement.

(6) *L’expérience montre que les tensions entre la concurrence et la stabilité dans le secteur financier sont plus apparentes que réelles.*

Il n’est pas évident qu’un niveau plus élevé de concentration sur certains segments des marchés financiers mondiaux induise une plus grande stabilité financière. En principe, puisque chaque intervenant financier concentré est une contrepartie de la plupart, sinon de la totalité, des autres grands intervenants sur le même marché, la concentration est en réalité associée à une plus grande instabilité financière mondiale potentielle. La débâcle de l’une de ces entreprises remettrait en cause la viabilité financière de toutes ses contreparties.

Compte tenu des rachats et disparitions de certaines entreprises financières au cours de la récente crise économique et financière mondiale, le surcroît de concentration en résultant sur certains segments du système financier mondial est associé aux deux maux jumeaux d’un renforcement du pouvoir de fixation des prix et d’une plus grande probabilité d’une autre crise financière. Ces préoccupations sont renforcées par des facteurs négatifs non liés à la concurrence tels que la médiocrité des pratiques internes de gestion des risques des entreprises financières elles-mêmes, la garantie publique des dépôts et l’aléa moral.

L’expérience de certains pays industrialisés durant la récente crise financière mondiale montre le rôle bénéfique des autorités de la concurrence et des régulateurs financiers pour éviter les conséquences néfastes d’un renforcement de la concentration sur le marché des entreprises financières. Les tarifs facturés par les banques et autres pratiques affectant directement les consommateurs devraient être sous le contrôle des autorités de la concurrence tandis qu’une autre autorité devrait contrôler le degré de prise de risque des établissements financiers suffisamment importants pour poser une menace systémique pour l’économie et le système national de paiement. On pourrait ainsi stimuler la concurrence parmi les banques et les autres établissements financiers sans menacer la stabilité financière.
BACKGROUND NOTE

1. Introduction

Pronounced downturns in economic activity have been known to induce substantial changes in the ends and means of policymaking in both developing and industrialised economies. Sometimes those changes are temporary (such as the rediscovery and the abandonment of active fiscal policies in many jurisdictions during the past three years), sometimes the changes are longer-lasting (such as the recently approved changes to banking regulation, known as the Basle III accords.) Abrupt shifts in policymaking are not confined to these policies, however, regulation, tax, and sector-specific policies have changed in response to economic crises as well.

Bearing in mind the substantial dislocation created by the recent global economic crisis, the purpose of this paper is to consider whether changes in policies towards cartel formation are merited during economic crises and the associated recoveries. To examine this matter evidence from both developing and industrialised countries on the treatment of cartels during previous "crisis" episodes, taken to be when economic activity has declined substantially, is summarised here. A significant fraction of the evidence presented here relates to eras where industrialised countries were at earlier stages of development. An important question to be addressed is whether that latter evidence has any contemporary relevance for developing countries.

Where available, pertinent evidence from the recent global economic downturn is presented and complements the historical information on the apparent motives and consequences of crisis-era approaches to cartels as well as the assessments of various analysts about the effects of such cartels. All together, this evidence can better inform assessments of the pros and cons of the various possible crisis-related approaches towards cartels.

That this question is being asked at all may come as a surprise to those who have followed developments over the past decade or so towards more active cartel enforcement. After all, an ever larger number of jurisdictions have enacted cartel laws or reformed their laws expanding enforcement capabilities, reducing exemptions, and stiffening penalties for breaking these laws. International norms on cartel enforcement have been developed (OECD 1998) and the sharing of best practices on cartel enforcement intensified (OECD 2005). Numerous studies from both developing and industrialised countries speak to the harm done by cartelisation to buyers and to others (Levenstein and Suslow 2005, 2007; Connor 2007). Moreover some of those cartels, such as export cartels, exploited exemptions from national cartel laws, just as some crisis-era cartels have.

* Prepared for the Secretariat by Simon J. Evenett, Professor of International Trade and Economic Development, Department of Economics, University of St. Gallen, Switzerland. The author is a Reporting Member of the U.K. Competition Commission, however, the views expressed here are entirely the author's and do not necessarily correspond to those of Commission's Staff or Members. They should neither be attributed to the OECD Secretariat nor to OECD member countries. The author welcomes comments and corrections of factual errors, which can be sent to him at the following email address: simon.evenett@gmail.com.
Nevertheless it cannot be taken for granted that the evidence that persuaded many of the merits of strengthening cartel enforcement during stable economic times will be as persuasive when policymakers face economies with high levels of unemployment, potential social instability, and low or volatile levels of demand. Even if national competition laws are not revised during an economic crisis, the circumstances under which those laws are enforced may evolve markedly, including the resources made available to competition authorities and the performance measures by which such authorities are judged. There may also be implications for the types and extent of competition advocacy undertaken by officials. The evidence assembled in this paper may also inform discussions on these policy choices should they arise in national fora.

The remainder of this paper is organised as follows. Section two defines the parameters of this paper, emphasising the focus is on cartels and not on other forms of collusion. Moreover, considerable attention is given to what turns out to be rather a broad set of considerations relevant to assessing crisis cartels. The third section summarises evidence about crisis cartels from national economic downturns and associated experiences. The fourth section is similar to the third but focuses on crisis cartels implemented in specific sectors. Evidence, such as is available, from the recent global economic downturn is presented in section five. The options available to policymakers are then summarised in section six. Whether the case for crisis cartels has been convincingly made is discussed in the concluding section of this paper along with a review of the main findings.

2. What are crisis cartels? Definitions and first principles

To prepare the ground for subsequent sections the distinction between cartels and crisis cartels is introduced as the term crisis cartel has different meanings to different people. Contested definitions are then compounded by a contested economic analysis of crisis cartels. Whenever an observation appears particularly contentious, or its logic potentially unclear, the ensuing summary will resort to quotations.

2.1 Cartels and crisis cartels

The focus of this paper will be on the types of explicit agreements between firms that compete for the same suppliers or customers. These agreements among private or public firms include those to fix prices, set quantities, set market shares (or, more generally, determine market allocation), and to rig bids. Forms of tacit collusion and other anti-competitive practices are not within the purview of this study.

The term crisis cartel is used in at least two ways in the existing economic literature. First, a crisis cartel can refer to a cartel that was formed during a severe sectoral, national, or global economic downturn without state permission or legal sanction. A second use of the term crisis cartel has been to refer to situations where a government has permitted, even fostered, the formation of a cartel among firms during severe sectoral, national, or global economic downturns, or when national competition law allows for the

---

1 The country contributions received for this session also provide information on some contemporary crisis cartels. The useful information contained therein is not repeated in this paper.
2 The use of quotations here limits accusations of misrepresenting or poorly summarising the argument in question.
3 Notice the word "firms" is used not the phrase "private firms," leaving open the possibility that state-owned or state-influenced firms could be members of a cartel.
4 This definition is silent as to which party instigated the cartel agreement. As will become clear below, governments may instigate, encourage, and even enforce cartel agreements among private firms.
5 This is not to imply that these other forms of anti-competitive practice are unimportant, during crises or otherwise.
creation of cartels during such downturns. Sometimes the second use of the term is synonymous with the terms depression cartel, recession cartel, and restructuring cartels\textsuperscript{6}, all of which indicate an excess of production capacity over current demand levels at the sectoral or national levels. Examples of both types of crisis cartel are given in sections 3-5 of this paper.

Both notions of the term have implications for the enforcement of cartel law: the first notion represents a challenge to enforcers, the second may place the cartel in question beyond the reach of enforcers.

In what follows each notion is considered in turn. First, however, the contested views on the harm done by cartels during economic crises are summarised. The associated disagreement over the economic effects of a cartel during an economic crisis does much to account for the differences in view about the optimal enforcement of cartel law and whether exemptions to cartel law should be granted during economic crises.

2.2 \textit{The contested economics of the impact of cartels during crises}

Much contemporary antitrust enforcement appears to be influenced by the neoclassical analysis of the impact of cartels on otherwise well-functioning markets. This analysis is to be contrasted with that of some development economists who take as their starting point imperfectly functioning markets, a cause of which could be over-capacity that tends to be observed during sectoral, national, and global economic crises.

Neoclassical analysis highlights the point that cartels typically involve private agreements that limit quantities sold, thereby effectively raising prices.\textsuperscript{7} In turn this both transfers income from buyers to sellers and reduces the allocative efficiency of the market mechanism. These arguments provide an economic justification for laws outlawing cartels and for implementing rigorous cartel enforcement regimes, even during economic crises.

When the buyer is a government, then cartelisation erodes the value for money obtained during public procurement processes, a particularly important effect during a crisis-induced era of austerity. When the buyers are private consumers with low incomes, or state purchasers of goods and services used to supply public services to the poor, then cartelisation can have deleterious consequences for the most vulnerable sections of society. On both efficiency and equity grounds, then, neoclassical type of analysis takes a dim view of cartelisation.

It should be noted, however, that some neoclassical analysts have argued that cartels unenforced by the state are inherently unstable. They reason as follows: Given that a cartel represents an artificial restriction on the total amount of goods trade, each cartel member could find additional customers willing to buy the product at the cartelised price. An important consideration for any cartel is how to prevent members from seeking to do so secretly, acting thereby in a manner that is ultimately contrary to durability of the cartel. This logic has been employed by some to call into question the necessity of cartel enforcement regimes if cartels are essentially unstable and dissolve over time. Of course, it is an empirical

\textsuperscript{6} It may be the case that certain jurisdiction's competition laws also contain definitions of these terms.

\textsuperscript{7} Although economic terminology is kept to a minimum in this paper, some is necessary if the key points of certain arguments or the key points of contention are to be stated precisely. Incremental production costs equal the increase in total costs incurred as a result of producing the last unit of output. When markets are operating well, the incremental production cost equals the cost to society of all of the resources employed producing the last unit of a good. A market is said to attain allocative efficiency if the price paid by a customer for the last unit of the good sold covers the total cost to society of producing the last unit, that is, if the price paid equals the incremental production costs.
question just how stable cartels are and whether the harm done by cartels during their existence still merits enforcement (Levenstein and Suslow 2006).

In contrast to this well-established line of thought, some development economists have argued that the harm done by the price-increasing effects of cartels pales when compared to certain benefits of cartels. Chang (1999) contends that the harm done to buyers by firms operating in a cartel at near full capacity can be much less than forcing firms to compete at sub-optimal output levels:

"Economists have traditionally debated on whether the social cost of monopoly is 1% or 2% of total output, but in industries with significant scale economy, choosing a sub-optimal scale of capacity can often mean 30-50% differences in unit costs" (page 10).

In industries where incremental production costs fall as output levels rise, following this view seems to imply allocating a given total level of market sales to fewer firms would enable each firm that produces to attain lower costs. Moreover, in such industries when overall demand for a product falls -- as is likely during an economic crisis -- incremental production costs would rise for the surviving firms. On this view, but for the creation of a market allocation cartel, prices may rise even more.

Ultimately, then, evaluating this argument requires taking a position on what does more harm to consumers: the exercise of any market power by the cartel or the higher prices necessary to cover costs associated with competition between firms in industries where unit costs fall as output rises. Plus there may be concerns that governments do not have the necessary information to optimally allocate market shares, although the firms concerned may be willing to share such information.

Chang argues that governments in East Asia have taken this approach to cartel formation on board, at least during the earlier stages of their development processes. In his opinion "...their attitude has been that monopolistic firms producing at optimal scale is much less of a drag to the economy than 'competitive' firms all producing at sub-optimal scales" (page 10). Unfortunately no statement by a policymaker is provided to support this contention.

Without this alternative to the neoclassical perspective, the question of whether cartels should be treated differently during economic crises would be moot. Indeed, to the extent that economic crises increase the incentive to cartelise the standard response is likely to be that competition agencies need to be more vigilant during economic crises. In the next section this matter is considered in some depth, before turning to the second notion of crisis cartels articulated earlier.

2.3 The impact of crises on the incentive to cartelise

This discussion should begin with two initial comments. First, the impact of a crisis on the incentive of firms to cartelise will depend on the nature of the crisis, be it sectoral, national, or international. In each case a crisis is taken here to refer to a deterioration in economic performance indicators (such as demand) beyond that associated with a typical business cycle downturn. Second, in thinking through the impact of each type of crisis on the behaviour of cartel members it will be useful to identify the ways in which the

---

8 Taken to the limit, if incremental unit costs always fall as output increases, on this logic one would allocate all sales to a single producer. There would be no need for a cartel here, rather the creation of a monopoly.

9 Whether this view is best thought of as an ex-post rationalisation or an accurate reflection of commonly held views of policymakers during East Asia's fast growth period remains to be established.
At the time a cartel is formed each potential member will have to gauge whether the gain from joining \((G_1)\) - the net present value of profits associated with price-fixing etc - net of any fines \((F)\) and other punishments that occur following successful cartel enforcement, which is expected to occur with probability \((p)\), exceeds the profits \((G_0)\) associated with continuing to compete with rivals in the traditional manner. In short, participating in a cartel is rational for a firm if:

\[
(G_1 - pF) > G_0 \Rightarrow \left( \frac{G_1 - G_0}{p} \right) > F
\]

Once a cartel is established, each member will have to determine whether remaining a cartel member is more profitable than "defecting." That is, whether deviating from the cartel accord -- including potentially providing evidence of the cartel's activities to the authorities, possibly in return for reducing sanctions or leniency -- offers the prospect of greater longer term profitability than adhering to the cartel accord.

Different types of crises are likely to affect the incentive to cartelise in different ways. For example, a sectoral crisis may be associated with reductions in both the expected profit from cartelising a given market \((G_1)\) and the expected profit from competing in the absence of the cartel \((G_0)\). Reductions in the former may limit the maximum fines that can be imposed on cartel members without bankrupting them. Hence the fines \((F)\) imposed during a crisis era may be less than during normal business conditions, which in turn increases the incentive to create and sustain cartelisation.

An international economic crisis, which by definition affects more than one jurisdiction, may see the factors mentioned in the paragraphs above apply simultaneously across many markets that a group of firms operate in. Indeed, to the extent that a global economic crisis is expected to lower fines on cartel members in many jurisdictions, it is possible that a cartel that otherwise would have confined itself to cartelising one national market may now find it profitable to cartelise multiple national markets. No doubt other logical possibilities exist.

There are two policy-relevant points to take away from this analysis. First, economic crises alter the incentives faced by firms to engage in cartelisation. Some of those incentives shift in favour of cartelisation. Second, as crises differ in their depth and scope (number of markets affected) and the

---

10 Although Stigler (1964) is the canonical reference concerning the relationship between the various aspects of the business environment and the incentive of private firms to form cartels, Alfred Marshall and Joseph Schumpeter both discussed previously the formation and effects of cartels and their German origins. According to Kinghorn (1996) the earliest writings in German about Kartells were by Friedrich Kleinwächter in 1883. It is noteworthy that early German writers were said to stress the ability of kartells to bring supply into line with demand and to frustrate the domination of a market by a single firm, both of which these authors saw as advantages. Later writers, mainly in the neoclassical tradition have associated cartels with the exercise of monopoly power. See Kinghorn (1996) for a summary of these different perspectives.

11 Levenstein and Suslow (2010) examine the incentives created by the fact that, to avoid bankruptcies that almost surely reduce competition in a market, some competition authorities have reduced the fines paid by cartel members that they have prosecuted successfully. Unless there are other means of punishing cartel members and associated executives, this development may reduce the deterrent value of cartel enforcement. The potentially perverse incentives created by taking the potential for bankruptcy into account when fining cartel members has also been explored by Stephan (2006).
incentives generated by each crisis may differ. Thus, generalisation across sectors and time may be hazardous.

2.4 Arguments frequently advanced in favour of state-encouraged crisis cartels and exemptions from cartel law relating to economic crises

As noted earlier, the second notion of crisis cartels relates to cartels that are permitted or encouraged by governments during sharp economic downturns or to the application of crisis-specific exemptions from cartel law. The different motives underlying a policy towards crisis-cartels can be distinguished from historical experience and from some of the theoretical considerations mentioned earlier (Chang 1999, Feibig 1999). It being accepted that the following motives are not necessarily consistent with one another, these motives could include:

- Limiting or avoiding employment losses.
- Facilitating rationalisation of a sector with excess capacity.
- Promoting innovation by facilitating co-operation between otherwise rival firms.
- Promoting productivity improvements by facilitating co-operation with the workforce.
- Stabilising prices, even promoting consumer welfare.
- Avoiding "ruinous" competition that denies firms the necessary profits for reinvestment.
- Preserving a proportion of the total market for favoured firms, including domestic firms.
- Avoiding a widespread backlash against cartel law, competition law, and their enforcement.

Even if a crisis-era policy towards cartels and cartel law enforcement has an established motive, or motives, that does not imply that the policy is necessarily "justified". Evaluation of the relative merits of a specific policy proposal turns critically on the evaluation criteria and the alternative policy options considered. With respect to evaluation criteria, economists typically distinguish between so-called economic welfare criteria (consumer surplus and total welfare) and all other criteria, which are referred to as non-economic criteria.12

Moving from the more general to the specific, in principle, a policy towards crisis cartels could be justified in any one of the following ways:

- The policy as implemented raises consumer surplus (or economic welfare) more than any alternative policy considered.

---

12 Non-economists often balk at this long-standing and widely-used distinction employed by economists. Surely, the goal of limiting job losses is "economic" in nature and labour market transactions are economic transactions. However, the distinction being made here is between evaluation criteria that refer solely to the gains from mutual exchange in markets (consumer welfare and total welfare) and other objectives.
The policy as implemented attains a numerical target associated with a chosen non-economic objective at a lower cost than any alternative policy considered.\textsuperscript{13}

Given a non-economic objective\textsuperscript{14} and the willingness of policymakers to trade-off attaining this objective against the costs of doing so, then a crisis cartel is said to be justified if the associated contribution to the stated objective and the cost incurred -- as evaluated by the policymaker -- is the most beneficial option available.

Several comments on these three "tests" are in order. First, a crisis cartel policy may have effects in more than one national jurisdiction. A national policymaker may, however, regard a cartel policy as justified if its effects within a jurisdiction meet one of the above criteria. This raises the possibility that a crisis cartel policy is "justified" from a certain national perspective, but "not justified" from a global perspective.

Second, all of the effects of a crisis cartel policy should be considered, including the consequences of the policy for propensity of cartels to form or disband in the future as well as the economic consequences of such changes, appropriately discounted. It may be the case that the full effects of any contemporary crisis cartel policies are not known for many years, hence the inclusion in this paper of a review of the historical evidence.

Third, there is no reason to suppose that the national policymakers' preferences are the same across countries or time. Therefore, if any particular crisis cartel policy from the past was found to be "justified", then it does not follow that the application of this policy is justified now. Moreover, the set of available policy options may differ over time. For example, governments now may be willing to give firms in difficulties subsidies and bailouts whereas in the 1930s this may have been regarded as anathema. Evidence from other countries and time periods must be interpreted carefully. Typically, additional analysis is needed to establish whether a crisis cartel policy that may have been considered justified in certain circumstances remains so in other circumstances. It is not appropriate to selectively use historical examples to one's liking and claim contemporary relevance for them.

These considerations also help evaluate the evidence that is presented on crisis cartel policies. Box 1 summarises the questions that might be asked in an evaluation of policies towards cartels during an economic crisis.

\begin{center}
\textbf{Box 1. Sorting through the evidence on crisis cartels}
\end{center}

Although quite a few papers have been written on the crisis cartels policies of different countries and in different sectors, the purpose of those papers was not always to assess whether the policies were justified in the sense described before. For competition authority officials and others seeking to extract the key lessons from the existing literature allowing them to better assess the merits of crisis cartel policies, the following questions may be useful:

\textsuperscript{13} For example, suppose a government wants to limit employment losses in a sector to five percent. A crisis cartel policy that ensures that employment losses are no more than five percent is said to be justified if there are no other policies that could attain the same result at lower cost to society, in terms not only of government outlays, but of lost consumer welfare and the costs of any resource distortions incurred by firms.

\textsuperscript{14} Such as productivity growth within a given sector.
Are the differences between the crisis cartel policy and the policy it superseded, if any, accurately and clearly explained?

Are the motives of the crisis cartel policy precisely formulated?
- If not in what ways, if at all, does the subsequent evaluation take account of any vagueness in the specification of the motives?

Which criteria, if any, were used to evaluate the performance of the crisis cartel policy?

Has the extent to which the crisis cartel policy outperformed alternative policies been demonstrated in a quantifiable manner?

Given the stated motives of the crisis cartel policy, was the choice of evaluation criteria appropriate?
- Is the set of criteria complete? Is there a criterion to cover each motive?

Was the set of viable alternative policies to the crisis cartel policy rich enough?

Is the contemporary relevance of the study's findings vitiated by differences in either
- the preferences of policymakers (between now and the epoch under study), or,
- the set of alternative policies available to decision-makers, or,
- the type of economic crisis and its consequences?

Asking these questions will also help focus evaluations on the factors that are central for determining the contemporary relevance of studies of prior crisis cartel policies.

As will become clear in the sections that follow, many of the extant studies do not conduct evaluations along these lines. In contrast, much more is known about the stated motives of policymakers. Whether their actual motives correspond to their stated motives is rarely discussed. Moreover, very little is known about the extent to which policymakers are prepared to trade off different objectives, such as consumer welfare and employment levels.

The purpose of this section has been to define what is meant by crisis cartels and to distinguish them from the ordinary meaning of the term cartel. Moreover, the contested logic concerning the impact of cartels during economic crises was described, not least because it motivates potentially different policies towards cartel enforcement and the granting of exemptions from cartel laws during economic crises. With respect to the latter, the motives for granting such exemptions were stated and a framework proposed for thinking through whether any such exemption could be justified.

3. **Historical evidence on crisis cartels from sharp economy-wide downturns**

To facilitate comparison, the evidence on crisis cartels presented in this paper is divided into three parts, reflecting differences over time and differences in type of crisis. In this section information about policies towards cartels applicable during prior economy-wide crises is summarised. This is to be distinguished from evidence on crisis cartels that have arisen during sectoral crises. Contemporary evidence on crisis cartels, to the extent available, can be found in the fifth section.

This particular organisation of the evidence on crisis cartels will highlight different factors affecting the design, implementation, and consequences of policies towards crisis cartels. Perhaps unsurprisingly, this section, with its focus on economy-wide crises, highlights system-wide choices taken with respect to crisis cartels. The next section highlights factors and evidence that is much more case- or sector-specific.
All of these factors are relevant to developing an overall assessment of previous policies towards crisis cartels.

To facilitate discussion the evidence in this section is presented in alphabetical order by jurisdiction. It is important to stress that this evidence is historical in nature. Therefore, it should not be assumed that contemporary law or enforcement practice necessarily bears any resemblance to earlier epochs.

3.1 Chinese Taipei up to and including the East Asian Financial Crisis

The OECD Secretariat paper for the 2006 Peer Review of Chinese Taipei's competition law notes that in earlier times the trend of policy was generally speaking towards restricting inter-firm rivalry. OECD (2008) states:

"Policy attention to market competition has a long lineage, although the usual tendency was to suppress it. Rules against monopolisation and price-fixing can be found as far back as the code of the Tang dynasty. But central control has also been prominent. Cultural distrust of traders led readily to reliance on price controls and state regulation or ownership of resources and production. The private sector joined in anti-competitive restraints. Guilds were enforcing price fixing agreements at the turn of the 20th century. As late as the mid-1980s, courts in Chinese Taipei were entertaining private competition suits in the form of complaints that competitors were cheating on cartel agreements. Meanwhile the government commonly intervened to protect the interests of enterprises." (page 130).

Even when a new Fair Trade Law (FTL) was enacted in 1991 provisions exempting crisis cartels from a prohibition on cartelisation were included. Moreover, other exemptions that might plausibly be invoked in economic crises were included such as "uniform specifications (to reduce costs, improve quality or increase efficiency), joint research and development, specialisation and rationalisation of operations, export cartels, import agreements, … and agreements among SMEs to improve efficiency and strengthen competitiveness" (page 134).

Interestingly, since the FTL came into force, there have been few applications for crisis cartels. In this regard, OECD (2008) notes:

"Crisis cartel applications are rare. Joint action to limit output or stem price cuts in an economic downturn would be permitted only if conditions in the market have driven the market price below “average production cost” and firms are threatened with exit or overproduction. It is not clear whether “production cost” means variable cost or total cost. In any event, there have been few requests for exemption on this basis. The FTC (Fair Trade Commission) rejected an application for a capacity-reduction agreement among fibre manufacturers in 1998, on the grounds that conditions were not irretrievable and the market was likely to recover."

This example demonstrates that competition authorities do not always have to accede to demands for crisis cartels. The small number of requests for crisis cartels, especially during the East Asian Financial Crisis which affected export-dependent Chinese Taipei significantly, begs the question as to what, if any, other forms of relief were available to firms during that crisis. The presence of alternative policy instruments may well have shielded the competition authority from pressure to compromise the enforcement of cartel law.
3.2  **Germany in the late 19th Century**

The apparent motivation and rationale for crisis cartels in Germany in the late 19th Century has been documented in a number of studies. Cho (2003) argues

"Cartels were historically recognized as legitimate by both the courts and governments distrustful of unbridled competition. In some cases, independent companies were required to join cartels if they wanted to operate properly" (page 46).

Cho goes on to argue, however, that the cartels became an important instrument of government policy during subsequent boom times, so much so that it has been contended that "after the First World War the country became the most cartelized nation in the world" (page 45).

Given the impressive economic growth experienced in Germany during 1870-1913, a period during which it overtook the United Kingdom in terms of annual production of industrial output, links between crisis-induced cartels, cartelisation in general, and improved economic performance have been identified by some analysts.

As several authors have made clear, at the time the German attitude to cartel formation was markedly different to the manner in which cartels were to be subsequently viewed elsewhere, not least in the United States. The following quotation from Kinghorn's analysis of German cartels at the end of the 19th century reveals not just the differences in thinking but, more importantly for the purposes of this background paper, how those differences relate to the motivation for cartelisation. Kinghorn (1996) argues:

"The neoclassical association of cartels with monopoly is a recent phenomenon in the history of economic thought. The first German economic work on kartells was written by Friedrich Kleinwächter in 1883. He argued that the kartells were an extension of medieval guilds, and applied the same theory to the kartells as was previously applied to guilds. Other scholars argued kartells evolved from the guild system in response to a growing market, and the associated increase in risk. They suggested that two important functions were served by the guilds, and later by the kartells: the adjustment of supply and demand to stabilize an industry, and the hindrance of monopolistic (single-producer) tendencies. The view that collusion among producers would serve to restrain, rather than promote monopolistic tendencies seems antithetical to the modern reader. The concern in this literature regarding monopoly power was a concern that one large producer would monopolize an industry in a given market, not that horizontal cooperation would foster a monopolistic outcome" (page 1).

At least one of these motives may bear upon crisis-related cartel formation in so far as a key feature of a sectoral crisis is a substantial mismatch between total demand and supply.

---

15 As Newman (1948) handily demonstrates, the fate of cartels in Germany in the Great Depression of the 1930s was heavily influenced by the desire of the Nazi government to control private sector production in the run up to and during the Second World War. Cartels became ever more tightly regulated (but not prohibited) and by 1943 ninety percent of existing cartels were said to have been dissolved or in the process of dissolution. It is not clear that this particular experience has contemporary relevance. Chapter V of Gerber (1998) provides a detailed account of the evolution of cartel law in Germany in the interwar years.

16 Here Cho refers to the famous judgement of the Reichsgericht (Supreme Court) of 4 February 1897 that made cartel agreements legally binding and to an Ordinance Against Abuse of Economic Power enacted on 2 November 1923, the first formal cartel law. Subsequently, general rules on cartels were included in the Act Against Unfair Competition.

17 Cho cites Berghahn (1986) in defence of this proposition.
3.3 Indonesia during the East Asian Financial Crisis

The East Asian Financial Crisis, which began with Thailand's devaluation of the Baht in July 1997, quickly spread to Indonesia. According to Iwantono (2003), the resulting economic crisis in Indonesia lasted from 1998 to 2003. Indonesian policy towards cartels appears to be mixed during this crisis even though a competition law with relatively clear provisions on cartels was enacted in 1999. On the one hand, the collapse in aggregate demand was thought to have disrupted many cartel arrangements without any official action being taken. Moreover, the newly founded (according to Iwantono it was indeed the crisis that allowed the introduction of the competition law in 1999) Indonesian competition authority (KPPU) recommended that the government abolish the airline industry cartel and that advice was taken. Yet, as Iwantono (2003) reports, during the crisis the KPPU did not recommend the abolition of "cartel activities" in the large sugar industry. The competing considerations that a competition authority may face - and almost certainly governments face - are neatly encapsulated by the following statement from Iwantono:

"For the time being, the KPPU has concluded that the policy [in the sugar sector] may give rise to unfair business practices. The five importers who (sic) dominate the market and tend to carry out cartel activities among themselves in order to maximize profit.

"The KPPU faces a dilemma, because the sugar policy has both economic and political nuances. Abolishing the policy would have significant economic and political impact. By letting imported sugar in, Indonesian sugar cane farmers will be in a very disadvantageous position since the imported sugar has already received subsidies from the respective producer governments. On the other hand if such policy is maintained, it will constitute an entry barrier that has the potential to trigger cartel activities in the sugar business.

"The KPPU holds the opinion that the Government has the obligation to protect the local sugar cane farmers from the threat of cheap imported sugar and a policy for such protection is politically appropriate but is inconsistent by itself with Lw No.5/1999." (page 6)

One question that arises from this example is whether the Indonesian government could have protected local sugar cane farmers without relaxing cartel enforcement. For example, as a member of the World Trade Organization, Indonesia has the right to impose tariffs on subsidy-ridden imports that have caused material injury to a domestic industry. Imposing a so-called countervailing duty on imported sugar cane could have been an alternative policy option. It is not known if the KPPU considered the latter option in its analysis or competition advocacy.

3.4 Japan in the post-war era

While cartels were first legalised in Japan in 1925, experience after the Second World War when Japan's economic growth accelerated is of greater interest, not least because the Japanese government created different types of crisis-related cartels. The focus here is on the available post-war evidence as it relates to so-called depression cartels and to sectors in economic decline.18 While the government interventions described here have often been associated with post-war Japanese industrial policy, no attempt is made to summarise the contentious debate over the latter.19

18 The latter being relevant as the apparent decline of a sector may have been established or confirmed by an economic crisis in that sector.

19 For differing views on this matter see Yamamura (1982) and Miwa and Ramseyer (2003).
As for the motivation for recession cartels, drawing on a leading analysis of Japanese industrial policy, Weinstein (1995) explains the relationship between recession cartels and sectoral performance:

"Yamamura suggests that a major reason why Japanese firms could invest in new plant and equipment with less risk than firms in other countries was that they knew that they would be allowed to form cartels during downturns. By shoring up profits with cartels in recessions, it is argued that MITI [the Ministry of International Trade and Industry] made it more profitable for Japanese firms to invest and thereby raised Japan's overall growth rate" (page 201).

If this explanation is correct, then, having taken account of the other determinants of profit margins, recession cartels should increase such margins.

Okimoto (1989) argues there is a competition-preserving motive for recession cartels. He argues:

"The rationale for anti-recession cartelization is that it pre-empts fratricidal warfare; it keeps the level of market concentration from increasing....In the long run, MITI officials used to argue, the imposition of some control over excessive competition through temporary anti-recession cartels was necessary to ensure that healthy competition would be sustained" (page 7).

As to the logic underlying these rationales, the former appears to be predicated on the assumption that firm investment outlays are largely determined by internally generated funds (i.e. profits). With respect to the latter rationale, assumptions appear to be made about the lack of any disciplining effect of subsequent new entry and the inability of government authorities to influence the behaviour of whatever small number of firms survives the "excessive competition" induced during recessions.

Weinstein also notes that during the era 1957-1988 Japanese antitrust enforcement was lax and that MITI did not have the resources to enforce compliance with the great majority of cartel agreements. Perhaps more tellingly, given the earlier emphasis on alternative policy instruments, Weinstein (1995) notes:

"Certainly, in comparison to the favourable tax treatment, subsidies, protection, and low-interest loans that some sectors received, exemptions from the virtually defunct Anti-Monopoly Law seem like relatively mild forms of government intervention" (page 201).

Peck, Levin, and Goto (1987) explain the role that cartels have played in Japanese policies towards declining industries. Although Japan's government had for some time policies in place to cushion the burden of sectoral decline, it was in 1978 that a comprehensive approach was adopted with the enactment of a law entitled Temporary Measures for Stabilization of Specific Depressed Industries. Peck, Levin, and Goto offer the following account of the role played by cartels in such Measures:

"Of course, most firms in declining industries, in Japan as elsewhere, operate at a loss. To enable firms to assume the burden of administering and partially financing structural adjustment, Japanese public policy aims to increase the resources available by directly coordinating industry-wide capacity reduction or by permitting cartelization for this purpose. Even where explicit agreement on prices or production levels is prohibited, a planning process or legal capacity-reduction cartels may be expected to restrain the tendencies to engage in the drastic price-cutting that might otherwise accompany extensive excess capacity. Thus, prices may tend to be higher than they would be in the absence of such policies, and this helps firms in the declining

---

20 This law was revised in 1983.
industries to undertake certain adjustment activities that are elsewhere undertaken by creditors or government agencies" (pages 81 and 82).

Effectively, then, cartels are created so as to shift the burden of financing adjustment, labour-related and otherwise, off the state budget. Peck, Levin, and Goto argue that there may well be reasons why firms have a stronger incentive finding alternative work for their under-utilised workers than government agencies, so there may be an offsetting efficiency rationale to the consumer-related deadweight losses (page 90).

The literature on Japan also contains information about the application of these crisis-related cartel policies. As to their frequency, both Rotwein (1976) and Weinstein (1995) note that only a small fraction of Japanese cartels were recession cartels. Weinstein also notes that most depression cartels only lasted for one year\(^2\), while other types of cartels lasted longer.

Several criteria have been proposed for assessing the performance of depression cartels. Duration has already been mentioned, but not much more systematic information is available.\(^2\) Compliance with capacity reduction requests is another. Impact on profit margins and exports are others. Each is discussed in turn.

For the Japanese depression cartels authorised between 1958 and 1972, Rotwein (1976) compares the official targeted reduction in monthly output with the actual reduction. In 25 percent of the cases the actual reduction equalled or exceeded two-thirds of the targeted reduction, an outcome Rotwein refers to as "fully effective". In 44 percent of cases the actual reduction was less than 30 percent of the targeted reduction, an outcome labelled "entirely or almost entirely ineffective". The remaining cases lied in between. Bearing in mind that the Japanese Fair Trade Commission (FTC) administered depression cartels, Rotwein interprets these results as follows:

"The FTC - which has been fundamentally opposed to cartels but under depression conditions has been legally obliged to consider industry requests for their formation - has adopted a quite different approach [from MITI]. Here the specified production adjustment represents the maximum allowed the cartel; whether or not this maximum is attained is left entirely up to the voluntary arrangements between the firms themselves. Judging from the record, it would appear that in a large number of cases FTC permission to make specific output adjustments turns out to be little more than an empty formality. Many firms apparently 'go along' with the request for such permission in order to avoid open clashes with other industry members, but with little or no intention of following through in practice."

In short, Rotwein concludes that legislation of a cartel offers little guidance as to its ultimate effect. Other factors, notably private sector incentives, intervene.

Peck, Levin, and Goto (1987) examine the 14 Japanese sectors that received relief under the 1978 Law (mentioned above). Most of the sectors they consider were "affected adversely" by sharp increases in energy prices in 1973 and 1979 (page 85). Six of these sectors had highly concentrated production, the others did not. Seven of the designated industries were allowed to form recession cartels. The variation across the sectors in relief given, in concentration, and in the presence of a recession cartel is correlated with indicators of sector performance.

---

21 Strictly speaking the legal protection for depression cartels tended to last for one year. This does not mean that cartel behaviour by firms necessarily ceased once the legal protection was removed.

22 Having said this Rotwein's list of depression cartels between 1958 and 1972, listed in Table V of that paper, bears out Weinstein's contention.
Peck, Levin, and Goto also focus on the extent to which excess capacity is eliminated as a result of government intervention. They find that the more concentrated sectors tend to set more ambitious capacity elimination targets. For example, in the concentrated aluminium smelting sector the percentage of excess capacity sought for elimination in 1977 actually exceeded 100 percent, an outcome they attribute to Japanese firms expecting further retrenchment in that sector after 1977.

In terms of outcomes, these authors notice a substantial difference between official reported data and actual outcomes. On average, concentrated sectors tend to reduce excess capacity by 25 percent, an estimate which just exceeds the 18 percent average reduction in excess capacity in less concentrated sectors (page 97). Nor does actual excess capacity reduction appear to be correlated with the presence of cartels. In fact, capacity reduction is greater (23 percent compared to 19 percent) on average in sectors without cartels.

Peck, Levin, and Goto summarise further findings and their policy implications as follows:

"First, none of the industries designated under the 1978 Law completed its restructuring in five years. Many "temporary" stabilization plans have entered their second five-year period, and the 1983 Law nearly doubled the number of designated industries. Particularly troublesome is the creation of business tie-ups, especially the joint sales agencies, that threaten to become permanent arrangements. Democratic governments everywhere have found that temporary measures that confer rents tend to become permanent ones.

"Second, although capacity reduction has proceeded more or less as planned, the plans, based largely on what firms were willing to do, may not have been sufficiently ambitious. In no industry was capacity entirely eliminated in response to lost international competitiveness. Comparative advantage might dictate, for example, a complete abandonment of the urea industry. Only aluminium smelting has approached this outcome; the current stabilization plan calls for a reduction in capacity to 25 per cent of the 1975 level.

"Third, although the evidence is murky, it appears that the structural adjustment policies have in fact been contaminated with protectionist measures. The precise extent of informal trade barriers in the chemical fertilizer industries is unknown, and probably unknowable, but the price discrepancies in urea, for example, are too large to support any conclusion other than that imports have been restricted.

"Despite these imperfections, the Japanese approach to declining industries seems on balance to be uniquely suited to the peculiar institutional environment of large-scale, concentrated Japanese industry. It may be unrealistic to insist that all structural adjustment be completed in five years, that loser industries completely scrap all capacity, and that protectionist measures be avoided entirely. It would certainly be difficult to argue that other countries have had greater success in phasing out their loser industries. Given marked international differences in labor and credit arrangements, Japan's approach to picking losers is probably inappropriate in an institutional environment like that of the United States, but in its context it has achieved reasonably satisfactory results" (page 122-123).

Weinstein (1995) examined the effect of administrative guidance and officially-sanctioned cartels on profit margins. First, comparing across 463 different sectors of the Japanese economy in 1963, he estimated the impact of the share of shipments in a sector covered by cartel arrangements on the ratio of sector value-added divided by total sales, his proxy for average sectoral profit margins. Across a wide range of econometric specifications Weinstein found that cartel presence lowers, not raises, average profit margins of a sector. Weinstein interpreted this finding as follows:
“This [econometric finding] seems to suggest that, in general, whatever horizontal restraints were put in place by these cartels appear to have been dominated by factors which caused margins to decline. One likely interpretation is that the favourable tax treatment and outright subsidies that often composed depressed industry policies causes output to rise or resulted in new entry (or perhaps a slowdown in exit.) These factors appear to have dominated any positive impact of horizontal cartel restraints on margins” (pages 208-210).

Weinstein then distinguished between different types of cartels (recession, those created through administrative guidance, and those created to facilitate industry adjustment). In his view the resulting econometric estimates implied that profit margins in recession cartels are probably lower because of greater competition between firms on the basis of quality. He summarised this finding as follows:

"Recession cartels, which were probably the most carefully enforced, seem to have resulted in price increases of 1-2% over their average life of 10 months and lead to quality improvements (or changes in the conditions of sale) that resulted in demand increases of 1% over the same time period. Administrative guidance seems to have had a similar or smaller impact, and designated industry cartels seem to have had an impact on prices of less than 5%. Since evidence on how much these cartels were expected to affect pricing and production in general indicates that the government was trying to get firms to reduce production and/or raise prices in the range of 10-20%, these results imply that cartels fell far short of their intended targets.” (page 220).

The impact of cartel presence on export performance was examined by Porter, Takeuchi, and Sakakibara (2000) using data that took account of every Japanese government-sanctioned cartel (of all types) from 1953-2004. These authors showed that cartels were almost never found in Japan's most successful export industries. This evidence casts doubt on any claims that crisis cartels provide a shielded home market from which the foundations of subsequent export success can be laid. If anything, intensity of competition in home markets is found in this research to positively correlate with subsequent export performance.

3.5 Republic of Korea in the 1970s and 1980s

Before the East Asian Financial Crisis various crisis-motivated cartels were permitted under Korean law. In response to sharp increases in commodity prices Korea enacted the Price Stabilisation and Fair Trade (PSFT) Act in 1975. Yang (2009) argues that the goal of inducing price restraint, or limiting price increases, was the central purpose of this law and its cartel provisions were subordinated to that goal. Yang provides the following summary of the application of the PSFT:

"Though the PSFT Act had provisions against cartels, only three cartel cases were challenged by the authorities from 1976 through 1979. Thus, even after the promulgation of the PSFT Act, the government did not show an active attitude toward regulating cartels. Rather, it approved several rationalization or depression cartels. Under the permission or patronage of the government, more than 250 trade associations were newly organized during that period and operated actively. Emphasizing short term price stabilization, the PSFT Act did not reach market structure; rather, it regulated nothing but market behavior. It was primarily a price control law, and cartel regulation was to be utilized as a means of short term price stabilization” (page 622).

The Monopoly Regulation and Fair Trade (MRFT) Act, enacted in 1980, contained specific exemptions from a provision prohibiting cartels for industrial restructuring and research and development. Both of these exemptions could in principle be employed during a sharp national economic downturn or crisis. Perhaps of comparable interest is the extent to which the Act sought to reconcile the prohibition on cartels with so-called administrative guidance provided by the Korean government to firms to, for
example, for a cartel. Any cartel that was created as a result of a formal Act or regulation of the Korean state could not be subject to prosecution under the MRFT. However, if firms chose to follow informal administrative guidance to create a cartel then no protection against prosecution was afforded. The distinctive treatment of formal as opposed to informal administrative guidance was upheld by the courts (Yang 2009).

One lesson from this particular feature of Korean historical experience for other countries is that the manner in which the private sector responds to administrative guidance on crisis cartels is likely to be influenced by legal protections, if any, afforded to those that follow different forms of administrative guidance.

3.6 The United States during the Great Depression

While the Great Depression in the United States is typically said to start in 1929, the policy regime concerning firm collaboration relevant then had been established earlier in the Hoover Administration (Miller, Walton, Kovacic, and Rabkin 1984). The "associationalist" movement was led by Herbert Hoover, first as Secretary of Commerce and then as US President, and viewed industry self-regulation as preferable to formal antitrust enforcement, especially with respect to cartels. The principles of this movement were said to have affected the enforcement practice of government agencies, including the US Federal Trade Commission. The principal tool was the so-called trade practice conference. As Miller, Walton, Kovacic, and Rabkin explain:

"Outwardly designed to suppress "unfair" or "unscrupulous" forms of business behaviour, the conferences in practice acted to curb legitimate means of competition. The FTC initiated the conferences by inviting all firms in an industry to meet in the presence of a commissioner and members of the commissioner's staff to discuss disputed practices within the trade. When a majority of conferees opposed some business tactic, the conferees approved resolutions calling for a ban on the suspected practices. If the FTC endorsed the conferees' view, it could classify the resolutions as either "Group I" or "Group II" rules. The Commission treated violations of Group I rules as prima facie violations of the FTC Act and sought cease and desist orders to halt them. For violations of Group II rules, however, the FTC based its decision to prosecute on the circumstances of each claimed infraction" (page 13).

These authors note that by the end of the 1920s the largest enforcement priority of the FTC related to these conferences. Between July 1927 and November 1929 nearly 60 such conferences were held at the FTC. With the onset of the Great Depression the supporters of co-operation between business and between government and business were to apply even more pressure for exemptions from the antitrust laws on the statute books. Specifically, pressures mounted to allow "trade groups to fix prices, allocate production, and consummate mergers and acquisitions" that would otherwise be prohibited.

Intervention gathered apace once President Franklin D. Roosevelt took office in 1933. As part of the New Deal that he proposed, the National Industrial Recovery Act (NIRA) was passed. This statute created the National Recovery Administration (NRA) which negotiated many accords or "codes" (as they were then referred to) for individual sectors or industries that specified product market outcomes (such as prices and output levels), labour market outcomes (wages and associated conditions), investment plans, and other corporate practices. President Roosevelt did not hide the fact that these codes could essentially circumvent

---

existing cartel law and, where the codes applied, effectively replace cartel law with regulation.\(^\text{24}\) These regulations were, for all intensive purposes, agreed between the government, private industry, and trade unions representing the workforce.

With respect to the motives of the supporters of this government intervention, Miller, Walton, Kovacic, and Rabkin argue:

"Indeed, the 'central motivating force' of the trade associations was the desire to improve prices by 'collective action.' Labor groups, too, were pleased to secure a quid pro quo in the form of higher wages, and government administrators no doubt enjoyed their newly found power over commerce and trade" (page 18).

Ultimately the US Supreme Court was to rule NIRA and its agricultural counterpart, guided by the activities of the Agricultural Adjustment Administration (AAA), unconstitutional. Still, the NRA and AAA's activities had time to affect market outcomes. Miller, Walton, Kovacic, and Rabkin (1984) summarise the consequences of the NIRA as follows:

"These gains to business, labor, and government interests, however, frequently came at the expense of consumers. The government planners, 'hungrily seeking new fields to conquer, seized upon any reason for extending their domain.'...In addition to the deliberate creation of monopolies, moreover, NRA administrators readily acquiesced in numerous code provisions that facilitated 'monopolistic or semi-monopolistic prices.' Some codes fostered extensive and explicit collusion among bidders for state, local, and federal government contracts, thereby raising profits for favored firms. Others facilitated clandestine price-fixing and restricted interregional product shipments. The glass container industry received an especially strong code as a reward for helping the government enforce the liquor revenue laws...The codes of the timber, copper, and glass container industries all 'had their origin in pre-code price-fixing activities of the groups concerned.

"All such practices led to 'consumer gouging.' They also harmed smaller firms because the larger firms dominated the code-making deliberation. Moreover, although the NRA activities successfully raised profits and wages for many of the favored firms and their employees, the agency substantially impeded recovery from the Great Depression" (page 18).

Over time more data has been collected, or made available, concerning the firms that were signatories to codes and those that were not. This has facilitated more formal, statistical evaluations of the effects of the cartel-related provisions of the NIRA. In the following, the findings of these evaluations, especially as they relate to whether crisis cartels can be justified, as compared to alternative policy interventions and other relevant benchmarks are summarised.

Taylor (2002, 2007) presents evidence on the extent of output contraction that can be attributed to NIRA-allowed cartels. Care is taken to control for non-cartel-related factors that may have affected sectoral output levels including wage and government spending provisions of the NIRA. Moreover, since other analysts have argued that compliance with the cartel provisions of many codes appeared to break down in 1934 (the so-called "compliance crisis") and this is taken into account as well.\(^\text{25}\) Overall, in his

---

\(^{24}\) Miller, Walton, Kovacic, and Rabkin (1984) quote President Roosevelt saying "We are relaxing some of the safeguards of the antitrust laws...[We] are putting in place of old principles of unchecked competition some new government controls..." (page 16).

\(^{25}\) In a separate analysis, Taylor and Klein (2008) develop and evaluate a game theoretic approach in which firms adhered to NIRA codes as long as they believed that failure to do so would result in a consumer
2002 study of cartel output levels from July 1933 to May 1935 (when the NIRA was struck down by the US Supreme Court), Taylor finds "the NIRA cartel codes themselves brought a ten percent reduction in manufacturing output" (page 8) in the months before the compliance crisis of 1934. The higher wage rates, paid as part of the NIRA package, independently reduced cartel output.

Taylor's 2007 study goes further and examines which of seven provisions in cartel codes affected the output of 66 US industries before, during, and after the period when the NIRA was enforced. Having taken account of the compliance crisis and macroeconomic variables likely to affect industry output (such as government spending), the coming into force of a cartel code tended to reduce industry output. Industries with more complex (longer) codes and whose codes specified production quotas, data-filing requirements, and new capacity restrictions saw greater falls in output. These findings confirm that the manner in which crisis cartels are implemented, especially that implementation relates to the enforcement of the cartel agreement, is an important determinant of the policy's overall effects.

Two studies also examine whether the introduction of a NIRA code reduced over the medium term the minimum concentration level necessary to sustain a cartel in a sector. Specifically, it may be useful to think in terms of the "critical concentration level" beyond which the firms in a sector can sustain a cartel without government intervention. The question, then, is whether that critical level was reduced in sectors where a NIRA code was in effect. Bearing in mind that the NIRA lost its legal force in 1935, for sectors that have signed a NIRA code, Alexander (1994) examined whether the critical concentration level in a sector in 1937 was less than that in 1933, and found that the former was on average 37% and the latter 60%. This finding, however, has been contested by Krepps (1997) who argues that Alexander's results are a function of the data sample used and that no account was taken of the variation in the critical concentration levels in the sectors where no NIRA code was ever signed. Still, the potential for longer term consequences of short term crisis cartel interventions may be of relevance in other jurisdictions.

The unexpected overturning by the US Supreme Court of both the NIRA and the AAA, its agricultural counterpart, provides a natural experiment that Alexander and Libecap (2000) have exploited. Although these laws were overturned, other still-legal provisions would have allowed for the principal forms of government intervention to be reconstituted. Interestingly, the latter provisions were exploited in agriculture but not in manufacturing. Alexander and Libecap advance the hypothesis supported by evidence for 23 US industries that the degree of cost heterogeneity in agricultural sectors was less than that in manufacturing sectors in the mid-1930s and this made it easier for the former to agree on restoring government intervention.

Initially, such boycotts were triggered by the U.S. government withdrawing a Blue Eagle emblem from firms found in violation of NIRA codes. But this sanction lost its potency. As Taylor and Klein (2008) argue: "However, as consumers lost enthusiasm for the Blue Eagle, firms realized that the NIRA compliance mechanism...was largely innocuous, and firms began to defect from the cartel. When these defections went unpunished, other firms lowered their evaluations of punishment, leading to further defections. "By the time the NRA Litigation Division began referring violators for prosecution in earnest, the compliance crisis was too far underway" (page 264). This finding is a further reminder that states need not confine themselves to sanctioning private sector crisis-cartels; the state may also seek to influence compliance with crisis cartel accords.

Specifically Taylor (2007) considers monthly data from January 1927 to December 1937, a total of 120 observations on each of 66 industries.

For details see sections II and III of their paper.

This is not to say there was no heterogeneity within agricultural sectors as the attempt to cartelise the U.S. orange growers, described in the next section of this paper, shows.
Alexander and Libecap's findings have implications for assessing the impact of the NIRA in the first place. As noted earlier, there was a compliance crisis in 1934. In addition, the NIRA codes were not supported by all firms. Much of their evidence implies that smaller, less efficient firms benefited the most from the crisis cartels instituted by the NIRA. Alexander and Libecap argue on page 381:

"It must be explained, however, why the business community could not unite behind some more credible administrator, with billions of dollars potentially available to reinforce cartels that would operate to enhance profits. We argue that business interests were simply too fragmented to attempt such unity, with the fragmentation driven by cost heterogeneity. There was, therefore, no “carrot” analogous to the agriculture subsidy program to entice firms’ cooperation with the industrial program.

"The industrial codes also had minimum wage, maximum hour, and collective bargaining provisions that were absent in the agricultural programs, and these provisions clearly reduced business support for the NRA. It is commonly observed that the NIRA labor provisions were a quid pro quo granted by business in order to obtain the right to cartelize. What is missing from this story is explication of why the industrial coalition supporting the NIRA was so weak as to have to make concessions to labor supporters, while large farmers were able to marginalize farm workers as well as small farmers. We contend that the concessions to labor were a reflection of a weaker industrial coalition and that its weakness stemmed from disagreements within and across industries regarding the desirability of any particular cartel program—disagreements that were rooted in cost heterogeneity.

"Subsequent conflicts over labor issues within the codes, moreover, often had their roots in cost heterogeneity. For instance, in industries, such as cotton textiles, with significant operations in both the northern and southern states, northern firms often tried to use uniform minimum wage provisions to eliminate a labor cost advantage enjoyed by southern firms. The labor-cost advantages enjoyed by less labor-intensive large firms in some industries reinforced small firm demands for price fixing powers within the codes."

More generally, cost heterogeneity was also a factor behind cartel instability and breakdown, according to Alexander and Libecap (2000, page 395). They note a tendency in the data for NIRA codes to be more stable in sectors where average total costs do not vary much with output levels.

In sum, the findings for the US crisis cartel regime in the Great Depression imply that its economic effects (principally output reduction) in any given sector depended critically on the contents of the cartel agreement and on the degree of cost heterogeneity in that sector. Note that, while the effects of other government measures are controlled for, no explicit comparisons were made in these empirical analyses of the relative effectiveness of crisis cartels compared to other forms of state intervention.

As evidence provided in the next section also confirms, US government experience was rarely confined to allowing or encouraging the establishment of private crisis-cartels. It seems that once the state starts down this path, other government interventions typically follow. Since the cartel members and their customers know this, one cannot rule out interested private parties seeking to influence government policies towards forming such cartels. Under these circumstances it may be unwise to assume that the state optimally intervenes to create crisis-cartels and refrains from further intervention. Experience suggests that proposals to fine-tune policies towards crisis cartels be tempered by such realities.

In drawing together the evidence presented in this section, surely the diversity of experience with respect to crisis cartels is of interest. Some competition authorities have been able to resist demands to issue exemptions to cartel laws, others could not. The role of other government agencies in providing
administrative guidance, potentially at odds with the goals of national competition law raises important questions concerning competition advocacy. Perhaps most tellingly of all, once governments start intervening in creating and fostering cartels, this typically represents the start of a more sustained process of intervention in markets, suggesting that a narrow focus on the pros and cons of cartel law exemptions may miss important pressures for intervention during economic crises.

4. Historical sector-specific examples of crisis cartels

Extracting the relevant evidence on crisis cartels in specific sectors is not as straightforward as one might have expected (before consulting the literature.) In many cases, a sectoral cartel may have been formed in response to an economic crisis or crisis conditions within a sector, however the cartels subsequent trajectory may owe little to its crisis-related origins. Moreover, the reason a cartel may be well known (even infamous) may have little to do with its crisis-era features.29 Our interest is in the crisis-related aspect of such cartels, not in every development in the business environment and in government regulation that affected such cartels.30 The following accounts are presented in chronological order.

4.1 State-induced cartelisation in the Massachusetts' railroads, 1872-1896

Railroads require substantial amounts of capital to be established and, once in operation, the incremental costs are a fraction of their recurring fixed outlays. Such circumstances can lead to price wars, price under-cutting, and substantial potential losses for investors. Dobbin and Dowd (1997) describe a "pro-cartel policy regime" in US railroads for the years 1872-1896 during which "every American railroad of any size joined a cartel in these years" (page 508). The regime they describe came to an end in 1897 when the US Supreme Court ruled that the Commerce and Sherman Acts applied to railroads.

Dobbin and Dowd pay particular attention to developments in the state of Massachusetts. After 1871 "Massachusetts began to promote railroad cartels as a way to stabilise prices and protect public capital" (page 509). In 1875 the Massachusetts Board of Railroad Commissioners were reported to have argued that competitive pricing had resulted in "fierce contests and violent fluctuations of very short duration." By 1878 these Commissioners were arguing that "uncontrolled competition is but one phase in railroad development and must result in some form of regulated combination" (as quoted in Dobbin and Dowd, 1997, page 509).

Another argument advanced before the US Congress was that cartels enabled the continuing, independent existence of railroads, and therefore avoided a consolidation that could lead to monopolisation. Dobbins and Dowd (1997) also argue that cartelisation kept investments in railroads so that supply and demand were better aligned. They reason as follows:

"When they [the railroad cartels] were operating smoothly, railroad construction proceeded slowly and followed demand. When cartels broke down, railroads built new lines ahead of

29 For example, the potash controversy between Germany and the United States, which came to a head in 1910 and 1911, arguably had more to do with the specific terms of the prevailing cartel arrangements in Germany than any crisis-era origins of the first and second "syndicates" among German potash producers.

30 Therefore, accounts of the impact of sectoral cartels that make no reference to economic crises are omitted. Given the purpose of this paper, perhaps the most important of which is Kinghorn (1996), an evaluation of the German cartels in coal, iron, and steel at the turn of the twentieth century. Comparing the pricing and output of German cartel members with their British and American counterparts at points in time and over time leads Kinghorn to conclude that these three German cartels increased output and lowered prices. “Further, the operation of the cartels stabilized demand, which encouraged cartel members to use more efficient production technologies” (page 339).
demand in the hope of capturing new markets. Cartels led incumbents to assume the industry would be stable and predictable, and prospective entrepreneurs found the cooperative relations among railroads encouraging" (page 510).

Dobbins and Dowd (1997) analysed the entry of every Massachusetts railroad not just during the cartel era but for the longer period 1826 to 1922, which covered different policy regimes. A total of 317 railroads were founded during 1826-1922, many during the era 1845-1855 when British financial capital was readily available for investment. They summarise their principal cartel policy-related findings are follows:

"Pro-cartel policies mitigated price competition among incumbents and thus boosted foundings. Antitrust policy enlivened competition and thus discouraged foundings, although industry revenues and track mileage continued to grow. After antitrust, expansion occurred through the growth of incumbents rather than through the establishment of new railroads" (page 524).31

4.2 Germany's potash cartel agreements of 1876 and 1883

Perhaps the first crisis-induced privately-inspired cartel for which there is extensive information involves the German potash32 industry. According to Tosdal's extensive account, at the turn of the twentieth century Germany was the largest supplier of Potash salts. In 1870 German mines produced just under 300,000 metric tons of such salts, by 1909 the annual amount produced exceeded seven million metric tons. Tosdal (1913) reports that the first price-fixing agreement between German producers was negotiated in 1876 after four years of falling prices which had seen a number of suppliers cease production (page 145). Once profits were restored a year later, several firms withdrew from the agreement and it lapsed.

Tosdal argues that the large investments necessary to mine and process potash and the fear that "the alternative of free competition and low prices, sure to entail serious losses upon all the mines, and eventually ruin to some, was rejected for combination" (page 146). A new agreement between producers was signed on October 21, 1883, the effects of which Tosdal (1913) contends are as follows:

"The potash industry prospered during the decade following the formation of the first agreement. The combination, including as it did all the producers, had been able to keep up prices and, at the same time, increase the demand for potash. The addition of new mines had not been a disturbing factor. The advantages of regulation had become too evident to allow a return of free competition upon the expiration of existing agreements" (page 147-148).

Tosdal also reports that the "serious" consequences of the depression of 1901 and 1902 had important implications for the negotiation of the second "syndicate" of German potash producers.

31 According to Dobbins and Dowd during the 1872-1896 era railroad foundings were "moderately high". During the antitrust regime of 1897-1922 such foundings were "near zero" (page 515). A subsequent statistical analysis of the determinants of foundings reveals different estimated coefficients for the two policy regimes.

32 Potash refers to a group of naturally occurring potassium salts and the products derived therefrom. Potash has been used to manufacture, amongst others, glass, soap, and fertiliser.
4.3 The 1885-1902 cartel among US Bromine producers

Between 1885 and 1902 the US Bromine producers agreed to a "pool" where there was "an independent, unincorporated firm with contracts to buy the entire output of every bromine producer." These contracts guaranteed producers a price, and prohibited them from selling to anyone else. The contracts were explicitly conditioned on the participation of all producers" (Levenstein 1997, page 119). The cartel had an international dimension in that an agreement was reached with the only significant foreign suppliers, German firms, for the latter not to export to the United States in return for a commitment of the US firms to refrain from exporting as well.

This cartel was formed after substantial falls in the price of bromine. Before the US Civil War bromine sold for more than six dollars per pound, by 1875 the price had fallen to 30 cents per pound. Prices were to fall a further seven percent between 1875 and 1880 and then a further 30 percent between 1880 and 1884. Although Levenstein does not explicitly link the creation of the pool to the sharp fall in price, such price falls are typically associated with "sectoral crises."

Levenstein (1997) does, however, link the pool's creation to the subsequent evolution in bromine prices.

"With the establishment of the bromine pool in 1885, this [price] trend was reversed. The price of potassium bromide increased 23% over the year. The average price during the NBC [National Bromine Company] pool (1885-1891) was almost ten percent higher than the average price during the previous five year period. When the NBC contracts terminated in 1891, prices returned to their pre-pool pattern, falling almost thirty percent" (page 121).

Similar qualitative changes were observed in bromine prices with the implementation of the next pool in 1892 and with its dissolution in 1902. Levenstein (1997) shows that prices were more stable during the pools than otherwise. Moreover, she notes "there is no evidence that changes in demand or cost can explain the observed fluctuations in price" (page 122).

4.4 International Steel Cartel, 1926-1933

According to Barbezat (1989) the legacy of the disruption of World War I was to improve the climate for co-operation between rival firms in Europe's leading industries in the 1920s. "In response to these shocks, the industries chose co-operation…" (page 435). However:

"....after the tremendous dislocation of their industries caused by World War I, the steelmakers of western Europe were unable to operate a complex system of international cartels, made up of unified national groups. The countries were able to agree, though, to a simple industrial policy, agreeing on market shares and protecting their domestic markets [from imported steel]. This enabled them to restructure their own domestic steel industries and to establish domestic organizations, thus taking a step toward the post-1933 export cartels, which were founded and depended on strong national groups" (Babezat 1989, page 436).

On 1 October 1926, the International Steel Cartel (ISC) was formed. Belgium, France, Germany, and Luxembourg were the four founding members of this Continental European cartel. Together they accounted for 65 percent of world steel exports in 1926 and 30 percent of world steel production. The ISC "set quota limits on total production in each of the countries, and the members agreed to respect national

---

33 Typically bromine does not occur in natural form but as part of salts. Bromine compounds are used in a wide range of manufacturing industries.
boundaries by limiting exports to member countries. The cartel did not explicitly set prices, but sought simply to fix production quotas for steel ingots” (page 436). The cartel agreement included penalties for overproduction and had provisions for terminating the accord in 1929, 1931, or whenever Germany altered the relevant tariff rates.

The ISC was beset with instability created by disagreements among the cartel members about the appropriate quota sizes and the punishments for infringing these quotas. At a meeting on 8 and 9 June 1927 German representatives complained bitterly about both. Attempts were made to accommodate German requests in this regard and by 1929 over-production penalties had been cut by 75 percent.

Barbezat cites contemporary sources that argue that the single most effective aspect of the cartel were the prohibitions or limitations on exporting between the ISC members. “By limiting imports, the members could better exploit their market power in their domestic markets….This allowed for the establishment of domestic cartels” (Barbezat 1989, page 438). For example, by 1929 these arrangements enabled the French producers to rebuild their own industry and then to form their own domestic cartels. From these ISC arrangements the "principle" that the domestic market was reserved for domestic producers arose.

Co-operation among the ISC members collapsed along with the drop in aggregate demand associated with the Great Depression. From this point on, Barbezat argues, differences between the ISC members were too great to sustain meaningful co-operation. Consequently, each member secured its national market for its own nation's producers (page 439).

4.5 US agricultural policy in the Great Depression, with special reference to Sugar and Oranges

During the Great Depression the US government, and for that matter state governments, intervened in the agricultural sectors in many different ways. This makes evaluating the specific impact of those interventions that sought to create or promote crisis cartels difficult. While the impact on market outcomes is of particular interest here, it should be recalled that the perceived success (or otherwise) of cartel-like intervention may have spurred other forms of government intervention, some of which remain in place and some of which has been emulated in other countries. The focus here is on two agricultural products where analyses of the impact on market outcomes has been attempted in recent years, sugar and oranges.

The regulation introduced via the so-called Sugar Acts of 1934 lasted until 1974. Bridgman, Qi, and Schmitz (2009) provide a qualitative and quantitative assessment of the impact of these regulations on sugar prices and on the allocation of production among US sugar producers. Although US sugar producers had proposed their own cartel arrangements under the NIRA, which included restrictions on the importation of sugar (notably from competitive Cuban rivals), these plans were rejected by the US government and a compromise, state-led and enforced cartel arrangement was instituted after the enactment of the 1934 Jones-Costigan Act.

Libecap (1998) provides an excellent overview of agricultural policy intervention in the United States from 1884 to 1970. In section 6.2 of this paper Libecap differentiates between three types of government intervention: provision of public goods, transfers, and economic regulation (the category including cartelisation of markets.) Libecap shows that the New Deal era (1933-1939) was associated with an abrupt increase in economic regulation, much of which stayed on the statute books until the second half of the twentieth century. Libecap does examine the consequences of the New Deal era regulation, however, he does not emphasise the impact of cartels. The only commodity that he analyses the price data for is wheat.

Reich (2007) contends that U.S. New Deal era regulatory initiatives influenced subsequent Israeli policy towards agriculture, in particular the agricultural exemption of Israeli competition law.
Ultimately limitations on sugar sales and imports were complemented by three state provisions that sought to enforce the industry (cartel) arrangements. First, entry by new farmers was banned, as was expansion by existing farmers. Each farmer was given an allotment of the amount of beets they could produce and of acres they could farm. Second, a subsidy to those beet farmers who abided by their allotments was given. This subsidy was paid for by a tax on white sugar, essentially transferring income from sugar refiners to beet farmers. Third, so that the beet processing industry (including the white sugar refiners) did not claw back the subsidy from the beet farmers in their contracts to buy beet, the government intervened to influence the terms of those contract negotiations.

These arrangements were able to limit competition (from home and abroad) and essentially segmented the US and world sugar markets. According to Bridgman, Qi, and Schmitz (2009):

"The cartel had two effects on prices. First, U.S. prices were decoupled from world prices. Second, by limiting domestic competition, U.S. sugar prices now grew roughly at the rate of general prices (in the case of the New York raw sugar price) whereas before they had fallen. As part of the cartel agreement, the government promised consumers a “fair” sugar price. In practice, the government interpreted this as meaning that raw sugar prices in New York should grow at the rate of the general level of prices. Hence, the cartel did a reasonable job of hitting this “fair” price target" (page 9).

They also show that the price of refined sugar compared to its inputs rose considerably, implying a significant expansion in profitability within the sector. However, Bridgman, Qi, and Schmitz go on to show that the price intervention, subsidy, and tax regime reduced sugar beet quality as well as extraction and recovery rates. Farmers were paid for the quantity of beets produced not the amount of sugar extracted, with inevitable consequences for the latter. Amongst the evidence cited, the authors note that before 1934, when the cartel began, 310 pounds of sugar were recovered on average from each ton of beets. During the cartel the recovery rate fell to a low point of 240 pounds. Since the cartels demise in 1974 the recovery rate has increased.

In sum, state-led enforcement of the US sugar cartel came at a price, in terms of the efficiency of the production of sugar beets and refining. Consumers paid higher prices while the state took measures to frustrate external and internal sources of competition. This cartel is instructive as it serves as a reminder that, first, states need not be content to let their firms organise crisis-era cartels on their own terms and, second, that when states do intervene to influence and enforce crisis-era cartels there are no guarantees that the intervention will be successful (whatever the evaluation criteria) or free of adverse consequences unforeseen at the cartel's inception. A likely candidate for such adverse consequences are state-generated distortions in the allocation of production among cartel members, with inefficient cartel members lobbying for greater allocations of market shares or output.

In contrast to the New Deal US sugar cartel, Hoffman and Libecap (1994) show that the orange cartel was beset by many features that undermined its operation during the 1930s. This was the case despite the fact that between 1930 and 1933 the nominal price of oranges fell 75 percent (while overall consumer prices fell 22 percent). Ultimately, the principal growers of oranges in the United States, from the states of California and Florida, were not at one. The much better organised Californian growers accepted a state-led marketing agreement in 1933 that involved weekly limits on interstate orange shipments. Florida's

---

36 It is noteworthy that it was legislation enacted in California that created a state agency to regulate intrastate shipments of speciality crops, such as oranges. Government intervention at the state level, therefore, helped overcome the collective action problem among Californian orange growers at the national level. This observation may have relevance for other jurisdictions where different levels of government share competency for a particular matter, such as the economic regulation of a sector or form of commerce.
growers and shippers rejected in the same year an agreement that was almost identical to the one signed by their Californian rivals (page 193). Two other agreements were subsequently proposed to Florida's growers, but it was not until 1939 that an agreement was acceptable to these growers and this agreement did not include limits on interstate shipments of oranges from Florida.

Hoffman and Libecap (1994) summarise as follows the conclusions of their analysis of the negotiations within this industry during the 1930s:

"The examination of negotiations between the Florida industry and the Agricultural Adjustment Administration from 1933 to 1939 to implement the orange marketing agreements shows how difficult it was to cartelize agriculture, even under relatively favorable circumstances. Heterogeneous interests and conflicts over quota rules prevented the weekly proroting of interstate orange shipments from Florida and the installation of a national prorationing framework for controlling shipments from Florida, California, and Texas. If a nationwide cartel could not be assembled for oranges, it most surely could not be assembled for wheat or corn. Hence, as agricultural regulation continued to develop, the emphasis was shifted to different ways of raising farm incomes" (page 217).

On top of these contractual problems, falling personal disposable incomes during the Great Depression and a high income elasticity of demand for oranges ensured that the demand slumped during the 1930s, disrupting agreed quotas for individual farmers and states. Moreover, the total acreage under cultivation increased in California and Florida by 21 percent and 79 percent, respectively, between 1933 and 1940, adding new entry to the list of the cartel's woes. As a result, Hoffman and Libecap report that the price of oranges never recovered to their pre-Depression levels.


Silicon, in the form of ferrosilicon, is used to for both deoxidisation and for reinforcing alloys in iron and steel production. Even though ferrosilicon can differ according to the degree of silicon content, the real price of ferrosilicon had fallen 40 percent in real terms from 1974 (the post war high) to 1987 (USGS 1998). The rate of real price decline was persistent and at approximately the same rate over time.

Several domestic US silicon companies were alleged to have fixed prices during 1989-1991, according to an indictment brought subsequently by US Federal authorities (USGS 1998). During 1988 ferrosilicon prices rose approximately 20 percent in real terms before continuing their downward trend. The form of cartelisation (price fixing) and the trend decline in real ferrosilicon prices is consistent with an explanation that the cartel sought to halt, and possibly reverse, a long term decline in sectoral profitability and, therefore, can be viewed as a form of crisis cartel, albeit one not sanctioned by the state.

An interesting feature of this cartel is that its members employed the US antidumping statute against importers of ferrosilicon, potentially disciplining what might referred to as disorderly or unco-operative foreign sources of supply. In 1993-4, having received petitions to investigate the importation of ferrosilicon, the US International Trade Commission had found that such imports from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela had "materially injured" the US industry. Following this determination and others, additional duties were placed on ferrosilicon imports from those jurisdictions. To its credit, upon receiving evidence of the price-fixing conspiracy amongst others, the US International Trade Commission reversed its determination in 1999 and ultimately the antidumping duties were scrapped. Still, five domestic ferrosilicon producers filed an appeal against this reversal (USGS 1999). The use of the anti-dumping statutes to enforce the international dimensions of this cartel contrasts with the outright negotiation of market allocation in some of the cartels from earlier eras described in this section.
The purpose of this section has been to summarise the main features of a selected number of crisis-era cartels. Sharp falls in prices, perhaps triggered by falls in aggregate demand, are a frequent trigger for such cartelisation, although disruption from other sources (such as a prior war) played a role in some cases. The desire to avoid "ruinous" competition in sectors with high investment outlays and low incremental costs, so as to generate stable rates of return that encourages the progressive investment in a sector, was also a motivating factor.

Government intervention was rarely confined to encouraging the formation of crisis-era cartels and exempting such arrangements from relevant competition laws. Once the state got involved, it often sought (or was persuaded to seek) to influence the terms of the cartel agreement and its stability. Enforcement of the resulting cartels was often a public-private affair. Moreover, whenever competition from foreign firms was an important source of rivalry, crisis cartels included provisions to shut out imports, adding an international dimension to the consequences of this form of state intervention.

As to the effectiveness of these cartels, it is striking how often considerations of cartel stability are mentioned, confirming long-standing insights as to the importance of this matter. While evidence has been presented that suggested that crisis cartels raised or stabilised prices, rarely was the harm to buyers ever estimated. Moreover, no attempt was made to estimate the magnitude of the alleged benefits from such cartels, or to show that cartelisation was the more efficient means of obtaining those benefits compared to the other policies available to governments.

Overall, then, what can one make of these findings? It cannot be denied that crisis cartels existed and that some had effects on prices. What has not been demonstrated is that the harm done to buyers by crisis cartels has been more than offset by the benefits from other sources. Perhaps this evidence exists for cartels created in normal economic conditions, no such evidence was found for crisis cartels. Moreover, on no occasion has it been demonstrated that crisis cartels and associated regulations attained stated government objectives (such as stabilising investment outlays) at less cost to society than other measures available to governments at times of economic crisis.37

5. Evidence from the recent global economic downturn

Given the incentives faced by privately-orchestrated cartels to keep their operations secret, no complete accounting of the cartels induced by the recent global economic downturn (that lasted from 2007 until at least 2009) is available. In fact, an extensive review of media outlets for articles about "recession cartels," "depression cartels," and "crisis cartels" produced only a very small yield.38

One attempt to use the recent global economic crisis to justify the creation of potential cartel-like arrangements is worth mentioning. The so-called Baltic Max Feeder scheme was motivated by the collapse of world trade observed in 2008 and the associated decline in revenues for the shipping industry. The scheme is said to refer to smaller vessels (up to 1,400 teu) that ship containers within Europe. These vessels are known as "feeders" precisely because they transport containers to and from ports where large international ocean-faring vessels dock and smaller ports where such larger vessels do not dock. It had been proposed that capacity be reduced and that ship-owners' revenues be enhanced by higher charter fees.

37 During the extensive research for this background paper no study of a crisis cartel was found that even purports to make such an empirical demonstration. This does not imply that such studies do not exist.

38 In contrast over the past two years nearly 5,000 newspaper and other media articles have mentioned "cartels." Unfortunately, the word cartel has many meanings and is not synonymous with recession cartel, depression cartel, or crisis cartel.
The latter proposal was withdrawn after opposition from charterers and a proposal to compensate shipowners for the tonnage of feeders' laid up (that is, taken off the market.)^39

On 15 January 2010 the European Commission announced that it would investigate these proposed arrangements under Article 101 of the Treaty on the Functioning of the European Union. The following statements from the associated official press release are informative:

"The 'Baltic Max Feeder' scheme has been elaborated and promoted by Anchor Steuerberatungsgesellschaft GmbH, a [private] German tax advisor, as a response to the current overcapacity of feeder container vessels, which has brought charter rates down."^40

"The Commission is in particular concerned that the scheme, whereby European ship owners collectively agree to cover the costs of removing feeder vessels from service, may be aimed at reducing capacity and therefore at pushing up charter rates for such vessels."^41

On 26 March 2010 the European Commission announced that it had closed its investigation into this matter. The associated official press release stated:

"The investigation aimed to establish whether the scheme's purpose was to reduce capacity and, therefore, push up charter rates for such vessels. If confirmed this would likely have been tantamount to a breach of Art 101 of the Treaty, which bans agreements restrictive of competition.

"In response to the opening of proceedings by the Commission, Anchor Steuerberatungsgesellschaft GmbH, the company at the origin of the scheme, informed the Commission in February that the planned scheme had been abandoned. Under these circumstances, the Commission considered that there were no reasons to further investigate and decided to close the case."^42

Another example of resort to cartelisation during the recent global economic crisis is state-led and relates to the rubber market. According to press statements by government ministers and a report from the United Nations Development Programme, during the year 2009 the governments of Indonesia, Malaysia,

---


40 A single agent, then, sought to overcome the collective action problem traditionally associated with the organisation of cartels.


and Thailand would reduce rubber exports by 915,000 tons. The following explanation appeared on the independent crisis-era monitoring website, the Global Trade Alert:

"It would appear that the Indonesian, Malaysian, and Thai rubber producers, acting through the International Tripartite Rubber Council (ITRC), have sought to restrict exports of rubber so as to increase world prices. These three countries are the largest exporters of rubber in the world, accounting for 70 percent of total supplies according to one recent estimate.

"Numerous news reports include quotes from leading business executives and business associations that are consistent with the above summary. Moreover, a recent report from the United Nations Development Programme makes reference to this alleged scheme. As of July 2009, however, it is not clear that any such concerted action has proved to be successful. One recent commentary stated: "Weakness was visible in Asian rubber futures despite the fact that International Tripartite Rubber Council members Thailand, Indonesia and Malaysia announced a decision to remove 915,000 tons from the market in 2009 to bolster prices". A reduction of this magnitude has been estimated as being equivalent to a sixth of the total world sales.

"According to the following quotation, found on an official Thai website, the alleged cooperation began in the fourth quarter of 2008". Deputy Minister of Agriculture and Cooperatives Teerachai Saenkaew said that the three countries met at a special meeting between the International Tripartite Rubber Council and International Rubber Consortium on October 29. They discussed ways to improve the rubber situation, which was facing falling prices following the global financial crisis."

Analysis of data on international trade flows in rubber suggests that this measure will likely affect the export of rubber between these three nations and 115 trading partners.

Rather than resort to crisis cartels, during the recent global economic downturn many governments offered bailouts and subsidies to domestic manufacturers, farmers, and service providers. While the bailouts to the financial sector received a lot of attention, many other firms were being offered financial assistance by their governments. According to the Global Trade Alert, which bases as many of its reports on official sources as possible, at least 164 subsidy and bailout schemes have been implemented since November 2008 by governments for firms not in the financial sector. Investigation (principally by

---

43 In the interests of transparency, it should be stated that the author coordinates this worldwide initiative to monitor state policies during and after the recent global economic downturn. Senior elected officials, leading business persons and analysts, and newspapers make frequent reference to the Global Trade Alert. Scholars now use this database too, which seeks to become the best source of information on contemporary discrimination in public policymaking.


45 More generally, the previous global economic downturn saw a resurgence of interest in "industrial policies." Aggarwal and Evenett (2010) document these various forms of government intervention employed, including subsidies, for a selected number of Asia-Pacific nations. As the Great Depression of the 1930s, and alluded to in the Libecap (1989) analysis mentioned above, the recent global economic downturn has spawned a wide range of government interventions, many of which could in principle be alternatives to forming crisis cartels. Therefore, the remarks that follow in the main text comparing subsidies to crisis cartels carry over with equal force to other forms of government interventions seen since the recent global economic downturn began.

46 This total does not include export financing schemes and consumption subsidies, both of which can upset the so-called level playing field between firms.
government sources\(^{47}\) has revealed that these subsidies and bailout schemes have distorted the conditions of competition, principally by shifting the burden of plant shut downs, unemployment, etc., on to trading partners in the relevant markets.\(^{48}\)

What is the relevance for this paper of the widespread resort to bailouts and subsidies outside the financial sector during the previous global economic downturn? These bailouts and subsidies serve to remind policymakers that there are alternative options to creating crisis cartels.\(^{49}\) Therefore, it is important that proponents of these cartels explain why their proposals attain stated national goals at less cost than alternative state measures, such as subsidisation.

Indeed, the fact that there is so little public evidence of cartel law exemptions being given during the recent global economic downturn suggests that either a lot of government-approved tacit cartelisation occurred "below the radar screen" in recent years or that governments rejected cartelisation in favour of bailouts. Perhaps the ready availability of credit, at least until the era of austerity began in mid-2010, shifted the cost calculus in favour of subsidisation.

Alternatively, when financial markets froze up for commercial firms in 2008 and 2009, it has been argued that "Cash is King" and that government bailouts delivered what firms desperately needed at the time, which in this case was short term financing ("cash") (Evenett 2010).\(^{50}\) Without such financing, suppliers and employees would be let go, further exacerbating economic conditions. In contrast, cartelisation offers higher prices and stable sales, which may increase cash flows per month but doesn't solve any substantial shortfall in financing needs.

The latter paragraphs do not seek to put subsidisation and bailouts on a pedestal above crisis cartels. It could well be that when a comprehensive assessment of the effects of the former is conducted that they are worse than the latter or, for that matter, worse than some other alternative policy. What matters is that the principle be established that crisis-era state interventions be compared to one another, rather than settling for evidence that one intervention has, or could have, an impact on the markets in question.

\(^{47}\) The European Commission conducts investigations of some such schemes implemented by the European Union's member states. Those investigations result in letters being sent to the implementing jurisdiction, letters which are publicly available. Taken together, these letters point to a substantial amount of subsidisation by European governments of their firms during the previous crisis. The latter statement does not imply that the degree of European subsidisation is necessarily greater than in other industrialised countries where subsidies have been employed.

\(^{48}\) From a competition law perspective distortions from subsidies and bailouts to the competitive process involving only domestic firms are relevant too. The Global Trade Alert only reports as problematic those subsidies and bailouts likely to harm foreign commercial interests and domestic firms; therefore, the 164 total reported in the text will underestimate the total number of competition-distorting subsidies implemented since November 2008. Reports on each of those subsidies and bailouts can be accessed at www.globaltradealert.org.

\(^{49}\) There could, of course, be a linkage between bailouts and crisis cartels. A government could make acceptance of financial support conditional on the parties concerned forming, or joining an existing, cartel. It would be interesting to check whether any such conditions have been applied.

\(^{50}\) This argument seems better suited to explaining the paucity of crisis cartels in jurisdictions where the government had access to financial markets willing to fund fiscal deficits, swelled in part by the cost of such subsidies and bailouts. Should evidence subsequently come to light that crisis cartels were employed more in jurisdictions whose governments could not finance such deficits, then the linkage between access to finance and cartelisation might be established. Of course, even in jurisdictions with little or no means to finance larger fiscal deficits, governments have been found to resort to measures other than cartelisation to "help" domestic firms. Those measures include competition-limiting regulation and protectionism.
6. Considerations relevant for policymaking

The historical and contemporary experience described in the three previous sections identifies a number of factors that ought to inform the approach that policymakers take towards cartels during sectoral, national, and international crises. This is not to suggest that relevance of each factor is the same in every sector or country, or even countries at similar levels of development. After all, the assessment of Japanese experience towards declining sectors reported earlier was doubtful that their findings were relevant to other countries going through a fast rate of industrialisation, that many developing countries have experienced.

A major lesson from the recent sharp global economic downturn is that policy towards crisis cartels ought to take into account the availability and potential desirability of alternative state measures. For example, the widespread resort to subsidisation in the recent downturn is likely to have had the opposite effect on prices in the affected sectors than resort to crisis cartels, namely, the former is likely to result in lower prices and potential benefits for customers. Moreover, the speed with which subsidies can be distributed and thereby can improve firm balance sheets in the short run may well have made such bailouts a more preferable instrument to creating crisis cartels.

Whether governments have the financial resources to sustain subsidisation is another relevant consideration, especially for developing countries. For budget-constrained jurisdictions subsidies may not be a practical alternative to crisis cartels. Other alternatives to crisis cartels need not incur state outlays, however. Rather than allowing supposedly rival firms to get in the habit of limiting competition between them -- a consequence of allowing the formation of a crisis cartel -- a government may decide to set temporarily the prices, or the minimum prices, that rivals can charge. While much may depend on the goods and services in question and the pre-crisis market structure, the central point here is that there could be interventions -- even interventions within the powers of a national competition authority -- that do less harm to the competitive process and to customer interests than crisis cartels.\footnote{This is not merely a hypothetical example. The contribution of Jordan to this Global Forum makes specific reference to establishing temporarily minimum prices for certain goods and services during an economic crisis.}

In considering alternative policies to crisis cartels it is worth bearing in mind that economic crises typically reveal considerable mismatches between installed capacity (supply) and the demand in certain sectors of the economy. The reallocation of resources away from sectors with excess capacity is an important part of the adjustment process after a crisis and policies that facilitate that adjustment might well be preferable to measures like crisis cartels that can discourage the scrapping of unneeded capacity. Mergers and acquisitions within a sector are a well established means through which restructuring takes place in market economies. While such mergers can attenuate competition between surviving firms the harm by them to purchasers may be considerably less than a crisis cartel that eliminates all competition between rivals. Other policies, such as active labour market policies and transfers, seek to limit the costs of restructuring.

The foregoing paragraphs suggest there are plausible alternative policy responses to crisis cartels, some involving competition law, some not. Competition authorities in both developing and industrialised countries have a clear stake in promoting crisis-era policy responses that pose the least, longer term threat to the competitive process. Consequently competition advocacy, within and outside government, could play a constructive role as the relative merits of crisis cartels are compared to other policy alternatives.

More generally, crisis cartels alter both production and consumption decisions. Worse, cartelisation may only indirectly affect outcomes that governments care about, such as employment. In these cases, a more direct policy instrument would target the incentive to employ persons, such as a temporary crisis-
related wage subsidy. For all of these reasons, the evaluation of crisis cartels is necessarily a relative one; decision-making processes should then be organised around comparisons across a number of plausible policy alternatives.

Another important lesson from the historical evidence presented earlier suggests that state intervention begets further intervention and that one-off interventions rarely satisfy whatever motives governments have or pressures they face from others. Establishing or permitting a crisis cartel can, therefore, become the start of sustained and far-reaching government intervention into a sector, as has been the case in the agricultural sectors of certain industrialised economies that started in the Great Depression (and in some cases, earlier). These practical considerations, that speak to the role that interest groups play over policymaking, ought to be taken into account when deciding policy towards the formation, review, and dissolution of cartels in crises.

What follows is an account of some of the options relating to the design of a process to authorise crisis-era cartels.

With respect to the approval of a crisis cartel, an important starting point is to establish criteria by which to evaluate any proposal to authorise a crisis-related cartel. Evaluations will be complicated by adopting too many criteria as trade-offs across attaining different criteria are difficult to undertake in a straightforward manner. Indeed, an apparently technocratic evaluation process can be fatally undermined, if arbitrary, undisclosed, and unaccounted for choices between criteria are permitted.

Although one choice facing governments is between ex-ante and ex-post reviews, surely any concerns about the harmful side-effects of the reviewed behaviour mitigates in favour of an ex-ante review. The review should be evidence-based, reflect knowledge of the sector in question, quantify all of the costs and benefits of the proposed behaviour, and provide a public rationale for any decision made.

Approval subject to conditions should be allowed for, in particular when the reviewing body can identify a better way to attain stated government objectives at lower cost. Testing whether a proposed arrangement between firms is the best means to attain state objectives ought to be an important part of the approval process. This requires that sufficient attention is given to viable alternative state interventions, including interventions outside the realm of competition law.

The question arises as to which body should conduct such reviews and what happens if a government body other than the competition authority is chosen to undertake such reviews. In the latter event the option of competition advocacy arises, although what it takes to make such advocacy effective may vary across jurisdictions. Even if the competition authority undertakes the review, the implementing legislation and regulations may require the authority to take into account factors that it normally leaves aside. Moreover, there may be obligations to consult with parties whose interests are not necessarily aligned with promoting the competitive process.

Since market circumstances, and not least government priorities, change over time, it is worth considering establishing review procedures for any approved crisis-cartel. The review should establish whether the cartel arrangement remains necessary (given the stated government goals), whether its scope is necessary to attain the goals, whether alternative government measures would more efficiently attain the goals, and the length of time for which any extension (with or without conditions) should be granted.

Ensuring that any review processes be evidence-based would shift the evaluation on to a more scientific basis, and so discount arguments made by analogy to other cartel episodes. Previous sections of this paper have highlighted the weaknesses in evidential base on crisis cartels and the need to compare the likely effects of proposed cartel arrangements with other plausible crisis-era interventions.
7. Concluding remarks

During previous economic crises governments have created or encouraged the formation of cartels. Some governments went further and enforced the associated agreements or provided for the courts to do so. Coming after nearly two decades of stricter cartel laws and enforcement practice, were governments to create cartels in reaction to the recent global economic crisis this would represent a sharp change in the direction of competition law and policy. Be that as it may, the question arises as to whether such crisis cartels can be justified. Drawing upon what is known about previous episodes of crisis cartels, the purpose of this paper was to describe and assess the relevant policy options. Plenty of relevant sectoral, national, and international evidence was referred to.

Much attention was given to the motives for creating crisis cartels, not least because these motives often suggest alternative policy measures that might attain the same government objective. Also, the motives of governments appear to have differed across country and sector. Some of the motives identified here are very hard to reconcile with the promotion of consumer welfare, raising the possibility that during economic crises the preferences of competition authorities may not be aligned with those of elected officials. A role for competition advocacy immediately arises but, if that is seen as likely to be counterproductive, then a competition authority may feel compelled to temporarily modify their enforcement practices in line with the crisis-era objectives of policymakers.

While a lot of evidence was reviewed for this paper, it is still the case that the empirical assessments of crisis cartels are incomplete. Little is known, for example, of the magnitude of the harm done to buyers from crisis cartels. Still, crisis cartels tended to reduce output and raise prices, although this was contested in some cases. In light of these findings it would be difficult to argue that crisis cartels had no effect.

The evidential base is sufficiently rich to demonstrate that the actual impact of crisis cartels is contingent on factors internal and external to the cartel. That in previous economic crises governments have intervened not just to encourage private cartels, but to enforce associated agreements speaks to the importance of entry and the well-understood and long-standing private incentives to cheat on cartel accords.

No evidence comparing the effectiveness of crisis cartels and other forms of state intervention could be found. This latter observation is of considerable contemporary relevance as governments appear to have resorted to selective state aids and bailouts -- rather than crisis cartels. The justification of crisis cartels should not turn, therefore, on whether these arrangements have effects but on whether they represent the best means of attaining stated government goals during an economic crisis.

On this latter criterion, the proponents have yet to offer a satisfactory demonstration of the merits of crisis cartels. Consequently, there is no basis to revise the general presumption in existing international norms that so-called hard core cartels should be discouraged. Nor does the recent global economic downturn provide a reason to reverse the two decade-long trend towards stronger enforcement against hard core cartels.
REFERENCES


Global Trade Alert. Information available at www.globaltradealert.org


1. Introduction

En période de recul sensible de l’activité économique, les objectifs et les moyens d’élaboration des politiques subissent d’importants changements, tant dans les économies en développement que dans les économies industrialisées. Parfois, ces changements sont temporaires (comme la remise au goût du jour ou le retrait des mesures budgétaires actives dans de nombreux pays ces trois dernières années), parfois ils durent plus longtemps (comme les récentes modifications apportées à la réglementation bancaire, connues sous le nom d’Accords de Bâle III). Cependant, les changements brutaux dans l’élaboration des politiques ne se limitent pas à ces mesures, et les crises économiques ont également entraîné des modifications en matière de réglementation, de fiscalité et de politiques sectorielles.

Au vu des graves bouleversements engendrés par la récente crise économique mondiale, le présent rapport se propose d’examiner si la modification des politiques en matière de formation des ententes est justifiée pendant les périodes de crise économique et de reprise subséquente. Pour répondre à cette question, nous proposons ici une synthèse des données des pays en développement et des pays industrialisés sur le traitement des ententes lors des précédents épisodes de «crise», considérés comme des moments de fort recul de l’activité économique. Une grande partie des éléments présentés ici fait référence à une époque où les pays industrialisés en étaient à un stade antérieur de leur développement. Il conviendra de déterminer si ce dernier élément présente un intérêt pour les pays en développement dans le contexte actuel.

Lorsqu’ils sont disponibles, les éléments pertinents tirés de la récente récession économique mondiale viennent compléter les données rétrospectives sur les apparentes justifications et conséquences des approches sur les ententes de crise et l’évaluation des effets de ces ententes, menée par divers analystes. Ensemble, ces éléments permettent de mieux appréhender les avantages et les inconvénients des différentes approches possibles en matière d’entente en période de crise.

Une telle question peut surprendre ceux qui ont assisté au durcissement progressif de la mise en œuvre de la législation sur les ententes ces dix dernières années. Après tout, de plus en plus d’États promulguent des lois sur les ententes ou réforment leur législation en vue d’étendre leurs capacités d’application du droit, réduire les exemptions, et renforcer les sanctions en cas de non-respect de ces lois. Des normes internationales sur la mise en œuvre de la législation sur les ententes ont été élaborées (OCDE 1998) et la mise en commun des pratiques exemplaires en la matière s’est intensifiée (OCDE 2005). De nombreuses études menées dans les pays industrialisés et en développement attestent des effets négatifs de la constitution d’ententes sur les acheteurs et les autres acteurs (Levenstein et Suslow 2005, 2007 ; Connor

* Préparée pour le Secrétariat par Simon J. Evenett, Professeur de commerce extérieur et de développement économique, Département d’économie, Université de St. Gall, Suisse. L’auteur est membre rapporteur de la commission de la concurrence du Royaume-Uni, mais les opinions exprimées ici, qui sont propres à l’auteur, ne reflètent pas nécessairement les opinions du personnel ou des membres de la Commission et ne doivent pas être attribuées au Secrétariat ni aux pays de l’OCDE. L’auteur accepte volontiers tous commentaires et corrections d’erreurs factuelles, qui peuvent lui être envoyées à l’adresse électronique suivante : simon.evenett@gmail.com.
2007). Qui plus est, certaines ententes, telles que les ententes à l’exportation, ont tiré parti des exemptions de certaines lois nationales sur les ententes, tout comme certaines ententes de crise.

Malgré cela, il n’est pas certain que les éléments qui ont convaincu du bien-fondé du renforcement de l’application des dispositions relatives aux ententes pendant les périodes de stabilité économique soient aussi efficaces lorsqu’il s’agit pour les gouvernants de répondre à un taux de chômage élevé, à un risque d’instabilité sociale, et à une faiblesse ou une volatilité la demande. Même si les législations nationales sur la concurrence ne sont pas révisées pendant une crise économique, les conditions d’application de ces législations peuvent sensiblement évoluer, s’agissant notamment des moyens mis à la disposition des autorités de la concurrence et des mesures de performance sur la base desquelles ces autorités sont jugées. Il peut également y avoir des répercussions sur les types de campagnes de sensibilisation à la concurrence menées par les pouvoirs publics et sur leur portée. Les données rassemblées dans le présent rapport peuvent en outre alimenter d’éventuels débats nationaux sur ces choix stratégiques.

Dans la deuxième partie, nous définissons les paramètres du rapport, en mettant l’accent sur les ententes, à l’exclusion d’autres formes de collusion. Une grande attention sera par ailleurs accordée à un ensemble assez large de considérations liées à l’évaluation des ententes de crise. La troisième partie présente la synthèse des éléments disponibles sur les ententes de crise formées lors de récessions économiques nationales et des enseignements qui en ont été tirés. La quatrième partie, similaire à la troisième, s’intéresse plus particulièrement aux ententes de crise mises en œuvre dans des secteurs particuliers. La cinquième partie détaille les éléments recueillis à la faveur de la récente crise économique mondiale, telles qu’elles sont disponibles1. La sixième partie offre ensuite une synthèse des solutions offertes aux pouvoirs publics. Enfin, la question de savoir si les ententes de crise sont justifiées est abordée dans la dernière partie du rapport, conjointement à un examen des principales conclusions.

2. **Qu’est-ce qu’une entente de crise ? Définitions et principes fondamentaux**

En guise d’introduction, il convient de faire la distinction entre entente et entente de crise, dans la mesure où tout le monde n’accorde pas la même signification à l’expression « entente de crise ». Or, la diversité des définitions nourrit la controverse sur l’analyse économique des ententes de crise. À chaque fois qu’une observation sera particulièrement litigieuse, ou que sa logique sera potentiellement ambiguë, le résumé ci-dessous aura recours à des citations2.

2.1 **Entente et entente de crise**

Le présent rapport portera pour l’essentiel sur les types d’accords formels entre les entreprises³ qui rivalisent pour obtenir les mêmes fournisseurs ou les mêmes clients. Parmi ces accords entre entreprises privées ou publiques figurent les accords qui fixent les prix, les quantités et les parts de marché (ou, plus

1 Les contributions des pays reçus en vue de la présente session fournissent en outre des informations sur certaines ententes de crise actuelles. Les informations utiles qui y sont contenues ne sont pas reprises dans ce rapport.

2 Le recours aux citations limite ici les accusations de déformation ou de résumé trop sommaire de l’argument en question.

3 À souligner, l’emploi du mot « entreprises » et non de l’expression « entreprises privées », qui réserve la possibilité aux entreprises publiques ou dominées par l’État d’être membres d’une entente.
généralement, ceux qui déterminent le partage des marchés), ainsi que les soumissions concertées. La présente étude ne traite pas des formes de collusion tacite ni des autres pratiques anticoncurrentielles.

Le terme d’entente de crise compte au moins deux acceptions dans la littérature économique actuelle. Premièrement, une entente de crise peut faire référence à une entente constituée pendant une grave crise économique sectorielle, nationale ou mondiale, sans autorisation de l’État ou sanction juridique. Une seconde acception de l’entente de crise faisait référence aux situations dans lesquelles un État avait autorisé, voire favorisé, la formation d’une entente entre entreprises pendant une grave crise économique sectorielle, nationale ou mondiale, ou lorsqu’un droit national de la concurrence prévoyait la création d’ententes pendant de telles périodes de récession. Cette seconde acception, qui est parfois synonyme d’entente de dépression, de récession, ou de restructuration, est le signe dans chaque cas d’un excédent de capacité de production par rapport aux niveaux ordinaires de la demande à l’échelle sectorielle ou nationale. Des exemples de ces deux types d’entente de crise figurent dans les sections 3 à 5 du présent rapport.

Les deux significations du terme ont des répercussions sur les instances chargées de l’application du droit des ententes : la première représente un défi pour elles, la deuxième peut placer l’entente en question hors de leur portée.

Avant d’examiner successivement chaque notion, nous procéderons à un tour d’horizon des controverses sur l’effet néfaste des ententes en période de crise économique. Le désaccord sur les effets économiques d’une entente pendant une crise économique explique dans une large mesure les différences de vue quant à la meilleure mise en application du droit des ententes et interroge sur l’opportunité d’accorder des exemptions au droit des ententes pendant les crises économiques.

2.2 Les facteurs économiques contestés de l’impact des ententes en période de crise

La plupart des mesures actuelles d’exécution du droit de la concurrence semblent influencées par l’analyse néoclassique de l’impact des ententes sur le bon fonctionnement des marchés. Cette analyse doit être distinguée de celle adoptée par certains économistes du développement, qui se basent sur des marchés au fonctionnement imparfait, dont une des causes pourrait tenir aux surcapacités généralement observées au cours des crises économiques sectorielles, nationales, et mondiales.

L’analyse néoclassique met en exergue le fait que les ententes impliquent généralement des accords privés qui limitent les quantités vendues et augmentent ainsi les prix dans la pratique. Par contrecoup, les...
revenus de l’acheteur sont transférés au vendeur et l’efficience allocative du mécanisme de marché est limitée. Ces thèses offrent une justification économique aux lois interdisant les ententes et aux systèmes stricts de mise en œuvre de la législation sur les ententes, même en période de crise économique.

Lorsque l’acheteur est un État, la constitution d’ententes a alors pour effet de réduire le rapport qualité/prix obtenu pendant le processus de passation des marchés publics, ce qui s’avère particulièrement grave pendant une période d’austérité induite par la crise. Lorsque les acheteurs sont des consommateurs privés ayant un faible revenu, ou des acheteurs publics de produits et services destinés à fournir un service public aux plus pauvres, la constitution d’ententes peut alors avoir des conséquences nuisibles pour les segments les plus vulnérables de la société. L’analyse de type néoclassique voit donc la constitution d’ententes d’un très mauvais œil, tant en termes d’efficacité que d’équité.

Il y a toutefois lieu de noter que, de l’avis de certains analystes néoclassiques, les ententes qui ne sont pas mises en œuvre par l’État sont instables par nature. Leur raisonnement est le suivant : étant donné qu’une entente correspond à une restriction artificielle du volume total des échanges de produits, les membres de l’entente pourraient trouver des clients supplémentaires disposés à acheter le produit au prix d’entente. Toute entente doit s’attacher à empêcher les membres d’agir secrètement de la sorte, en ce que, en dernière analyse, cela serait contraire au caractère durable de l’entente. Ce raisonnement a été utilisé par certains pour remettre en cause la raison d’être des systèmes de mise en œuvre de la législation sur les ententes, si les ententes sont par essence instables et vouées à se dissoudre avec le temps. Bien sûr, la question de la stabilité des ententes est empirique, tout comme celle de savoir si les effets néfastes qu’elles causent lorsqu’elles sont en place méritent encore des mesures d’exécution (Levenstein et Suslow 2006).

À contre-courant de ce raisonnement reconnu, certains économistes du développement ont fait valoir que les effets néfastes des ententes causés par la hausse des prix étaient insignifiants comparés à certains de leurs avantages. Chang (1999) soutient que les entreprises fonctionnant pratiquement à plein rendement dans le cadre d’une entente peuvent avoir sur les acheteurs des effets néfastes beaucoup moins importants que si on les forçait à rivaliser à des niveaux de production sous-optimaux :

« La question de savoir si le coût social du monopole est de 1 ou 2 % de la production totale est régulièrement discutée par les économistes, mais dans les secteurs d’activité à grandes économies d’échelle, opter pour un rendement sous-optimal peut souvent représenter une différence de 30 à 50 % dans les coûts unitaires » (page 10).

Dans les secteurs où les coûts marginaux de production baissent lorsque les niveaux de production augmentent, cette thèse semble signifier que l’attribution à un plus petit nombre d’entreprises d’un volume donné de ventes sur le marché permettrait à chaque entreprise productrice de réduire ses coûts. Qui plus est, dans ces secteurs d’activité, lorsque la demande globale pour un produit baisse – ce qui est probable pendant une crise économique – les coûts marginaux de production augmentent pour les entreprises survivantes. Selon cette théorie, sans la création d’une entente sur le partage du marché, les prix pourraient augmenter encore davantage.

En définitive, l’appréciation de cet argument exige de prendre position sur ce qui affecte le plus les consommateurs : l’exercice d’une puissance commerciale par l’entente, ou bien des prix plus élevés indispensables pour couvrir les coûts liés à la concurrence entre entreprises dans des secteurs où les coûts unitaires baissent à mesure que la production augmente. De plus, le fait que les États ne disposent pas des

---

Poussé à l’extrême, ce raisonnement reviendrait à attribuer toutes les ventes à un seul producteur, si les coûts marginaux unitaires baissent systématiquement lorsque la production augmente. La création d’un monopole serait ici plus utile qu’une entente.
informations nécessaires pour répartir au mieux les parts de marché, bien que les entreprises en question soient disposées à partager ces informations, peut constituer un problème.

Chang soutient que les États de l’Asie de l’Est ont opté pour cette approche sur la formation des ententes, au moins pendant les premières phases de leur processus de développement. Selon lui, « … ils sont partis du principe que les entreprises monopolistiques ayant un niveau de production optimal constituaient moins un frein pour l’économie que les entreprises ‘compétitives’ ayant toutes un niveau de production sous-optimal » (page 10). Malheureusement, aucun responsable de l’action publique n’a jamais corrobore cette affirmation.

Sans cette alternative à la conception néoclassique, la question de savoir si les ententes devraient être traitées différemment pendant les périodes de crise économique perdrait de son intérêt. En effet, dans la mesure où les crises économiques encouragent la formation d’ententes, la réaction type serait probablement d’inviter les autorités de la concurrence à être plus vigilantes en période de crise économique. Nous examinerons ce point plus en détail dans la section suivante, avant d’aborder la deuxième acceptation des ententes de crise évoquée précédemment.

2.3 L’impact des crises sur les incitations à former des ententes

Deux commentaires s’imposent à titre liminaire. Premièrement, l’impact d’une crise sur les incitations des entreprises à former des ententes dépendra du type de crise, selon qu’elle est sectorielle, nationale, ou internationale. Dans chacun de ces cas, une crise s’entend d’une détérioration des indicateurs de performance économiques (comme la demande) à laquelle s’ajoute généralement un ralentissement de l’activité. Deuxièmement, pour analyser l’impact de chaque type de crise sur le comportement des membres d’une entente, il sera utile d’identifier les effets néfastes de la crise sur l’environnement commercial et, surtout, les incitations à former une entente ou à rester membre d’une entente. Fort heureusement, le raisonnement sous-tendant cette analyse est bien établi.

Au moment de la formation d’une entente, chaque membre potentiel devra évaluer si le gain tiré de l’adhésion (G₁) – la valeur actuelle nette des bénéfices liés à la fixation des prix, etc. – déduction faite de toute amende (F) et autres sanctions encourues après une mise en œuvre réussie du droit des ententes selon une probabilité (p), dépasse les bénéfices (G₀) tirés du maintien de la concurrence avec les entreprises rivales sur un mode traditionnel. En résumé, participer à une entente se justifie pour une entreprise si :

\[
(G₁ - pF) > G₀ \Rightarrow \left(\frac{G₁ - G₀}{p}\right) > F
\]

9 Reste à déterminer si cette théorie doit plutôt être envisagée comme une rationalisation ex post ou comme l’exact reflet de l’idée généralement défendue par les gouvernants pendant la période de croissance rapide qu’a connu l’Asie de l’Est.

Une fois qu’une entente est établie, chacun des membres devra déterminer s’il est plus avantageux pour lui de rester membre de l’entente ou de la « quitter », en d’autres termes, si déroger à l’accord d’entente – notamment en communiquant aux autorités des données sur les activités de l’entente, et éventuellement en échange d’une réduction des peines ou d’une mesure de clémence – offre la perspective d’une plus grande rentabilité à long terme que de respecter l’accord d’entente.

Différents types de crises sont susceptibles d’affecter à différents degrés l’incitation à former une entente. Par exemple, une crise sectorielle peut être liée à la réduction des profits attendus de la cartelisation d’un marché donné ($G_1$) et des profits attendus de la concurrence en l’absence d’entente ($G_0$). Une réduction des premiers peut limiter les amendes qui peuvent être infligées aux membres d’une entente sans les mettre en faillite. Ainsi, les amendes (F) appliquées pendant une période de crise peuvent s’avérer moins élevées que dans des conditions normales d’activité des entreprises, ce qui encourage par la suite la création et le maintien d’ententes.

Dans le cadre d’une crise économique internationale, qui par définition a des effets dans plusieurs pays, les facteurs mentionnés précédemment peuvent s’appliquer simultanément à plusieurs marchés sur lesquels un groupe d’entreprises exerce ses activités. En effet, dans la mesure où une crise économique mondiale est censée réduire le montant des amendes dues par les membres d’une entente dans bon nombre de pays, il se peut qu’une entente qui se serait autrement limitée à un marché national trouve alors avantageuse de se déployer sur de multiples marchés nationaux. D’autres possibilités logiques existent certainement.

Cette analyse permet de dégager deux points pertinents pour les pouvoirs publics. En premier lieu, les crises économiques ont des effets négatifs sur les mesures incitatives proposées aux entreprises pour prendre part à la constitution d’ententes. Certaines de ces mesures sont favorables à la constitution d’ententes. En second lieu, tout comme l’intensité et la portée (nombre de marchés affectés) des crises sont variables, les mesures incitatives induites par chaque crise peuvent être différentes. Il peut dès lors être dangereux de généraliser à tous les secteurs et dans le temps.

2.4 Arguments le plus souvent avancés pour justifier les ententes de crise encouragées par l’État et exemptions au droit des ententes liées aux crises économiques

Comme on l’a vu, la seconde acception des ententes de crise est relative aux ententes autorisées ou encouragées par les États en période de grave récession économique ou aux exemptions au droit des ententes tirées de la crise. Les différentes raisons justifiant une action à l’égard des ententes de crise peuvent être tirées des expériences passées et de certaines considérations théoriques mentionnées précédemment (Chang 1999, Feibig 1999). Ces raisons peuvent être les suivantes, étant entendu qu’elles ne sont pas forcément compatibles :

- Limiter ou éviter les pertes d’emploi.
- Organiser la rationalisation d’un secteur ayant un excédent de capacité.
- Promouvoir l’innovation en facilitant la coopération entre des entreprises par ailleurs rivales.
- Encourager les améliorations de productivité en facilitant la coopération avec les travailleurs.

Levenstein et Suslow (2010) étudient les mesures d’incitation créées par le fait que, pour éviter les faillites qui limitent presque à coup sûr la concurrence sur un marché, certaines autorités de la concurrence ont réduit les amendes payées par les membres d’une entente qu’elles avaient condamnés. En l’absence d’autres moyens de sanctionner les membres d’une entente et les dirigeants associés, cet aménagement peut atténuer le caractère dissuasif de la mise en œuvre de la législation sur les ententes. Stephan (2006) a également étudié les mesures incitatives potentiellement négatives que crée la prise en compte d’une possible faillite au moment de condamner les membres de l’entente à une amende.
• Stabiliser les prix, voire promouvoir le bien-être des consommateurs.
• Éviter la concurrence « coûteuse » qui prive les entreprises des bénéfices nécessaires à leur réinvestissement.
• Réserver une part du marché total aux entreprises favorisées, y compris les entreprises nationales.
• Éviter le rejet général du droit des ententes, du droit de la concurrence, et de leurs mesures d’exécution.

Le fait qu’une politique d’entente et d’application du droit des ententes en période de crise ait une ou plusieurs causes reconnues ne signifie pas que cette politique est nécessairement « justifiée ». L’évaluation des mérites relatifs d’une proposition d’action gouvernementale particulière repose de manière cruciale sur les critères d’évaluation et sur les différentes options stratégiques envisagées. S’agissant des critères d’évaluation, les économistes établissent souvent une distinction entre ce que l’on appelle les critères de bien-être économique (surplus du consommateur et bien-être total) et tous les autres critères, appelés critères non économiques.12

En allant du général au particulier, une politique à l’égard des ententes de crise pourrait en principe être justifiée par l’une des raisons suivantes :

• La politique telle qu’elle est mise en œuvre augmente davantage le surplus du consommateur (ou le bien-être économique) que toute autre politique envisagée.
• La politique telle qu’elle est mise en œuvre réalise un objectif chiffré associé à un objectif non économique convenu à un coût inférieur à toute autre politique envisagée.13
• Avec un objectif non économique14 et la volonté des gouvernants de trouver un équilibre entre cet objectif et les coûts qu’il entraîne, une entente de crise est alors réputée justifiée si la contribution connexe à l’objectif déclaré et au coût supporté – tel que les gouvernants l’évaluent – constitue l’option disponible la plus avantageuse.

Ces trois « critères » appellent plusieurs observations. Tout d’abord, une politique d’entente de crise peut avoir des répercussions dans plusieurs pays. Des autorités nationales peuvent toutefois considérer qu’une politique d’entente est justifiée si ses effets dans leur pays satisfont à l’un des critères ci-dessus. Cela soulève la possibilité qu’une entente de crise soit « justifiée » d’un certain point de vue national, mais « injustifiée » du point de vue mondial.

Ensuite, tous les effets d’une politique d’entente de crise devraient être pris en considération, y compris les conséquences politiques sur la propension à la formation ou la dissolution d’ententes dans l’avenir et les conséquences économiques de ces changements, actualisées de manière appropriée. Il se

12 Les non-économistes refusent souvent cette distinction ancienne et très régulièrement utilisée par les économistes. Il ne fait aucun doute que l’objectif de limiter les pertes d’emplois est « économique » par nature et que les transactions du marché du travail sont des transactions économiques. Cependant, la distinction est ici faite entre les critères d’évaluation qui font exclusivement référence aux gains tirés des échanges mutuels sur les marchés (bien-être des consommateurs et bien-être total) et d’autres objectifs.

13 Supposons par exemple qu’un État veuille limiter à 5 % les pertes d’emploi dans un secteur. Une politique d’entente de crise qui veille à ce que les pertes d’emploi ne dépassent pas 5 % est réputée justifiée si aucune autre mesure ne permet d’atteindre le même résultat à un moindre coût pour la société, non seulement en termes de dépenses publiques mais aussi de perte du bien-être des consommateurs et de coût des distorsions de ressources supporté par les entreprises.

14 Par exemple la croissance de la productivité dans un secteur donné.
peut que les pleins effets des nouvelles politiques d’entente de crise ne soient pas perceptibles pendant quelques années, ce qui explique l’analyse des données historiques contenue dans le présent rapport.

Enfin, il n’y a pas de raison de supposer que les préférences des pouvoirs publics nationaux sont les mêmes d’un pays à l’autre ou dans le temps. Dès lors, le fait qu’une politique particulière d’entente de crise ait été jugée « justifiée » par le passé ne signifie pas pour autant que son application est justifiée aujourd’hui. De plus, les options stratégiques existantes peuvent changer au fil du temps. Par exemple, il se peut que les États soient aujourd’hui disposés à subventionner ou renflouer les entreprises en difficulté, ce qu’ils auraient considéré comme une abomination dans les années 30. Les données provenant d’autres pays et relatives à d’autres périodes doivent être interprétées avec la plus grande précaution. Généralement, une analyse complémentaire est nécessaire pour déterminer si une politique d’entente de crise qui aurait pu se justifier dans certaines circonstances se justifie toujours dans un contexte différent. Il n’est pas acceptable d’avoir recours à des exemples historiques soigneusement choisis à l’appui de son discours et prétendre qu’ils présentent un intérêt dans le contexte actuel.

Ces considérations permettent en outre d’évaluer les données communiquées relatives aux politiques d’entente de crise. L’encadré 1 résume les interrogations qui pourraient être soulevées dans une évaluation des politiques d’entente en période de crise économique.

### Box 1. Sélection des éléments relatifs aux ententes de crise

Même si d’assez nombreux articles ont été consacrés aux politiques d’entente de crise menées dans différents pays et dans différents secteurs, ils n’ont pas toujours eu pour objet de déterminer si les mesures adoptées étaient justifiées dans le sens que nous venons de décrire. Les questions suivantes peuvent s’avérer utiles aux agents et autres membres des autorités de la concurrence qui souhaitent tirer les grandes leçons de la documentation existante pour mieux évaluer le bien-fondé des politiques d’entente de crise :

- Les différences entre la politique d’entente de crise et la politique qu’elle a remplacée, le cas échéant, sont-elles précisément et suffisamment expliquées ?
- Les justifications de l’entente de crise sont-elles formulées avec précision ?
  - Dans la négative, comment l’évaluation ultérieure tient-elle compte, à supposer qu’elle le fasse, de l’imprécision des justifications ?
- Quels critères, s’il en existe, ont servi à évaluer l’efficacité de la politique d’entente de crise ?
- Dans quelle mesure les résultats de la politique d’entente de crise ont été meilleurs que ceux des autres politiques a-t-elle été quantifiée ?
- Compte tenu des justifications affichées de la politique d’entente de crise, le choix des critères d’évaluation était-il approprié ?
  - La série de critères est-elle complète ? Existe-t-il un critère pour chaque justification ?
- Le train de mesures alternatives réalisables en matière d’entente de crise était-il suffisant ?
- L’intérêt des conclusions de l’étude dans le contexte actuel est-il vicié par des différences dans
  - les préférences des responsables de l’action publique (entre aujourd’hui et l’époque étudiée), ou,
  - le train de mesures alternatives à la disposition des décideurs, ou,
  - le type de crise économique et ses conséquences ?

Répondre à ces questions permettra aussi d’axer les évaluations sur les éléments essentiels qui permettent de déterminer l’intérêt dans le contexte actuel des études sur les politiques d’entente de crise antérieures.
Comme on le verra, les évaluations menées dans le cadre de bon nombre des études encore en cours ne suivent pas cette voie. En revanche, on connaît beaucoup mieux les motivations affichées par les gouvernants. Le fait de savoir si leurs motivations réelles correspondent à leurs motivations affichées est rarement discuté. Par ailleurs, on sait peu de choses sur la propension des gouvernants à faire des arbitrages entre différents objectifs, comme le bien-être des consommateurs et les niveaux d’emploi.

Dans cette section, nous nous sommes efforcés de définir ce qu’on entendait par la notion d’entente de crise et de la distinguer du sens ordinaire du terme entente. Nous y avons par ailleurs décrit le raisonnement controversé sur l’impact des ententes en période de crise économique, car il pourrait inciter à adopter différentes politiques en matière d’application de la législation sur les ententes et à accorder des exemptions au droit des ententes en période de crise. Sur ce dernier point, nous avons exposé les raisons justifiant l’octroi de telles exemptions et proposé un cadre de réflexion autour de la question de leur justification.

3. Éléments rétrospectifs sur les ententes de crise en période de forte récession

Pour simplifier la comparaison, les éléments relatifs aux ententes de crise présentées dans le présent rapport sont répartis en trois parties, correspondant à différents moments et à différents types de crise. Cette section offre une synthèse des informations relatives aux politiques d’entente applicables avant les périodes de crise économique. Elles se distinguent des éléments sur les ententes de crise en période de crises sectorielles. Les éléments récents disponibles sur les ententes de crise figurent dans la cinquième section.

Cette présentation particulière des éléments sur les ententes de crise mettra en évidence les différents facteurs ayant une incidence sur l’élaboration, la mise en œuvre et les conséquences des mesures applicables aux ententes de crise. Il n’est peut-être pas surprenant de constater que cette section, qui s’intéresse surtout aux crises économiques, fait une large place aux choix opérés à l’échelle du système en matière d’ententes de crise. La section suivante met en lumière des facteurs et des éléments qui sont davantage fonction de cas ou de secteurs particuliers. Tous ces éléments sont utiles à une évaluation globale des mesures en matière d’ententes de crise mises en place auparavant.

Pour faciliter leur examen, les données sont présentées selon l’ordre alphabétique anglais des pays. Il est important de souligner que ces données sont rétrospectives par nature, raison pour laquelle la législation ou les pratiques actuelles en matière de mise en œuvre de la législation ne sont pas forcément comparables à celles des époques antérieures.

3.1 Le Taipei chinois avant et pendant la crise financière est-asiatique


« L’intérêt porté à la concurrence des marchés a une origine lointaine, même si la tendance générale était de la faire cesser. Déjà le code Tang contenait des règles destinées à lutter contre la monopolisation et la fixation des prix. Mais le contrôle central de l’État a également eu son importance. La méfiance culturelle à l’égard des négociants a rapidement entraîné le recours au contrôle des prix et à la réglementation de l’État ou encore à la propriété des ressources et des moyens de production. Le secteur privé a participé aux restrictions de concurrence. Les
corporations appliquaient encore les accords de fixation des prix au début du 20ème siècle. Ce n’est qu’au milieu des années 80 que les tribunaux du Taipei chinois ont été compétents pour juger des affaires de concurrence privée sous la forme de plaintes pour tricherie des concurrents à l’égard des accords d’ententes. Dans le même temps, l’État intervenait généralement pour protéger les intérêts des entreprises » (page 130).

Même la nouvelle Loi sur le commerce loyal (FTL) promulguée en 1991 contient des dispositions prévoyant des exemptions à l’interdiction de constituer des ententes pour les ententes de crise. D’autres exemptions, qui pourraient éventuellement être invoquées en période de crise économique, ont également été incluses, comme les « spécifications uniformes (pour limiter les coûts, améliorer la qualité ou accroître le rendement), la recherche et le développement en commun, la spécialisation et la rationalisation des opérations, les ententes d’exportation, les accords d’importation, (…) et les accords entre PME visant à améliorer le rendement et renforcer la compétitivité » (page 134).

Chose intéressante, depuis qu’elle est entrée en vigueur, la FTL a été peu appliquée aux ententes de crise. À cet égard, l’OCDE (2008) observe :

« Les demandes de constitution d’ententes de crise sont rares. Il ne serait permis de mener des actions communes pour limiter la production ou freiner les réductions de prix dans un contexte de crise économique que si les conditions sur le marché avaient contribué à réduire le prix du marché en deçà du ‘coût de production moyen’ et si les entreprises étaient exposées au risque de sortie du marché ou de surproduction. On ignore si le ‘coût de production’ désigne le coût variable ou le coût total. Quoi qu’il en soit, très peu de demandes d’exemptions ont été présentées sur cette base. La FTC (Fair Trade Commission) a rejeté une demande relative à un accord de réduction des capacités entre des fabricants de fibres en 1998, au motif que les conditions n’étaient pas irréversibles et que le marché était susceptible de se redresser ». 

Cet exemple est la preuve que les autorités de la concurrence ne doivent pas toujours donner suite aux demandes de constitution d’ententes de crise. Le nombre limité de ces demandes, en particulier pendant la crise financière est-asiatique qui a très durement frappé le Taipei chinois, tributaire de ses exportations, soulève la question des autres formes d’aide dont disposaient éventuellement les entreprises pendant cette crise. Il se peut que l’existence d’autres instruments d’action ait protégé l’autorité de la concurrence de la pression exercée sur elle pour transiger sur l’application du droit des ententes.

3.2 L’Allemagne à la fin du 19ème siècle

La justification et la raison d’être apparentes des ententes de crise en Allemagne à la fin du 19ème siècle ont été détaillées dans un certain nombre d’études. Selon Cho (2003) :

« Les ententes ont été historiquement reconnues comme légitimes par les tribunaux et par les pouvoirs publics, inquiets d’une concurrence effrénée. Des entreprises indépendantes ont parfois dû adhérer à des ententes pour pouvoir exercer leurs activités de façon satisfaisante » (page 46).

15 Comme Newman (1948) l’a bien démontré, le sort des ententes allemandes pendant la Grande Dépression des années 30 a été fortement influencé par la volonté du gouvernement nazi de contrôler la production du secteur privé à la veille de la Deuxième Guerre mondiale et pendant celle-ci. Les ententes ont fait l’objet de réglementations encore plus strictes (sans toutefois être interdites) et en 1943, 90 % des ententes existantes étaient censées avoir été dissoutes ou être en cours de dissolution. Il n’est pas certain que cette expérience particulière présente un intérêt dans le contexte actuel. Le chapitre V de l’article de Gerber (1998) décrit dans le détail l’évolution du droit allemand des ententes pendant l’entre-deux-guerres.
Cela étant, Cho affirme ensuite que les ententes sont devenues un instrument important des politiques publiques au cours de périodes ultérieures de grande activité, au point qu’on a pu affirmer qu’« après la Première Guerre mondiale, le pays [était] devenu la nation du monde la plus cartellisée » (page 45). La croissance économique spectaculaire enregistrée en Allemagne entre 1870 et 1913, période pendant laquelle le pays a détrôné le Royaume-Uni en termes de production annuelle de produits industriels, a permis à certains analystes d’identifier des liens entre les ententes induites par la crise, la constitution d’ententes en général, et l’amélioration des performances économiques.

Comme plusieurs auteurs l’ont bien précisé, la position allemande à l’égard de la formation des ententes était à cette époque sensiblement différente de celles ultérieurement adoptées dans d’autres pays, notamment aux États-Unis. La citation suivante, tirée de l’étude réalisée par Kinghorn sur les ententes allemandes de la fin du 19e siècle, met en évidence non seulement les différences de points de vue mais, ce qui est plus important aux fins de la présente note, la façon dont ces différences sont liées à la justification de la constitution d’ententes. Kinghorn (1996) affirme :

« Le lien néoclassique établi entre les ententes et le monopole est un phénomène récent dans l’histoire de la pensée économique. Les premiers travaux économiques allemands sur les ‘cartels’ (Kartellen allemand) ont été rédigés par Kleinwächter en 1883. Celui-ci soutenait que les cartels s’inscrivaient dans le prolongement des corporations du Moyen-âge, et leur appliquait donc la même théorie. D’autres universitaires ont prétendu que les cartels s’ vendaient formés à partir du système des corporations, en réponse à une expansion du marché et à l’augmentation du risque qui en découle. Ils ont suggéré que les corporations, et plus tard les cartels, assuraient deux fonctions primordiales : celle d’ajuster l’offre et la demande pour stabiliser un secteur, et celle de faire obstacle aux tendances monopolistiques (producteur unique). L’idée selon laquelle la collusion entre producteurs servirait à restreindre plutôt qu’à encourager les tendances monopolistiques peut sembler antithétique au lecteur d’aujourd’hui. Les craintes exprimées par ces auteurs à l’égard du pouvoir de monopole tenaient davantage au fait qu’un gros producteur puisse monopoliser un secteur sur un marché donné, et non qu’une coopération horizontale puisse encourager une situation de monopole » (page 1).

Une de ces justifications au moins peut tenir à la formation des ententes liées à la crise dans la mesure où l’une des caractéristiques essentielles d’une crise sectorielle réside dans la grande inadéquation qui existe entre l’offre globale et la demande globale.

3.3 L’Indonésie pendant la crise financière est-asiatique


---

16 Cho fait ici référence au célèbre jugement du Reichsgericht (Cour suprême) du 4 février 1897, qui rend les accords d’ententes juridiquement contraignants, et au Décret réprimant les abus de pouvoir économique, promulgué le 2 novembre 1923, qui est le premier texte de loi formel sur les ententes. Des règles générales sur les ententes ont par la suite été incluses dans la Loi contre la concurrence déloyale.

17 Cho cite Berghahn (1986) à l’appui de cette proposition.
Pour l’instant, la KPPU a constaté que la politique [adoptée dans le secteur du sucre] pouvait donner naissance à des pratiques commerciales abusives. Les cinq importateurs (sic) dominent le marché et mènent en général entre eux des opérations d’entente en vue de maximiser leurs profits.

La KPPU se trouve face à un dilemme, car la politique sucrière a des aspects à la fois économiques et politiques. Abolir cette politique aurait de fortes répercussions économiques et politiques. En laissant entrer le sucre d’importation, les producteurs indonésiens de canne à sucre se mettront dans une position très défavorable, sachant que le sucre d’importation a déjà reçu des subventions des différents États producteurs. D’un autre côté, si cette politique est maintenue, elle constituera un obstacle à l’entrée qui pourrait engendrer des opérations d’entente dans le secteur sucrier.

La KPPU estime que l’État a l’obligation de protéger les producteurs locaux de canne à sucre contre la menace du sucre d’importation et que, même si une telle politique de protection est politiquement appropriée, elle est en soi incompatible avec la Loi n° 5/1999. Cet exemple pose la question de savoir si le gouvernement indonésien aurait pu protéger les producteurs locaux de canne à sucre sans mettre en œuvre la législation sur les ententes. Par exemple, en sa qualité de membre de l’Organisation mondiale du commerce, l’Indonésie est en droit d’imposer des droits de douane sur des importations largement subventionnées qui causent de graves dommages à la branche de production nationale. Imposer ce que l’on appelle un droit compensateur sur la canne à sucre importée aurait pu constituer une autre action possible. On ne sait pas si la KPPU a tenu compte de cette dernière option dans son analyse ou dans ses opérations de sensibilisation à la concurrence.

3.4 Le Japon pendant l’après-guerre

Les ententes ont été légalisées au Japon pour la première fois en 1925, mais l’expérience tirée de l’après Deuxième Guerre mondiale, lorsque la croissance économique du Japon s’est accélérée, présente un plus grand intérêt, notamment parce que le gouvernement japonais a créé différents types d’ententes liées à la crise. Nous nous sommes particulièrement intéressés aux données d’après-guerre, car elles concernent ce que l’on appelle les ententes de dépression et les secteurs en déclin. S’il est vrai que les interventions publiques décrites ici ont souvent été associées à la politique industrielle japonaise de l’après-guerre, notre intention n’est pas d’offrir une synthèse des débats controversés qu’elle a suscités.

Pour expliquer les ententes de récession, Weinstein (1995) analyse la relation qui les unit aux performances sectorielles, en se fondant sur une étude majeure de la politique industrielle japonaise :

« Pour Yamamura, une des principales raisons pour lesquelles les entreprises japonaises pouvaient investir dans de nouveaux équipements et matériels en prenant moins de risques que les entreprises d’autres pays tenait à ce qu’elles savaient qu’elles seraient autorisées à créer des ententes en période de récession. En consolidant les bénéfices grâce aux ententes de récession, le

18 Ce dernier point est à prendre en considération, dans la mesure où le déclin apparent d’un secteur peut avoir été créé ou consolidé par une crise économique dans ce secteur.

19 Pour différents points de vue sur cette question, se reporter à Yamamura (1982) et à Miwa et Ramseyer (2003).
MITI (Ministère du commerce international et de l'industrie) a, affirme-t-on, rendu l'investissement plus avantageux pour les entreprises japonaises, ce qui a ainsi augmenté le taux de croissance globale du Japon (page 201).

Si cette explication est juste, et compte tenu des autres caractéristiques des marges bénéficiaires, les ententes de récession devraient alors avoir pour effet d'accroître ces marges.

Okimoto (1989) soutient que les ententes de récession sont justifiées par la volonté de préserver la concurrence. Il affirme :

« La cartellisation antirécession se justifie par le fait qu'elle peut remédier aux guerres fratricides ; elle empêche la concentration du marché d'augmenter (...). Comme les fonctionnaires du MITI le faisaient valoir, il était nécessaire de contrôler la concurrence excessive sur la durée au moyen d'ententes antirécession temporaires, pour garantir le maintien d'une concurrence saine » (page 7).

Quant au raisonnement sur lequel reposent ces justifications, il semble qu'il soit fondé sur le postulat que les dépenses d'investissement des entreprises sont en grande partie déterminées par les fonds générés en interne (c'est-à-dire les bénéfices). Pour ce qui est de cette dernière justification, des hypothèses sont formulées sur le manque d'effet de discipline des nouvelles entrées ultérieures et sur l'incapacité des autorités publiques à influencer le comportement du petit nombre d'entreprises ayant survécu à la « concurrence excessive » provoquée par les récessions.

Weinstein note par ailleurs qu'entre 1957 et 1988, les mesures japonaises d'exécution du droit de la concurrence étaient laxistes et que le MITI ne disposait pas des ressources nécessaires pour faire respecter l'application de la grande majorité des accords d'ententes. Et, ce qui est peut-être encore plus révélateur, compte tenu de l'attention particulière accordée précédemment aux autres instruments d'action, Weinstein (1995) relève :

« Assurément, comparées aux avantages du traitement fiscal, des subventions, de la protection, et des prêts à faible taux d'intérêt dont certains secteurs ont bénéficié, les exemptions à la Loi antimonopole, quasiment défunte, se révèlent des formes bien dérisoires d'intervention de l'État » (page 201).


Peck, Levin et Goto décrivent comme suit le rôle joué par les ententes dans ces Mesures :

« Bien sûr, la plupart des entreprises des secteurs en déclin, au Japon comme ailleurs, fonctionnent à perte. Pour permettre aux entreprises d'assumer la charge de gérer et de financer en partie l'ajustement structurel, la politique publique japonaise cherche à accroître les ressources disponibles en organisant directement la réduction des capacités dans l'ensemble du secteur ou en autorisant la formation d'ententes à cette fin. Même lorsque les accords exprès sur les prix ou les niveaux de production sont interdits, il est à craindre qu'un processus de planification ou des ententes légales visant la réduction des capacités freinent les aspirations à se lancer dans des réductions radicales des prix qui pourraient normalement accompagner un excédent de capacité de grande ampleur. Par conséquent, les prix peuvent avoir tendance à être

20 Cette loi a été révisée en 1983.
plus élevés qu’ils ne le seraient en l’absence de telles mesures, ce qui aide les entreprises des secteurs en déclin à effectuer certains ajustements réalisés ailleurs par les créanciers ou les organismes gouvernementaux» (pages 81 et 82).

Dans les faits, les ententes sont alors créées pour ne plus faire peser le poids du financement des ajustements, en matière de main-d’œuvre et autres, sur le budget de l’État. Peck, Levin et Goto estiment que les entreprises pourraient bien avoir des raisons d’être davantage incitées à chercher de nouveaux emplois à leurs travailleurs sous-employés que ne le sont les organismes gouvernementaux, et qu’une logique d’efficience compense peut-être les pertes sèches liées à la consommation (page 90).


Plusieurs critères ont été avancés pour évaluer l’efficacité des ententes de dépression. Leur durée a déjà été mentionnée, mais peu d’autres informations complètes sont disponibles. Leur respect des demandes de réduction des capacités est un autre critère, comme leur impact sur les marges bénéficiaires et les exportations. Nous les examinerons successivement.

S’agissant des ententes de dépression japonaises autorisées de 1958 à 1972, Rotwein (1976) compare l’objectif officiel de réduction de la production mensuelle à la réduction réelle. Dans 25 % des cas, la réduction réelle était égale ou dépassait de deux tiers l’objectif de réduction, résultat que Rotwein qualifie de « pleinement efficace ». Dans 44 % des cas, la réduction réelle était inférieure de 30 % à l’objectif de réduction, résultat décrit comme étant « totalement ou presque totalement inefficace ». Les cas restants se situaient entre les deux. Sachant que les ententes de dépression étaient gérées par la Fair Trade Commission japonaise (FTC), Rotwein interprète ces résultats de la façon suivante :

« La FTC – qui était radicalement opposée aux ententes mais qui, en période de crise économique, a été légalement tenue de prendre en considération les demandes des entreprises d’en constituer – a adopté une approche assez différente [de celle du MITI]. Ici, l’ajustement spécifique de la production correspond au maximum autorisé à l’entente ; seuls les accords volontaires conclus entre les entreprises permettent de déterminer si ce maximum est atteint ou non. Si l’on en croit les annales, il semblerait que l’autorisation de la FTC de procéder à des ajustements spécifiques de la production se soit avérée vide de sens dans un grand nombre de cas. De nombreuses entreprises ‘acceptent’ en apparence de demander cette autorisation pour éviter les affrontements ouverts avec les autres intervenants du secteur, tout en n’ayant que peu ou pas l’intention de les respecter en pratique ».

En bref, Rotwein conclut que les lois qui régissent les ententes offrent peu d’informations sur leur effet en dernière analyse. D’autres facteurs interviennent, notamment les incitations accordées au secteur privé.

—

21 À strictement parler, la protection juridique des ententes de dépression durait le plus souvent un an. Cela ne signifie pas que le comportement collusoire des entreprises prenait nécessairement fin avec la suppression de la protection juridique.

22 Cela étant dit, la liste des ententes de dépression entre 1958 et 1972, dressée par Rotwein et figurant au Tableau V de ce rapport, corrobore l’affirmation de Weinstein.

Peck, Levin et Goto s'intéressent également à la proportion dans laquelle l’intervention de l’État résorbe l’excédent de capacité. Ils constatent que plus les secteurs ont tendance à être concentrés, plus les objectifs d’élimination des surcapacités sont ambitieux. Par exemple, dans le secteur concentré de la fusion de l’aluminium, le pourcentage d’élimination des surcapacités recherché en 1977 dépassait les 100 % en pratique, effet qu’ils attribuent aux entreprises japonaises qui s’attendaient à de nouvelles compressions dans ce secteur après 1977.

En termes de chiffres, ces auteurs observent une différence substantielle entre les données officielles déclarées et les chiffres réels. Dans l’ensemble, les secteurs concentrés ont tendance à réduire leurs surcapacités de 25 %, estimation qui dépasse la réduction moyenne de 18 % dans les secteurs moins concentrés (page 97). La réduction réelle des surcapacités ne semble pas non plus être liée à la présence d’ententes. En fait, la réduction des capacités est en moyenne plus grande (23 % contre 19 %) dans les secteurs qui ne recourent pas aux ententes.

Peck, Levin et Goto résument ainsi les autres données recueillies et leurs conséquences politiques :

« Premièrement, aucun des secteurs d’activités couverts par la Loi de 1978 n’a achevé sa restructuration dans le délai de cinq ans. Certains plans de stabilisation ‘provisoires’ ont entamé leur deuxième période quinquennale, et le nombre de secteurs couverts a presque doublé avec la Loi de 1983. La création d’alliances entre les entreprises est particulièrement regrettable, notamment les comptoirs de vente en commun, qui risquent de devenir permanents. Les pays démocratiques du monde entier ont constaté que les mesures provisoires qui visent à octroyer des rentes avaient tendance à devenir définitives.

Deuxièmement, bien que la réduction des capacités se soit plus ou moins déroulée comme prévu, les plans, en grande partie établis sur la base de ce que souhaitaient les entreprises, ont pu ne pas s’avérer suffisamment ambitieux. Aucun secteur n’est parvenu à éliminer totalement les capacités face à une perte de leur compétitivité internationale. L’avantage comparatif pourrait par exemple prescrire d’abandonner entièrement le secteur de l’urée. Seul le secteur de la fusion de l’aluminium s’est approché de ce résultat ; le plan de stabilisation actuel préconise une réduction des capacités de 25 % par rapport au niveau de 1975.

Troisièmement, bien que les éléments de preuve soient confus, il semble que les mesures d’ajustement structurel aient en fait été faussées par des mesures protectionnistes. On ne connaît pas, et on ne connaîtra sans doute jamais, l’ampleur exacte des obstacles informels au commerce dans les secteurs des engrais chimiques, mais les différences de prix dans le secteur de l’urée par exemple sont trop importantes pour conclure à autre chose qu’à une restriction des importations.

Malgré ces défauts, la stratégie japonaise à l’égard des secteurs en déclin semble en définitive convenir remarquablement bien à l’environnement institutionnel particulier qu’est celui de l’industrie japonaise, à la fois de grande envergure et concentrée. Il peut sembler peu réaliste d’exiger que tous les ajustements structurels soient exécutés en cinq ans, que les secteurs perdants renoncent entièrement à toutes leurs capacités, et que les mesures protectionnistes
soient totalement évitées. Il serait assurément difficile d’affirmer que les autres pays ont mieux négocié la suppression progressive de leurs secteurs perdants. Compte tenu des fortes différences, à l’échelle internationale, entre les dispositifs en matière de travail et de crédit, la stratégie du Japon consistant à choisir les perdants serait probablement inappropriée dans un environnement institutionnel comme celui des États-Unis, mais dans le contexte qui est le sien, elle a permis d’obtenir des résultats plutôt satisfaisants » (page 122-123).

Weinstein (1995) a examiné les effets des instructions administratives et des ententes approuvées par les pouvoirs publics sur les marges bénéficiaires. Il a d’abord comparé 463 secteurs de l’économie japonaise de 1963 et, sur cette base, a estimé l’impact de la part des expéditions, dans un secteur soumis à une entente, sur le rapport valeur ajoutée du secteur/ventes totales, variable qu’il a utilisée pour calculer les marges bénéficiaires sectorielles moyennes. À travers une large gamme de spécifications économétriques, Weinstein a découvert que la présence d’ententes réduisait (et non pas augmentait) les marges bénéficiaires moyennes d’un secteur. Weinstein a ainsi interprété ce constat :

« Il [le constat économétrique] laisse entendre que, d’une manière générale, les restrictions horizontales, quelles qu’elles soient, mises en place par ces ententes semblent avoir été dominées par des facteurs qui ont entraîné une baisse des marges. Cela peut s’expliquer par le fait que le traitement fiscal favorable et les subventions inconditionnelles qui composaient souvent les politiques en faveur des secteurs touchés par la crise entraînaient une hausse de la production ou conduisaient à de nouvelles entrées sur le marché (ou éventuellement à un ralentissement des sorties). Ces facteurs semblent avoir dominé l’éventuel impact positif des restrictions horizontales sur les marges » (pages 208-210).

Weinstein établit alors une distinction entre les différents types d’ententes (les ententes de récession, celles engendrées par les instructions administratives, et celles créées pour faciliter l’ajustement du secteur). D’après lui, les estimations économétriques qui en ont été tirées laissaient entendre que les marges bénéficiaires dans les ententes de récession étaient probablement inférieures en raison de la plus grande concurrence sur la qualité à laquelle les entreprises se livraient. Il résume ainsi ce constat :

« Les ententes de récession, qui ont sans doute été mises en œuvre avec le plus grand soin, semblent s’être soldées par des hausses de prix de 1 à 2 % sur leur durée moyenne de 10 mois et par des améliorations de la qualité (ou à des changements dans les conditions de vente) qui ont entraîné une augmentation de la demande de 1 % sur la même période. Les instructions administratives semblent avoir eu un impact identique ou moindre, et les ententes dans les secteurs couverts, un impact sur les prix inférieur à 5 %. Comme les données concernant la façon dont ces ententes étaient censées influer sur la fixation des prix et la production indiquent d’une manière générale que l’État tentait d’inciter les entreprises à réduire leur production et/ou à augmenter leurs prix dans la limite de 10 à 20 %, ces résultats laissent supposer que ces ententes sont loin d’avoir atteint leurs objectifs » (page 220).

3.5 La République de Corée dans les années 70 et 80

Avant la crise financière est-asiatique, le droit coréen autorisait diverses ententes justifiées par les crises. En réponse aux brusques augmentations du prix des matières premières, la Corée a promulgué la Loi sur la stabilisation des prix et le commerce loyal (PSFT, Price Stabilisation and Fair Trade Act) en 1975. Selon Yang (2009), cette loi, notamment par le jeu de ses dispositions touchant les ententes, visait surtout à inciter au contrôle des prix et à limiter les hausses de prix. Yang résume ainsi l’application de la PSFT :

« Malgré les dispositions relatives aux ententes contenues dans la Loi PSFT, seuls trois cas d’entente ont été mis en cause par les autorités de 1976 à 1979. Ainsi, même après la promulgation de la Loi PSFT, l’État ne s’est pas montré très énergique en matière de réglementation des ententes. Il a même approuvé plusieurs ententes de rationalisation et de dépression. Avec l’autorisation de l’État ou sous son égide, plus de 250 nouvelles associations professionnelles ont été créées pendant cette période, qui se sont avérées très actives. En privilégiant la stabilisation des prix à court terme, la Loi PSFT n’a pas touché la structure du marché et n’a en fait réglementé que son comportement. Il s’agissait à l’origine d’une loi sur le contrôle des prix, et la réglementation des ententes devait servir à stabiliser les prix à court terme » (page 622).

La Loi sur la réglementation des monopoles et le commerce loyal (MRFT, Monopoly Regulation and Fair Trade Act), promulguée en 1980, prévoyait des exemptions spécifiques à l’une des dispositions interdisant les ententes en matière de restructuration industrielle et de recherche et développement. Deux de ces exemptions pouvaient en principe être invoquées pendant une période de forte récession ou crise économique nationale. Le souci de la Loi de concilier l’interdiction des ententes avec les « instructions administratives » du gouvernement coréen aux entreprises, en vue par exemple de former une entente, présente peut-être un intérêt comparable. Aucune entente constituée à la suite d’une loi formelle ou d’un règlement du gouvernement coréen ne pouvait faire l’objet d’une action publique au titre de la MRFT. Cela étant, si les entreprises choisissaient de se conformer à des instructions administratives informelles de constituer une entente, elles n’étaient alors plus protégées contre les poursuites judiciaires. La différence de traitement entre instructions administratives formelles et informelles a été confirmée par les tribunaux (Yang 2009).

L’une des leçons que les autres pays peuvent tirer de cette caractéristique particulière de l’expérience coréenne tient à l’influence sur la réaction du secteur privé aux instructions administratives relatives aux ententes de crise que peut avoir l’éventuelle protection juridictionnelle accordée à ceux qui se conforment à d’autres formes d’instructions administratives.

3.6 Les États-Unis pendant la Grande Dépression

Si la Grande Dépression aux États-Unis est généralement réputée avoir débuté en 1929, le régime relatif à la collaboration des entreprises, qui était alors d’actualité, a été mis en place plus tôt par l’Administration Hoover (Miller, Walton, Kovacic et Rabkin 1984). Le mouvement « associationnaliste », mené par Herbert Hoover, d’abord en tant que secrétaire au Commerce puis comme Président des États-Unis, considérait que l’autorégulation de l’industrie était préférable aux mesures d’exécution formelles du droit de la concurrence, s’agissant en particulier des ententes. On a pu dire que le principe à la base de ce mouvement avait nuit aux pratiques des organismes gouvernementaux en matière de mise en œuvre de la législation, y compris de la Federal Trade Commission (FTC). Le principal instrument était ce que l’on appelait la conférence sur les pratiques commerciales (trade practice conference). Comme Miller, Walton, Kovacic et Rabkin l’expliquent :

Ces auteurs font observer qu’à la fin des années 20, la priorité de la FTC en matière de respect de la législation était donnée à ces conférences. De juillet 1927 à novembre 1929, près de 60 conférences de ce type ont été organisées par la FTC. Avec la Grande Dépression, les partisans de la coopération entre les entreprises d’une part, et entre l’État et les entreprises d’autre part, ont dû peser de tout leur poids en faveur des exemptions au droit de la concurrence prévues dans la législation. En particulier, les pressions se sont accentuées en vue de permettre aux « associations professionnelles de fixer les prix, répartir la production, et opérer des fusions et acquisitions »23, toutes pratiques normalement interdites.

L’intervention a rapidement pris de l’ampleur quand le Président Franklin D. Roosevelt est entré en fonction en 1933. Dans le cadre du New Deal qu’il proposait, le National Industrial Recovery Act (NIRA) a été adopté. Cette loi est à l’origine de la création de la National Recovery Administration (NRA) qui a négocié de nombreux accords ou « codes » (comme on les appelait alors) pour des secteurs ou des industries particuliers, qui définissaient le fonctionnement du marché des produits (comme les prix et les niveaux de production), le fonctionnement du marché du travail (salaires et conditions connexes), les plans d’investissement, et d’autres pratiques des entreprises. Le Président Roosevelt n’a pas caché le fait que ces codes de fonctionnement des ententes pourraient au fond avoir pour effet de contourner le droit des ententes en vigueur et, lorsqu’ils étaient appliqués, de remplacer efficacement le droit des ententes par la réglementation24. Ces réglementations ont été, en fait, convenues entre l’État, le secteur privé, et les syndicats de travailleurs.

Sur les motivations des partisans de cette intervention de l’État, Miller, Walton, Kovacic et Rabkin indiquent :

« En effet, la ‘principale force de motivation’ des associations professionnelles tenait à leur volonté d’améliorer les prix grâce à des ‘pratiques concertées’. Même les groupes de travailleurs étaient heureux de s’assurer une contrepartie sous la forme de salaires plus élevés, et il ne fait aucun doute que les administrateurs publics ont apprécié leur tout nouveau pouvoir sur le commerce et les affaires » (page 18).

Par la suite, la Cour suprême des États-Unis a été amenée à juger inconstitutionnels le NIRA et son équivalent agricole, en s’inspirant des activités de l’Agricultural Adjustment Administration (AAA).

---


Toutes ces pratiques ont abouti à ‘ escroquer le consommateur’. Elles ont en outre porté atteinte aux plus petites entreprises, les plus grandes présidant les délibérations pour l’élaboration des codes. Qui plus est, bien que les pratiques de la NRA soient parvenues à accroître les bénéfices et les salaires de bon nombre des entreprises favorisées et de leurs salariés, l’institution a, dans une large mesure, empêché la reprise après la Grande Dépression » (page 18).

Avec le temps, davantage de données ont été collectées, ou communiquées, tant sur les entreprises qui avaient signé les codes que sur les autres. Cela a facilité des évaluations plus formelles et statistiques des effets des dispositions du NIRA relatives aux ententes. Les paragraphes suivants offrent une synthèse des conclusions de ces évaluations, concernant notamment la justification des ententes de crise, par rapport à d’autres interventions publiques et au regard d’autres critères pertinents.

Taylor (2002, 2007) présente des données sur le rôle joué par les ententes autorisées par le NIRA dans la contraction de la production. Les facteurs non associés aux ententes qui peuvent avoir affecté les niveaux de production sectorielle, comme les dispositions du NIRA relatives aux salaires et aux dépenses publiques, sont particulièrement pris en compte. Par ailleurs, d’autres analystes ont depuis suggéré que le respect des dispositions de bon nombre de codes de fonctionnement d’ententes semble avoir pris fin en 1934 (ce que l’on a appelé la « compliance crisis » ou crise des défactions), et ce point doit également être pris en compte. Globalement, dans son étude de 2002 sur les niveaux de production des ententes de juillet 1933 à mai 1935 (au moment où le NIRA a été invalidé par la Cour suprême des États-Unis), Taylor

Dans une analyse séparée, Taylor et Klein (2008) mettent au point et évaluent une théorie des jeux dans laquelle les entreprises adhèrent aux codes NIRA tant qu’elles estiment que le non-respect de ces codes conduirait à un boycott des consommateurs. À l’origine, ces boycotts étaient lancés par le gouvernement américain, qui retirait l’emblème Blue Eagle aux entreprises convaincues de violation des codes NIRA. Mais cette sanction a perdu de sa force. Comme Taylor et Klein (2008) l’affirment : « Cependant, à mesure que les consommateurs perdaient de leur enthousiasme pour le Blue Eagle, les entreprises se rendaient compte que le mécanisme de conformité du NIRA (…) était dans l’ensemble très accommodant et les entreprises ont commencé à quitter les ententes. Lorsque ces défactions restaient impunies, les autres entreprises revoyaient leurs sanctions à la baisse, entraînant ainsi de nouvelles défactions. ‘Lorsque la section contentieuse de la NRA a commencé à engager pour de bon des poursuites contre les contrevenants, la crise de respect était déjà trop avancée’ (page 264). Cette constatation nous rappelle, si besoin en était, que les pouvoirs publics n’ont pas besoin de se limiter à sanctionner les ententes de crise du secteur privé ; ils peuvent aussi chercher à influer sur le respect des accords d’entente de crise ».

25 Dans une analyse séparée, Taylor et Klein (2008) mettent au point et évaluent une théorie des jeux dans laquelle les entreprises adhèrent aux codes NIRA tant qu’elles estiment que le non-respect de ces codes conduirait à un boycott des consommateurs. À l’origine, ces boycotts étaient lancés par le gouvernement américain, qui retirait l’emblème Blue Eagle aux entreprises convaincues de violation des codes NIRA. Mais cette sanction a perdu de sa force. Comme Taylor et Klein (2008) l’affirment : « Cependant, à mesure que les consommateurs perdaient de leur enthousiasme pour le Blue Eagle, les entreprises se rendaient compte que le mécanisme de conformité du NIRA (…) était dans l’ensemble très accommodant et les entreprises ont commencé à quitter les ententes. Lorsque ces défactions restaient impunies, les autres entreprises revoyaient leurs sanctions à la baisse, entraînant ainsi de nouvelles défactions. ‘Lorsque la section contentieuse de la NRA a commencé à engager pour de bon des poursuites contre les contrevenants, la crise de respect était déjà trop avancée’ (page 264). Cette constatation nous rappelle, si besoin en était, que les pouvoirs publics n’ont pas besoin de se limiter à sanctionner les ententes de crise du secteur privé ; ils peuvent aussi chercher à influer sur le respect des accords d’entente de crise ». 73
constate que « les codes NIRA de fonctionnement des ententes ont eux-mêmes provoqué une réduction de 10 % de la production manufacturière » (page 8) au cours des mois précédant la crise des déflections de 1934. Les taux de salaires plus élevés, payés au titre du programme NIRA, ont objectivement réduit la production des ententes.

L’étude de Taylor de 2007 va plus loin et recherche parmi les sept dispositions contenues dans des codes de fonctionnement d’ententes celles qui ont affecté la production de 66 secteurs d’activité américains avant, pendant, et après la période d’application du NIRA. Compte tenu de la crise de l’indiscipline et des variables macroéconomiques susceptibles d’affecter la production industrielle (comme les dépenses publiques), l’entrée en vigueur d’un code de fonctionnement d’une entente avait tendance à limiter la production industrielle. Les secteurs d’activité soumis à des codes plus complexes (plus longs) et prévoyant des quotas de production, des obligations d’archivage des données, ainsi que de nouvelles limites de capacité, ont connu les baisses de production les plus fortes. Ces constatations confirment que les modalités de mise en œuvre des ententes de crise, notamment lorsque la mise en œuvre concerne l’application de l’accord d’entente, sont une caractéristique importante des effets d’ensemble des politiques publiques.

Deux études s’intéressent également au fait de savoir si l’adoption d’un code NIRA n’a pas réduit sur le moyen terme le niveau de concentration minimum nécessaire pour maintenir une entente dans un secteur. En effet, il peut être instructif de penser en termes de « niveau de concentration critique » au-delà duquel les entreprises d’un secteur peuvent maintenir une entente sans intervention de l’État. La question est alors de savoir si ce niveau critique a baissé dans les secteurs dans lesquels un code NIRA était en vigueur. Comme le NIRA avait perdu toute valeur juridique en 1935 pour les secteurs dans lesquels un code NIRA était applicable, Alexander (1994) a recherché si le niveau de concentration critique d’un secteur en 1937 était inférieur à celui de 1933, et a découvert que le premier était en moyenne de 37 % et le second de 60 %. Cette conclusion a toutefois été contestée par Krepps (1997) qui affirme que les résultats d’Alexander s’expliquent par l’échantillon de données utilisé et que la variation des niveaux de concentration critiques dans les secteurs où aucun code NIRA n’a été signé n’a pas été prise en compte. Toujours est-il que les éventuelles conséquences à plus long terme des ententes de crise à court terme peuvent présenter un intérêt pour d’autres pays.


Les conclusions d’Alexander et Libecap ont en fait des répercussions sur l’évaluation de l’impact du NIRA. Comme on l’a vu, une crise des déflections sévissait en 1934. De plus, toutes les entreprises n’approuvaient pas les codes NIRA. D’après la plupart des données que les auteurs ont collectées, les

---

26 Plus précisément, Taylor (2007) prend en compte les données mensuelles de janvier 1927 à décembre 1937, représentant un total de 120 observations sur chacun des 66 secteurs d’activité.

27 Pour plus de détails, se reporter aux sections II et III de leur document.

28 Cela ne veut pas dire que le secteur agricole n’était pas hétérogène, comme l’indique la tentative des producteurs d’oranges américains de former une entente, décrite dans la section suivante.
entreprises les plus petites et les moins performantes sont celles qui ont le plus bénéficié des ententes de crise instituées par le NIRA. Alexander et Libecap affirment, page 381 :

« Il y a cependant lieu d’expliquer pourquoi les entreprises n’ont pas pu s’unir derrière une autorité plus fiable, qui disposait en puissance de plusieurs milliards de dollars pour renforcer les ententes qui auraient pour effet d’accroître les bénéfices. Nous estimons que les entreprises étaient simplement trop fragmentées pour prétendre à une telle unité, fragmentation favorisée par l’hétérogénéité des coûts. Il y n’avait, dès lors, aucune ‘carotte’ comparable au programme de subvention agricole susceptible de pousser les entreprises à coopérer au programme industriel.

Les codes industriels contenaient aussi des dispositions relatives aux salaires minimums, au volume horaire maximum et à la négociation collective, qui n’existait pas dans les programmes agricoles et qui limitaient à l’évidence le soutien aux entreprises à l’égard de la NRA. Il est communément admis que les dispositions du NIRA relatives au travail constituaient une contrepartie offerte par les entreprises pour obtenir le droit de former une entente. Cela n’explique pas pourquoi la coalition industrielle qui soutenait le NIRA a été si inefficace au point de devoir faire des concessions aux défenseurs des travailleurs, alors que les grands agriculteurs étaient en mesure de marginaliser les ouvriers agricoles autant que les petits agriculteurs. Nous prétendons que les concessions faites aux travailleurs étaient la conséquence d’un affaiblissement de la coalition industrielle, dont l’impuissance était liée aux désaccords existant au sein des entreprises et entre elles quant à l’intérêt des programmes d’entente – désaccords qui s’expliquaient par l’hétérogénéité des coûts.

Les conflits ultérieurs sur les questions liées au travail dans le cadre des codes étaient par ailleurs souvent dus à l’hétérogénéité des coûts. Par exemple, dans les secteurs tels que celui des textiles en coton, dont les activités étaient importantes à la fois dans les États du nord et du sud, les entreprises du nord ont souvent tenté de recourir aux dispositions uniformes relatives aux salaires minimums pour supprimer les avantages en termes de coût du travail dont jouissaient les entreprises du sud. Les avantages liés au coût du travail dont bénéficiaient les grandes entreprises à moindre intensité de main-d’œuvre dans certains secteurs ont accentué les revendications des petites entreprises de voir intégrer dans les codes le pouvoir de fixation de prix ».


En somme, les constatations tirées du régime américain des ententes de crise pendant la Grande Dépression laissent supposer que ses effets économiques (principalement la réduction de la production) sur un secteur dépendaient pour l’essentiel du contenu de l’accord d’entente et de l’hétérogénéité des coûts dans ce secteur. Il est à noter que, bien que ces études empiriques tiennent compte des effets des autres mesures gouvernementales, elles ne font toutefois état d’aucune comparaison formelle entre l’efficacité relative des ententes de crise et celle d’autres formes d’intervention publiques.

Comme le confirment également les données fournies dans la section suivante, l’expérience du gouvernement américain s’est rarement limitée à autoriser ou encourager la constitution d’ententes privées de crise. Il semble que, dès que les autorités s’engagent dans cette voie, d’autres formes d’interventions publiques prennent le pas. Comme les membres des ententes et leurs clients en sont conscients, on ne peut pas empêcher les personnes privées intéressées de chercher à influencer les politiques publiques face à la
constitution de telles ententes. Dans ces circonstances, il peut s’avérer aléatoire de tenir pour acquis que les interventions de l’État visant à créer des ententes de crise sont les meilleures interventions possibles et que celui-ci s’abstient de toute autre intervention. L’expérience tend à montrer que les propositions de mesures adaptées aux ententes de crise sont tempérées par ces réalités.

Pour rassembler les données présentées dans cette section, la diversité des expériences en matière d’ententes de crise nous est bien sûr très précieuse. Certaines autorités de la concurrence ont réussi à s’opposer aux nombreuses voix qui se sont élevées pour exiger l’octroi d’exemptions au droit des ententes, d’autres non. Le rôle des autres organismes gouvernementaux dans la transmission des instructions administratives, potentiellement en contradiction avec les objectifs du droit national de la concurrence, pose des questions importantes sur les opérations de sensibilisation à la concurrence. Et, ce qui est peut-être le plus révélateur, une fois que les pouvoirs publics commencent à intervenir dans la création et la protection des ententes, un processus plus durable d’intervention sur les marchés s’engage alors souvent, semblant indiquer qu’à trop s’attacher aux avantages et inconvénients des exemptions au droit des ententes, on peut laisser passer d’importantes demandes d’intervention pendant les crises économiques.

4. Exemples historiques d’ententes de crise spécifiques à un secteur

Extraire les données pertinentes relatives aux ententes de crise dans des secteurs spécifiques ne s’est pas avéré aussi simple que prévu (avant de consulter la documentation disponible). Dans certains cas, une entente sectorielle peut avoir été formée en réponse à une crise économique ou à un contexte de crise dans un secteur, sans que son évolution ultérieure soit fortement liée à la crise. Par ailleurs, le fait qu’une entente soit célèbre (voire tristement célèbre) peut n’avoir que peu de rapport avec le fait qu’elle est liée à une période de crise. Nous ne nous intéressons qu’aux aspects de ces ententes liés à la crise, et non aux évolutions de l’environnement commercial ou aux réglementations publiques qu’elles ont connues. Les exposés ci-dessous sont présentés dans l’ordre chronologique.

4.1 La formation d’une entente induite par l’État dans les chemins de fer du Massachusetts, 1872-1896

Les chemins de fer nécessitent des capitaux considérables et, une fois en service, les coûts marginaux constituent une partie de leurs dépenses fixes récurrentes. Un tel contexte peut être à l’origine d’une guerre ou d’une érosion des prix, et entraîner des pertes potentielles considérables pour les investisseurs. Dobbin et Dowd (1997) dépeignent un « régime de politique favorable aux ententes » dans les chemins de fer américains au cours des années 1872 à 1896, période pendant laquelle « tous les chemins de fer américains, quelle que soit leur taille, ont rejoint une entente » (page 508). Ce régime a pris fin en 1897, quand la Cour suprême des États-Unis a jugé que le Commerce Act et le Sherman Act s’appliquaient aux chemins de fer.

---

29 Par exemple, il n’est pas interdit de penser que le différend relatif à la potasse opposant l’Allemagne et les États-Unis, qui a atteint un point critique en 1910 et 1911, était davantage lié aux conditions particulières des ententes de potasse au début du 20e siècle, à l’époque en Allemagne qu’aux origines liées à la crise des premier et deuxième ententes allemandes de potasse.

30 C’est la raison pour laquelle sont exclus les comptes rendus de l’impact des ententes sectorielles qui ne font pas référence aux crises économiques. Compte tenu de l’objet du présent rapport, le plus important est celui de Kinghorn (1996), consacré à l’étude des ententes allemandes dans les secteurs du charbon, du fer, et de l’acier au début du 20e siècle. La comparaison des prix et de la production des membres des ententes allemandes avec leurs homologues britanniques et américains à certains moments et dans le temps a conduit Kinghorn à conclure que ces trois ententes allemandes avaient été à l’origine d’une augmentation de la production et d’une baisse des prix. « De plus, le mode de fonctionnement des ententes a stabilisé la demande, ce qui a incité leurs membres à faire appel à des technologies de production plus efficaces » (page 339).
Dobbin et Dowd se sont particulièrement intéressés à la situation de l’État du Massachusetts. Après 1871, « le Massachusetts a commencé à encourager les ententes dans le secteur des chemins de fer comme moyen de stabiliser les prix et protéger les capitaux publics » (page 509). En 1875, le Conseil des commissaires des chemins de fer du Massachusetts aurait affirmé que la tarification concurrentielle avait conduit à « des luttes féroces et à de violentes fluctuations de courtes durées ». En 1878, ces commissaires soutenaient que « la concurrence non maîtrisée ne constituait qu’une étape du développement des chemins de fer et devait aboutir à une certaine forme d’association réglementée » (cités par Dobbin et Dowd, 1997, page 509).

Selon un autre argument avancé devant le Congrès américain, les ententes permettaient aux chemins de fer de continuer à exister en toute indépendance, et empêchaient ainsi toute fusion susceptible d’entraîner une monopolisation. Dobbins et Dowd (1997) défendent également la thèse selon laquelle la cartellisation soutenait les investissements dans le secteur des chemins de fer, de sorte à harmoniser davantage l’offre et la demande. Leur raisonnement est le suivant :

« Lorsqu’elles [les ententes dans le secteur des chemins de fer] se déroulaient sans heurts, la construction des lignes ferroviairesavançait lentement et suivait la demande. Lorsque les ententes ont été démantelées, les chemins de fer ont construit de nouvelles lignes en anticipant la demande dans l’espoir de conquérir de nouveaux marchés. Les ententes conduisaient les entreprises en place à supposer que le secteur serait stable et prévisible, et les candidats entrepreneurstrouvaient prometteuses les relations de coopération entre les chemins de fer » (page 510).

Dobbins et Dowd (1997) ont étudié l’entrée de chaque ligne ferroviaire du Massachusetts, non seulement pendant la période de l’entente, mais aussi pendant la période de 1826 à 1922, qui a connu différents régimes. Au total, 317 lignes ont été créées de 1826 à 1922, dont un grand nombre de 1845 à 1855 au moment où les capitaux financiers britanniques étaient disponibles à l’investissement. Leurs principales conclusions sur les politiques d’entente sont ainsi résumées :

« Les politiques favorables aux ententes ont réduit la concurrence par les prix entre les entreprises en place et ont ainsi stimulé la création d’entreprise. La politique antitrust a encouragé la concurrence et par là même découragé la création d’entreprise, bien que les recettes du secteur et le kilométrage des voies ferroviaires aient continué d’augmenter. Une période d’essor, davantage due au développement des entreprises en place qu’à la création de nouvelles lignes, a ensuite succédé aux comportements anticoncurrentiels » (page 524).

4.2 Les accords d’ententes allemands sur le prix de la potasse de 1876 et 1883

La première entente inspirée par le secteur privé et induite par la crise pour laquelle nous disposons d’informations détaillées concerne peut-être le secteur allemand de la potasse. Selon le compte rendu circonstancié de Tosdal, l’Allemagne était le plus grand fournisseur de sels de potasse au tournant du 20e siècle : alors qu’en 1870, les mines allemandes produisaient un peu moins de 300 000 tonnes métriques de ces sels, en 1909, le volume annuel produit dépassait sept millions de tonnes métriques. Tosdal (1913) rapporte que le premier accord de fixation des prix signé entre les producteurs allemands a été négocié en 1876 après quatre années de chute des prix, qui avaient contraint un certain nombre de fournisseurs à

31 D’après Dobbins et Dowd, les créations de lignes ferroviaires de 1872 à 1896 étaient « moyennement importantes ». Pendant le régime de lutte contre les comportements anticoncurrentiels de 1897 à 1922, leur nombre était « proche de zéro » (page 515). Une analyse statistique ultérieure des caractéristiques des créations met en évidence une différence des coefficients estimés pour les deux régimes.

32 La potasse désigne un groupe de sels de potassium d’origine naturelle et les produits qui en sont dérivés. La potasse était notamment utilisée pour fabriquer du verre, du savon et de l’engrais.
cesser leur production (page 145). Quand elles ont renoué avec les bénéfices l’année suivante, certaines entreprises ont dénoncé l’accord, qui a alors pris fin.

Tosdal insiste sur les vastes investissements nécessaires à l’exploitation minière et à la transformation de la potasse ainsi que sur la crainte que « l’alternative de la libre concurrence et des bas prix, qui comportait certainement le risque de lourdes pertes pour l’ensemble des mines, et à terme celui d’en ruiner certaines, soit rejetée pour association » (page 146). Un nouvel accord entre les producteurs a été signé le 21 octobre 1883, dont Tosdal (1913) affirme qu’il a eu les effets suivants :

« L’industrie de la potasse a été florissante pendant les dix années qui ont suivi la conclusion du premier accord. L’association, qui regroupait l’ensemble des producteurs, a été en mesure de maintenir les prix à la hausse et, dans le même temps, d’accroître la demande en potasse. Le dispositif n’a pas été perturbé par le rattachement de nouvelles mines. Les avantages de la réglementation étaient trop appreciables pour envisager un retour à la libre concurrence à l’expiration des accords existants » (pages 147-148).

Tosdal explique en outre que les « graves » conséquences de la dépression de 1901 et 1902 avaient eu d’importantes répercussions sur la négociation pour la formation du deuxième « groupement » de producteurs de potasse allemands.

4.3  L’entente entre les producteurs américains de bromure de 1885 à 1902

De 1885 à 1902, les producteurs américains de bromure ont convenu de constituer un « groupement » dans le cadre duquel « une entreprise indépendante, non constituée en société, achetait par contrat l’ensemble de la production de chaque producteur de bromure 33. Ces contrats garantissaient un prix aux producteurs et leur interdisaient de vendre à un autre acheteur. Les contrats étaient expressément subordonnés à la participation de l’ensemble des producteurs » (Levenstein 1997, page 119). L’entente avait une dimension internationale puisqu’un accord, conclu uniquement avec les principaux fournisseurs étrangers, à savoir des entreprises allemandes, engageait celles-ci à ne pas exporter à destination des États-Unis, et en retour interdisait aux entreprises américaines d’exporter.

Cette entente s’est formée à la suite de baisses importantes des prix du bromure. Avant la guerre civile américaine, le bromure était vendu plus de six USD la livre ; en 1875, le prix était tombé à 30 USD la livre. Les prix devaient encore baisser de 7 % entre 1875 et 1880 et à nouveau de 30 % entre 1880 et 1884. Même si Levenstein n’établit pas expressément de lien entre la création du groupement et la baisse brutale des prix, une telle baisse est généralement associée aux « crises sectorielles ».


« Avec l’établissement du groupement des producteurs de bromure en 1885, cette évolution [du prix] s’est inversée. Le prix du bromure de potassium a augmenté de 23 % au cours de l’année. Le prix moyen du bromure à l’époque du groupement NBC [National Bromine Company] (1885-1891) était plus élevé d’environ 10 % que le prix moyen des cinq années précédentes. Lorsque les contrats NBC ont pris fin en 1891, les prix ont retrouvé leur niveau d’avant le groupement, après une chute de près de 30 % » (page 121).

33 Généralement, le bromure n’existe à l’état naturel que sous forme de sels. Les composés de bromure composés sont utilisés dans diverses industries manufacturières.
Des évolutions qualitatives analogues ont été observées à propos des prix du bromure lors de la mise en œuvre du groupement suivant en 1892 et de sa dissolution en 1902. Levenstein (1997) montre que les prix étaient plus stables pendant les périodes de groupements. Elle note par ailleurs que « rien n'indique que les modifications de la demande ou des coûts puissent expliquer les fluctuations de prix observées » (page 122).

4.4 L’Entente internationale de l’acier, 1926-1933

D’après Barbezat (1989), le désordre causé par la Première Guerre mondiale a eu pour effet de rendre le climat plus propice à la coopération entre les entreprises rivales des secteurs de premier plan de l’Europe des années 20. « En réaction à ces chocs, les entreprises ont choisi la coopération… » (page 435). Toutefois :

« ....après les profonds bouleversements que connurent leurs entreprises à la suite de Première Guerre mondiale, les fabricants d’acier de l’Europe occidentale n’ont pas été en mesure de faire fonctionner un système complexe d’ententes internationales, composées de groupes nationaux unifiés. Mais, les pays ont pu convenir ensemble d’une politique industrielle simple, en se mettant d’accord sur les parts de marché et en protégeant leurs marchés nationaux [contre l’acier importé]. Ils ont ainsi pu restructurer leurs propres industries sidérurgiques nationales et mettre en place des structures nationales, faisant ainsi un pas vers les ententes d’exportation postérieures à 1933, qui ont été formées par de puissants groupes nationaux, dont elles étaient tributaires » (Barbezat 1989, page 436).


L’EIA a souffert de l’instabilité générée par les désaccords entre ses membres sur les volumes de quotas souhaitables et les sanctions en cas de non-respect de ces quotas. Les représentants allemands se sont amèrement plaints de ces deux aspects à l’occasion d’une réunion qui s’est tenue les 8 et 9 juin 1927. Des efforts ont été faits pour répondre aux demandes allemandes à cet égard et en 1929, les sanctions pour surproduction ont été réduites de 75 %.

Selon des sources récentes que cite Barbezat, l’aspect le plus efficace de l’entente était l’interdiction ou la limitation des exportations entre les membres de l’EIA. « Grâce au contrôle des importations, les membres pouvaient exploiter au mieux leur puissance commerciale sur leurs marchés nationaux (…). Cela a permis la constitution d’ententes nationales » (Barbezat 1989, page 438). Par exemple, en 1929, ces accords ont permis aux producteurs français de reconstruire leur propre industrie et de former ensuite leurs propres ententes nationales. C’est de ces accords de l’EIA qu’a été tiré le « principe » selon lequel le marché national était réservé aux producteurs nationaux.

La coopération entre les membres de l’EIA a cessé avec la chute de la demande globale liée à la Grande Dépression. À partir de là, affirme Barbezat, les différences entre les membres de l’EIA étaient trop importantes pour permettre de maintenir une coopération utile. Chaque membre a alors protégé son marché national au profit de ses producteurs nationaux (page 439).
4.5 La politique agricole américaine pendant la Grande Dépression, concernant notamment le sucre et les oranges

Pendant la Grande Dépression, l’intervention du gouvernement américain – et des gouvernements fédéraux d’ailleurs – dans le secteur agricole a pris diverses formes, ce qui complique l’évaluation de l’impact précis de ces interventions qui avaient pour objet de créer ou d’encourager les ententes de crise. S’il est vrai que l’impact sur le fonctionnement du marché est particulièrement intéressant dans ce cas précis, il y a lieu de rappeler que le succès (ou autre) réel ou supposé des interventions apparentées à des ententes peut avoir encouragé d’autres formes d’intervention publique, dont certaines sont toujours en place et d’autres ont été adoptées par d’autres pays. L’accent est mis sur deux produits agricoles ayant donné lieu à une analyse d’impact sur le fonctionnement du marché ces dernières années, à savoir le sucre et les oranges.

La réglementation mise en œuvre par ce que l’on appelle les Sugar Acts de 1934 a été appliquée jusqu’en 1974. Bridgman, Qi et Schmitz (2009) proposent une analyse qualitative et quantitative de l’impact de cette réglementation sur les prix du sucre et sur la répartition de la production entre les producteurs de sucre américains. Bien que ces derniers aient proposé leurs propres accords d’entente au titre du NIRA, qui prévoyait des restrictions sur l’importation de sucre (en particulier en provenance de leurs concurrents cubains), ces plans ont été rejetés par le gouvernement américain et une entente de compromis, conduite et mise en œuvre par l’État, a été instituée après la promulgation du Jones-Costigan Act de 1934.

Par la suite, les restrictions concernant les ventes et les importations de sucre ont été complétées par trois mesures des autorités qui avaient pour objectif de faire exécuter les accords (d’entente) existant dans ce secteur. Premièrement, l’entrée sur le marché de nouveaux agriculteurs était interdite, tout comme l’expansion des agriculteurs en place. Chaque agriculteur se voyait accorder une part du volume de betteraves qui pouvait être produit et une part de la surface qui pouvait être cultivée. Deuxièmement, une subvention était accordée aux producteurs de betteraves qui s’étaient conformés à leurs parts. Le coût de cette subvention était pris en charge par une taxe sur le sucre blanc, ce qui revenait pour l’essentiel à transférer les revenus des raffineurs de sucre aux producteurs de betteraves. Troisièmement, pour que l’industrie de transformation de la betterave (comprenant les raffineurs de sucre blanc) ne récupère pas la subvention accordée aux producteurs de betterave dans ses contrats d’achat, l’État est intervenu sur les conditions de négociation de ces contrats.

Ces accords pouvaient limiter la concurrence (nationale et étrangère) et ont été à l’origine d’une segmentation profonde des marchés du sucre américains et mondiaux. D’après Bridgman, Qi et Schmitz (2009):


35 Reich (2007) affirme que les initiatives réglementaires américaines de la période du New Deal ont influencé les politiques agricoles israéliennes ultérieures, en particulier l’exemption de l’agriculture au regard du droit de la concurrence israélien.
« L’entente a eu un double effet sur les prix. D’abord, les prix américains ont été dissociés des prix mondiaux. Ensuite, en limitant la concurrence nationale, les prix du sucre aux États-Unis ont augmenté pour atteindre approximativement le niveau général des prix (dans le cas du prix du sucre brut à New York) alors qu’ils avaient précédemment chuté. Dans le cadre de l’accord d’entente, le gouvernement avait promis aux consommateurs un prix ‘équitable’ pour le sucre, ce qu’il a en pratique interprété comme signifiant que les prix du sucre brut à New York devaient atteindre approximativement le niveau général des prix. L’entente a donc atteint cet objectif de prix ‘équitable’ de façon tout à fait satisfaisante » (page 9).

Ces accords ont en outre mis en évidence que le prix du sucre raffiné par rapport à ses matières premières avait considérablement augmenté, laissant supposer une forte hausse de la rentabilité dans ce secteur. Cela étant, Bridgman, Qi et Schmitz indiquent ensuite que le prix d’intervention, les subventions et le régime fiscal ont diminué la qualité de la betterave sucrière et réduit l’extraction et les taux de récupération. Les producteurs étaient payés au volume de betteraves produit et non au volume de sucre extrait, ce qui a inévitablement eu des répercussions pour eux. Parmi les éléments cités, les auteurs font remarquer que, avant 1934, au début de l’entente, on récupérait en moyenne 310 livres de sucre par tonne de betteraves. Pendant l’entente, le taux de récupération est tombé au niveau très faible de 240 livres. Depuis le démantèlement de l’entente en 1974, le taux de récupération a augmenté.

En somme, la mise en œuvre du Cartel du sucre conduite par les autorités américaines a eu un prix, en termes de rendement de la production de betteraves sucrières et de raffinage. Les consommateurs payaient des prix plus élevés, alors que les autorités prenaient des dispositions pour éliminer les sources de concurrence externes et internes. Cette entente est instructive en ce qu’elle rappelle d’abord que les pouvoirs publics ne doivent pas prendre leurs entreprises et leur réglementation à leurs propres conditions et ensuite que, lorsque les autorités interviennent pour influencer et mettre en œuvre les ententes de crise, rien ne garantit que l’intervention aboutira (quels que soient les critères d’évaluation utilisés) ou n’aura pas de conséquences négatives qui n’avaient pas été prévues lors de la création de l’entente. Les conséquences négatives les plus susceptibles de se produire sont les distorsions induites par les pouvoirs publics sur la répartition de la production entre les membres de l’entente, jointes aux sollicitations de ceux d’entre eux dont le rendement n’est pas bon en vue d’obtenir d’une meilleure répartition des parts de marché ou de la production.

À la différence du Cartel du sucre pendant le New Deal aux États-Unis, Hoffman et Libecap (1994) montrent que l’entente sur le prix des oranges a présenté de nombreuses anomalies qui ont compromis son fonctionnement au cours des années 30, et cela en dépit du fait qu’entre 1930 et 1933, le prix nominal des oranges avait chuté de 75 % (quand les prix généraux à la consommation baissaient de 22 %). Par la suite, les principaux producteurs d’oranges des États-Unis, provenant des États de Floride et de Californie, ne sont pas parvenus à se mettre d’accord. Les producteurs californiens les mieux organisés 36 ont accepté en 1933 un contrat de commercialisation géré par l’État, qui prévoyait des restrictions hebdomadaires sur les expéditions d’oranges entre États. La même année, les producteurs et les transporteurs de Floride ont refusé un accord qui était quasiment identique à celui signé par leurs concurrents californiens (page 193). Deux autres accords ont par la suite été proposés aux producteurs de Floride, mais il a fallu attendre 1939 pour qu’ils y acceptent un, qui ne contenait pas de restrictions sur les expéditions d’oranges de Floride.

36 Il est à noter que ces lois promulguées en Californie qui sont à l’origine de la création d’une agence d’État chargée de réglementer les expéditions interétatiques de produits agricoles spécifiques, comme les oranges. L’intervention publique au niveau des États a ainsi permis de surmonter le problème des pratiques concertées entre les producteurs d’oranges californiens au niveau national. Ce constat peut présenter un intérêt pour d’autres États qui connaissent plusieurs niveaux d’administration ayant une compétence partagée sur une question particulière, telle que la réglementation économique d’un secteur ou d’une forme de commerce.
Hoffman et Libecap (1994) résument ainsi les conclusions de leur analyse des négociations au sein de ce secteur pendant les années 30 :

« L’examen des négociations entre les producteurs d’oranges de Floride et l’Agricultural Adjustment Administration de 1933 à 1939 en vue de mettre en œuvre des accords de commercialisation montre à quel point il a été difficile de former des ententes dans le secteur agricole, même dans un contexte économique relativement favorable. Les différences d’intérêt et les conflits sur les règles des quotas ont empêché la répartition au pro rata des expéditions interétatiques d’oranges en provenance de Floride et la mise en place d’un système national de répartition au pro rata pour contrôler les expéditions en provenance de Floride, de Californie et du Texas. Si une entente sur l’ensemble du pays n’a pas pu se former pour les oranges, il est très probable qu’elle ne pourra pas se former non plus pour le blé ou le maïs. Par conséquent, comme la réglementation agricole a continué de se développer, l’accent a davantage été mis sur d’autres moyens d’accroître les revenus agricoles » (page 217).

Outre ces problèmes contractuels, la baisse des revenus personnels disponibles pendant la Grande Dépression et la forte élasticité de la demande d’oranges par rapport au revenu ont fait le lit de l’effondrement de la demande au cours des années 30, qui a affecté les quotas convenus pour chacun des producteurs et des États. Par ailleurs, la superficie totale cultivée a augmenté en Californie et en Floride de 21 et 79 % respectivement, de 1933 à 1940, ajoutant ainsi aux mauvais résultats de l’entente. En fin de compte, Hoffman et Libecap rapportent que les prix des oranges n’ont plus jamais atteint leurs niveaux d’avant la Dépression.


Le silicium, sous la forme de ferrosilicium, sert à la désoxydation et à la solidification des alliages dans la production de fonte, de fer et d’acier. Même si la composition du ferrosilicium peut varier en fonction de sa teneur en silicium, sa composition réelle a chuté de 40 % en termes réels de 1974 (niveau le plus élevé depuis la guerre) à 1987 (USGS 1998). Le rythme de la baisse du prix réel a été constant et à peu près fixe dans le temps.


Un aspect intéressant de cette entente tient à ce que ses membres utilisaient la loi antidumping américaine à l’encontre des importateurs de ferrosilicium, contrôlant ainsi ce que l’on pourrait appeler des sources étrangères d’approvisionnement désordonnées ou peu coopératives. En 1993 et 1994, à la suite de pétitions reçues par la Commission du commerce international des États-Unis (US International Trade Commission) pour qu’elle enquête sur les importations de ferrosilicium, celle-ci a découvert que ces importations en provenance du Brésil, de la Chine, du Kazakhstan, de Russie, d’Ukraine, et du Venezuela avaient « nuit de façon substantielle » à l’industrie américaine. À la suite de cette constatation, entre autres, des droits de douane supplémentaires ont été appliqués aux importations de ferrosilicium en provenance de ces pays. La Commission du commerce international des États-Unis, et c’est tout à son honneur, est revenue sur sa constatation en 1999 après avoir notamment reçu la preuve du complot de fixation des prix, après quoi les droits antidumping ont finalement été supprimés. Malgré cela, cinq producteurs nationaux de ferrosilicium ont formé un recours contre ce revirement (USGS 1999). Le recours aux lois antidumping pour faire exécuter les volets internationaux de cette entente contraste avec la négociation sans condition du partage des marchés pratiquée dans certaines ententes plus anciennes, décrites dans cette section.
La présente section visait à présenter brièvement les principales caractéristiques d’un certain nombre d’ententes de crise. La forte baisse des prix, peut-être engendrée par la baisse de la demande globale, entraîne souvent la formation de telles ententes, bien que les bouleversements causés par d’autres facteurs (comme une guerre antérieure) aient joué un rôle dans certains cas. La volonté d’éviter une concurrence « coûteuse » dans les secteurs connaissant de fortes dépenses d’investissement et de faibles coûts marginaux, de manière à stabiliser les taux de rentabilité et ainsi stimuler une progression de l’investissement dans un secteur, a aussi constitué un facteur d’explication.

L’intervention des pouvoirs publics s’est rarement réduite à encourager la formation d’ententes en période de crise et à exonérer ces accords des dispositions du droit de la concurrence. Une fois que les autorités étaient impliquées, elles cherchaient souvent (ou croyaient chercher) à influencer les conditions des accords d’entente et leur stabilité. La mise en œuvre des ententes qui en ont résulté relevait souvent d’un partenariat public-privé. De plus, chaque fois que la concurrence des entreprises étrangères constituait une source importante de rivalité, les ententes de crise prévoyaient des dispositions pour exclure les importations, ajoutant une dimension internationale aux conséquences de cette forme d’intervention publique.

Quant à l’efficacité de ces ententes, il est frappant de voir que des considérations relatives à leur stabilité sont souvent mentionnées, ce qui confirme l’intérêt déjà ancien de cette question. S’il est vrai que des arguments ont été avancés, qui suggèrent que les ententes de crise ont augmenté ou stabilisé les prix, les effets néfastes sur les acheteurs n’ont que rarement été estimés. De plus, rien n’a jamais été entrepris pour évaluer l’ampleur des avantages réputés de ces ententes, ou pour démontrer que la formation d’une entente était le moyen le plus efficace d’obtenir ces avantages par rapport à d’autres politiques publiques.

En dernière analyse, quelles conclusions tirer de ces constatations ? On ne peut pas nier que les ententes de crise ont existé et qu’elles ont eu quelques incidences sur les prix. Mais il n’a pas été établi que les effets néfastes des ententes de crise sur les acheteurs aient été plus que compensés par les avantages d’autres sources. La preuve existe peut-être pour les ententes créées dans une conjoncture économique normale, mais elle n’a pas été rapportée pour les ententes de crise. Par ailleurs, il n’a jamais été démontré que les ententes de crise et les règlements associés aient atteint les objectifs fixés par les pouvoirs publics (comme la stabilisation des dépenses d’investissement) à un moindre coût pour la société que d’autres mesures mises à leur disposition en période de crise économique.

5. **Données tirées de la récente crise économique mondiale**

Les dispositions incitant les ententes privées à maintenir la confidentialité de leurs opérations expliquent qu’il n’existe aucun compte rendu complet des ententes induites par la récente crise économique mondiale (qui a duré de 2007 jusqu’à 2009 au moins). En fait, une recherche approfondie des articles consacrés dans les médias aux « ententes de récession », aux « ententes de dépression », et aux « ententes de crise » a révélé que le sujet avait été peu évoqué.37

Une tentative d’utiliser la récente crise économique mondiale pour justifier la création d’éventuels accords s’apparentant à des ententes mérite d’être mentionnée. Le projet surnommé « Baltic Max Feeder » a été suscité par l’effondrement du commerce mondial de 2008 et par la diminution des recettes qui en a

37 Les recherches approfondies qui ont été nécessaires pour rédiger ce document d’information n’ont fait apparaître aucune étude d’entente de crise qui prétende faire cette démonstration empirique. Cela ne signifie pas que de telles études n’existent pas.

38 À l’inverse, ces deux dernières années, près de 5 000 journaux et autres médias ont abordé le thème des « ententes ». Néanmoins, le mot entente a de nombreuses significations et n’est pas synonyme d’entente de récession, d’entente de dépression, ou d’entente de crise.
découlé pour le secteur du transport maritime. Le projet est censé concerner les navires plus petits (jusqu’à 1 400 evp) que les porte-conteneurs utilisés en Europe. Ces navires sont connus sous le nom de « navires de collecte » du fait précisément qu’ils transportent des conteneurs à destination et en provenance de ports où accostent les hauturiers étrangers, et de ports plus petits dans lesquels ces grands navires ne peuvent pas accoster. Il avait été proposé de réduire la capacité et d’accroître les recettes des armateurs en augmentant les frais d’affrètement. Cette dernière suggestion a été retirée après l’opposition des affréteurs et à la suite d’une proposition de dédommagement des armateurs pour la mise hors service des navires de collecte (c’est-à-dire, leur retrait du marché)\textsuperscript{39}.

Le 15 janvier 2010, la Commission européenne a annoncé qu’elle examinerait ces propositions d’accords dans le cadre de l’article 101 du Traité sur le fonctionnement de l’Union européenne. Les déclarations ci-dessous, tirées du communiqué de presse officiel qui a suivi sont riches, d’enseignements :

> « Le projet ‘Baltic Max Feeder’ a été développé et promu par Anchor Steuerberatungsgesellschaft GmbH, un cabinet allemand [privé] de conseil fiscal, afin de répondre au problème de surcapacité qui affecte le secteur des porte-conteneurs et qui entraîne une baisse du taux d’affrètement de ces navires »\textsuperscript{40}.

> La Commission craint notamment que ce projet, en vertu duquel les propriétaires européens de navires soient convenus de prendre collectivement en charge les coûts afférents à la mise hors service de navires de collecte, n’ait pour but de réduire la capacité et, par conséquent, de provoquer une augmentation des taux d’affrètement de ces navires »\textsuperscript{41}.

Le 26 mars 2010, la Commission européenne a annoncé qu’elle clôturait son enquête dans cette affaire. Le communiqué de presse officiel précisait :

> « L’enquête visait à établir si le projet n’avait pas pour but de réduire la capacité et, par conséquent, de provoquer une augmentation des taux d’affrètement de ces navires. Si cela s’était confirmé, cela aurait vraisemblablement été assimilé à une infraction à l’article 101 du traité, qui interdit les accords restrictifs de concurrence.

> En réponse à l’ouverture de la procédure par la Commission, Anchor Steuerberatungsgesellschaft GmbH, l’entreprise à l’origine du projet, a informé la Commission en février que ce dernier avait été abandonné. Dans ces circonstances, la Commission a estimé qu’il n’y avait aucune raison de poursuivre l’examen du dossier et a décidé de le classer »\textsuperscript{42}.


\textsuperscript{40} Un seul agent a ensuite cherché seul à surmonter le problème des pratiques concertées traditionnellement associé à l’organisation d’ententes.


Un autre exemple de recours à la formation d’entente sous l’impulsion des pouvoirs publics pendant la récente crise économique mondiale concerne le marché du caoutchouc. D’après les déclarations de certains ministres parues dans la presse et selon un rapport du Programme des Nations Unies pour le Développement, au cours de l’année 2009, l’Indonésie, la Malaisie, et la Thaïlande auraient réduit leurs exportations de caoutchouc de 915 000 tonnes. L’explication suivante a été donnée sur le site Internet de l’organisme indépendant de surveillance en période de crise Global Trade Alert43:

« Il semblerait que les producteurs de caoutchouc indonésiens, malais et thaïlandais, agissant dans le cadre du Conseil international tripartite sur le caoutchouc (ITRC), aient cherché à limiter les exportations de caoutchouc de manière à faire grimper les prix mondiaux. Ces trois pays sont les principaux exportateurs de caoutchouc au monde, représentant 70 % de l’approvisionnement total d’après une récente estimation.

Des chefs d’entreprise et des associations professionnelles de premier plan, qui sont cités dans un grand nombre de nouveaux rapports, confirment l’information ci-dessus. En outre, un récent rapport du Programme des Nations Unies pour le développement fait référence à ce ‗projet’. Cela étant, il n’est pas certain que depuis juillet 2009, cette action concertée ait eu des résultats positifs. Selon un récent commentaire : ‗On a pu observer une certaine faiblesse des contrats à terme sur le caoutchouc asiatique en dépit de la décision annoncée par les membres du Conseil international tripartite sur le caoutchouc que sont la Thaïlande, l’Indonésie et la Malaisie de retirer 915 000 tonnes du marché en 2009 pour soutenir les prix’. Il a été estimé qu’une réduction d’une telle ampleur correspondait à un sixième du volume total des ventes mondiales.

‘D’après la citation suivante, trouvée sur le site internet officiel de la Thaïlande, la coopération présumée a débuté au dernier trimestre 2008’. Le ministre adjoint de l’Agriculture et des Coopératives, Teerachai Saenkaew, a indiqué que les trois pays s’étaient rencontrés le 29 octobre lors d’une réunion extraordinaire entre le Conseil international tripartite sur le caoutchouc et le Consortium international du caoutchouc. Ils ont discuté des moyens d’améliorer la situation du secteur du caoutchouc, qui subissait une baisse des prix suite à la crise financière mondiale »44.

L’analyse des données sur les courants d’échanges internationaux de caoutchouc tend à montrer que cette mesure aura probablement une incidence sur les exportations de caoutchouc entre ces trois nations et leurs 115 partenaires commerciaux.

Plutôt que de recourir aux ententes de crise, lors de la récente crise économique mondiale, bon nombre d’États ont proposé des sauvetages et des subventions aux fabricants, producteurs et prestataires nationaux. S’il est vrai que les sauvetages dans le secteur financier ont particulièrement retenu l’attention, beaucoup d’autres entreprises ont reçu le soutien financier de leurs gouvernements45. D’après Global Trade Alert, 43 Dans un souci de transparence, il convient de préciser que l’auteur coordonne cette initiative mondiale, qui a pour objet de surveiller les politiques nationales mises en œuvre pendant et après la récente crise économique mondiale. Les élus de premier plan, les hommes et femmes d’affaires influents, et les analystes ainsi que les journaux, font fréquemment référence aux articles de Global Trade Alert. Les universitaires font maintenant eux aussi appel à cette base de données, qui aspire à devenir la meilleure source d’information sur les nouvelles discriminations dans l’élaboration des politiques publiques.


45 De manière plus générale, la précédente crise économique mondiale a suscité un regain d’intérêt pour les « politiques industrielles ». Aggarwal et Evenett (2010) décrivent de façon détaillée les différentes formes d’intervention publique utilisées pour un certain nombre de pays de la région Asie-Pacifique, notamment
Alert, dont les rapports reposent autant que possible sur des sources officielles, au moins 164 dispositifs de subvention et de sauvetage ont été mis en œuvre depuis novembre 2008 par les États, au bénéfice d’entreprises n’exerçant pas dans le secteur financier. L’enquête (provenant essentiellement de sources gouvernementales) a fait apparaître que ces dispositifs avaient faussé les conditions de concurrence, notamment en faisant peser la responsabilité des fermetures d’usines, du chômage, etc., sur les partenaires commerciaux dans les marchés concernés.

Quel intérêt présente pour cet exposé le recours général aux sauvetages et aux subventions en dehors du secteur financier pendant la précédente crise économique mondiale ? Ces dispositifs servent à rappeler aux gouvernants qu’il existe des alternatives à la création d’ententes de crise. Il est donc important que les partisans de ces ententes expliquent comment leurs propositions permettent d’atteindre les objectifs nationaux affichés à un coût moindre que les mesures alternatives prises par les pouvoirs publics, comme les subventions.

Le fait qu’il existe si peu de preuves manifestes des exemptions au droit des ententes accordées lors de la récente crise économique mondiale tend en effet à montrer que de nombreuses ententes tacitement approuvées par les pouvoirs publics n’ont pas été détectées ces dernières années, ou que ces pouvoirs publics ont écarté les ententes au profit des opérations de sauvetage. Peut-être la possibilité d’accéder immédiatement au crédit, au moins jusqu’au début de la période d’austérité à la mi-2010, a-t-elle fait pencher la balance en faveur des subventions.

À l’inverse, lorsque les marchés de capitaux se sont fermés aux entreprises commerciales en 2008 et 2009, certains ont avancé que « l’argent était roi » et que les sauvetages organisés par les pouvoirs publics avaient apporté ce dont les entreprises avaient besoin à l’époque, c’est-à-dire d’un financement à court terme. Comme la Grande Dépression des années 30, et conformément à ce que laisse entendre l’analyse de Libecap (1989) évoquée ci-dessus, la récente crise économique mondiale a été à l’origine de toute une gamme d’interventions des pouvoirs publics, dont certaines pourraient en principe constituer une alternative à la formation d’ententes de crise. En conséquence, les observations qui suivent dans le texte principal sur la comparaison entre les subventions et les ententes de crise renvoient avec la même vigueur aux autres formes d’intervention publique observées depuis le début de la récente crise économique mondiale.

46 Ce total ne prend pas en compte les dispositifs de financement des exportations ni les subventions à la consommation, qui peuvent tous deux deaser « l’égalité des chances » entre les entreprises.

47 La Commission européenne a mené des enquêtes sur certains systèmes mis en œuvre par les États membres de l’Union européenne, aux termes desquelles elle a adressé aux autorités d’exécution des courriers dont le contenu a été rendu public. Ensemble, ces lettres attestent d’un nombre considérable de subventions accordées par les États européens à leurs entreprises lors de la précédente crise. Cette dernière remarque ne signifie pas que les subventions européennes sont nécessairement plus importantes que dans d’autres pays industrialisés ayant eu recours aux subventions.

48 Du point de vue du droit de la concurrence, les distorsions du processus concurrentiel créées par les dispositifs de subvention et de sauvetage n’impliquant que les entreprises nationales sont également à prendre en considération. Global Trade Alert ne qualifie de « contestables » que les subventions et les sauvegarde qui sont susceptibles de porter atteinte aux intérêts commerciaux étrangers et aux entreprises nationales ; dès lors, le total de 164, indiqué dans le texte, sous-évalue le nombre total des subventions qui faussent la concurence mises en œuvre depuis novembre 2008. Les rapports concernant ces dispositifs sont accessibles sur le site www.globaltradealert.org.

49 Il pourrait, bien sûr, y avoir un lien entre les sauvegarde et les ententes de crise. Un gouvernement pourrait accepter d’apporter son soutien financier sous réserve que les parties concernées forment une nouvelle entente ou en rejoignent une existante. Il serait intéressant de vérifier si de telles conditions ont déjà été appliquées.
terme (« des liquidités ») (Evenett 2010). Sans ce financement, les fournisseurs et les salariés seraient congédiés, ce qui aggraverait encore la situation économique. À l’inverse, la formation d’ententes permet de relever les prix et de stabiliser les ventes, ce qui peut accroître les flux de trésorerie mensuels sans toutefois résoudre le problème de l’insuffisance manifeste des besoins de financement.

Le paragraphe précédent ne cherche pas à mettre les dispositifs de subvention et de sauvetage sur un piédestal par rapport aux ententes de crise. Une évaluation complète des effets de ces dispositifs pourrait bien établir qu’ils sont plus néfastes que les effets des ententes ou, d’ailleurs, plus néfastes que certains autres instruments d’action. L’essentiel est de poser en principe que les interventions des pouvoirs publics en période de crise doivent être comparées les unes aux autres, plutôt que de se contenter de la preuve qu’une intervention a, ou pourrait avoir, un impact sur les marchés pertinents.

6. Considérations pertinentes pour l’élaboration des politiques

L’expérience passée et récente décrite dans les trois parties précédentes permet de dégager un certain nombre de facteurs qui devraient servir de base à l’approche adoptée par les responsables de l’action publique vis-à-vis des ententes formées au cours des crises sectorielles, nationales et internationales. Cela ne signifie pas que ces facteurs ont la même pertinence dans tous les secteurs ou pays, ni même dans les pays dans lesquels les niveaux de développement sont identiques. Après tout, rien n’indiquait que les conclusions de l’évaluation de l’expérience japonaise décrite précédemment sur les secteurs en déclin soient applicables à d’autres pays connaissant une industrialisation rapide, comme cela a été le cas de nombreux pays en développement.

L’un des principaux enseignements de la récente et brutale crise économique mondiale est que toute action à l’égard des ententes de crise devrait tenir compte de l’existence et de l’intérêt potentiel de mesures gouvernementales alternatives. Par exemple, le recours général aux subventions lors de la dernière crise aurait sans doute eu sur les prix dans les secteurs affectés un effet inverse à celui des ententes de crise, à savoir que les subventions auraient sans doute conduit à une baisse des prix et à de possibles bénéfices pour les consommateurs. Il est par ailleurs possible que la rapidité avec laquelle les subventions peuvent être attribuées et ainsi améliorer le bilan des entreprises à court terme aurait fait de cette forme d’aide un instrument préférable à formation des ententes de crise.

La question de savoir si les pouvoirs publics disposent des ressources financières nécessaires pour maintenir les subventions est un autre facteur à prendre en considération, s’agissant en particulier des pays en développement. Pour les pays dont les budgets sont limités, les subventions n’offriront peut-être pas une alternative appropriée aux ententes de crise. Cela étant, les alternatives aux ententes de crise ne vont pas nécessairement de pair avec des dépenses publiques. Plutôt que de permettre aux entreprises supposées rivales de régulièrement limiter la concurrence entre elles – conséquence de l’autorisation de former des ententes de crise – les autorités peuvent décider de fixer temporairement les prix, ou les prix minimums, appliqués par les concurrents. S’il est vrai que beaucoup de choses peuvent dépendre des produits et services en cause et de la structure du marché avant la crise, le point essentiel tient ici à ce que certaines interventions – même des interventions relevant des compétences d’une autorité nationale de la

Cet argument semble mieux à même d’expliquer l’absence d’ententes de crise dans les pays où les autorités publiques qui avaient accès aux marchés de capitaux étaient disposées à financer les déficits budgétaires, en partie creusés par le coût de ces subventions et sauvetages. Si des éléments devaient ultérieurement indiquer que ces ententes de crise ont été davantage utilisées dans les pays dont les gouvernements ne pouvaient pas financer de tels déficits, le lien entre l’accès au financement et la formation d’ententes pourrait alors être établi. Bien entendu, même dans les pays n’ayant que peu ou pas de moyens de financer des déficits budgétaires plus importants, il s’est avéré que les gouvernements avaient employé des mesures autres que la constitution d’ententes pour « venir en aide » aux entreprises nationales. Parmi ces mesures figurent la réglementation visant à limiter la concurrence, et le protectionnisme.
concurrence – pourraient avoir moins d’effets néfastes sur le processus concurrentiel et les intérêts des consommateurs que les ententes de crise.  

Pour étudier les mesures alternatives aux ententes de crise, il convient de garder à l’esprit que les crises économiques font souvent apparaître d’importants décalages entre la capacité de production installée (offre) et la demande dans certains secteurs de l’économie. La réaffectation des ressources à d’autres secteurs que ceux connaissant des surcapacités constitue une part importante du processus d’ajustement après une crise, et toutes les mesures visant à simplifier cet ajustement pourraient bien s’avérer préférables à des mesures comme les ententes de crise, qui peuvent décourager la mise au rebut des capacités inutiles. Les fusions et acquisitions sectorielles constituent un moyen de restructuration bien connu dans les économies de marché. Ces fusions peuvent réduire la concurrence entre les entreprises qui ont survécu, mais leurs effets sur les acheteurs peuvent s’avérer beaucoup moins néfastes que dans une entente de crise, qui élimine toute concurrence entre entreprises rivales. D’autres mesures, telles que les politiques actives du marché du travail et les transferts, visent à limiter les coûts de restructuration.

Les paragraphes ci-dessus laissent entendre que des mesures alternatives aux ententes de crise sont possibles, certaines faisant jouer le droit de la concurrence, d’autres non. Les autorités de la concurrence des pays industrialisés et en développement ont un rôle très clair à jouer dans la mise en œuvre des mesures de crise qui, à long terme, menacent le moins possible le processus concurrentiel. En conséquence, dès lors que l’on compare le mérite relatif des ententes de crise aux mesures alternatives, le plaidoyer pour la concurrence, au sein et en dehors de l’administration publique, pourrait alors jouer un rôle constructif.

De manière plus générale, les ententes de crise altèrent les décisions de production et de consommation. Pire, la constitution d’ententes ne peut avoir qu’un effet indirect sur les résultats attendus par les pouvoirs publics, par exemple en matière d’emploi. Dans cette perspective, un instrument d’action plus direct, tel qu’une subvention salariale temporaire liée à la crise, permettrait de se concentrer sur l’incitation à l’emploi des personnes. Pour toutes ces raisons, l’évaluation des ententes de crise est forcément relative et les processus de décision devraient alors prévoir la comparaison d’un certain nombre de solutions de rechange possibles.

Une autre leçon intéressante tirée des données rétrospectives présentées plus haut tend à montrer que l’intervention de l’État entraîne d’autres interventions et que les interventions exceptionnelles satisfont rarement aux attentes des pouvoirs publics quelles qu’elles soient ou aux pressions qu’ils subissent d’autres intervenants. Établir ou permettre une entente de crise pourrait de ce fait constituer le prélude à une intervention durable et de grande portée des pouvoirs publics dans un secteur, comme cela a été le cas du secteur agricole dans certaines économies industrialisées pendant la Grande Dépression (et encore plus tôt dans d’autres cas). Ces considérations pratiques, qui rappellent le rôle joué par certains groupes d’intérêts dans l’élaboration des politiques, devraient être prises en compte au moment de décider des mesures de formation, d’examen, et de démantèlement des ententes de crise.

On trouvera ci-après une description de certaines des options d’élaboration d’un processus visant à autoriser les ententes de crise.

En ce qui concerne l’appropriation d’une entente de crise, il est avant tout essentiel de définir des critères d’évaluation des propositions d’autorisation. L’adoption d’un trop grand nombre de critères compliquera les évaluations, car les arbitrages entre les différents critères sont difficiles. En effet, un

51 Il ne s’agit pas d’un simple exemple hypothétique. La contribution de la Jordanie à ce Forum mondial fait spécifiquement référence à la mise en place temporaire de prix minimums pour certains produits et services pendant une crise économique.
processus d’évaluation en apparence technocratique peut être définitivement compromis si des choix de critères arbitraires, dissimulés et imprévus sont possibles.

Bien que les pouvoirs publics aient le choix entre des analyses *ex ante* et *ex post*, l’analyse *ex ante* est malgré tout celle qui lève le plus les inquiétudes sur les effets secondaires néfastes du comportement étudié. L’analyse doit reposer *sur des éléments concrets*, rendre compte de la connaissance du secteur en question, quantifier l’ensemble des coûts et des avantages du comportement préconisé, et *justifier publiquement* toute décision prise.

L’*approbation soumise à conditions* doit être envisagée, en particulier quand l’organisme chargé de l’analyse peut trouver un meilleur moyen d’atteindre les objectifs affichés des pouvoirs publics, et à un moindre coût. La vérification qu’une proposition d’arrangement entre entreprises est le meilleur moyen d’atteindre ces objectifs doit faire partie intégrante du processus d’approbation, ce qui exige de porter une attention suffisante aux *autres interventions viables des pouvoirs publics*, y compris celles qui sortent du cadre du droit de la concurrence.

La question se pose de savoir quel organisme doit mener ces analyses et ce qui arrive lorsqu’un organisme public autre que l’autorité de la concurrence est choisi. Dans ce dernier cas, l’option du *plaidoyer pour la concurrence* est possible, bien que les efforts nécessaires pour en assurer l’efficacité puissent varier d’un pays à l’autre. Même si l’autorité de la concurrence entreprend l’analyse, elle peut être tenue, par les lois et règlements d’application, de prendre en compte des facteurs qu’elle laisse habituellement de côté. Elle peut par ailleurs être obligée de consulter des parties dont les intérêts ne concordent pas nécessairement avec la mise en œuvre du processus concurrentiel.

Compte tenu de l’évolution avec le temps de la situation du marché, et notamment des priorités des pouvoirs publics, il est judicieux de définir les procédures d’examen de toute entente de crise approuvée. L’examen doit déterminer si l’entente reste nécessaire (compte tenu des objectifs affichés des pouvoirs publics), si sa portée est suffisante pour atteindre ces objectifs, si d’autres mesures prises par les autorités ne seraient pas plus efficaces pour atteindre ces objectifs, et il doit enfin déterminer la durée de toute éventuelle prolongation (soumise ou non à conditions).

En s’assurant que tout processus d’examen *repose sur des éléments concrets*, on donne à l’évaluation un fondement plus scientifique, écartant ainsi les arguments avancés par analogie dans d’autres cas d’entente. Dans les précédentes sections de ce rapport, nous avons mis en évidence la fragilité des données concrètes sur les ententes de crise et la nécessité de comparer les effets éventuels des ententes prévues à d’autres interventions possibles en période de crise.

7. **Observations finales**

Au cours des précédentes crises économiques, les pouvoirs publics ont créé des ententes ou en ont encouragé la formation. Certains sont allés plus loin en faisant appliquer les accords connexes ou en veillant à ce que les tribunaux le fassent. Après presque vingt ans de pratiques législatives et répressives strictes en matière d’entente, imaginer qu’un État puisse créer des ententes en réaction à la récente crise économique mondiale représenterait un brusque revirement du droit et de la politique de la concurrence. Quoi qu’il en soit, on peut se demander si ces ententes de crise peuvent se justifier. Sur la base des enseignements tirés des cas d’ententes de crise ci-dessus, le présent rapport avait pour but de décrire et d’évaluer les lignes d’action envisageables les plus appropriées. De nombreuses données sectorielles, nationales, et internationales pertinentes ont été détaillées.

Une grande attention a été accordée aux raisons justifiant la création d’ententes de crise, notamment parce que ces raisons laissent souvent entrevoir un cadre d’action alternatif qui pourrait servir les mêmes
objectifs que ceux des pouvoirs publics. De la même façon, les raisons invoquées par les autorités semblent avoir été différentes selon les pays et selon les secteurs. Certaines des raisons identifiées ici sont très difficiles à rapprocher de l’idée de développement du bien-être des consommateurs, ce qui augmente le risque que, en cas de crise économique, les préférences des autorités de la concurrence ne soient pas conformes à celles des élus. Le plaidoyer pour la concurrence a un rôle immédiat à jouer mais, s’il parait devoir se révéler contre-productif, une autorité de la concurrence pourra alors se sentir obligée de modifier temporairement ses pratiques en matière d’application du droit, en tenant compte des objectifs des responsables de l’action publique en période de crise.

De nombreuses données ont été examinées pour rédiger le présent rapport, mais l’évaluation empirique des ententes de crise reste incomplète. On sait peu de choses, par exemple, de l’ampleur des effets néfastes des ententes de crise sur les acheteurs. Toujours est-il que les ententes de crise ont souvent eu tendance à limiter la production et augmenter les prix, bien que cela ait été contesté dans certains cas. À la lumière de ces constatations, il serait difficile de prétendre que les ententes de crise sont dénuées d’effets.

Les données concrètes sont suffisamment riches pour démontrer que l’impact réel d’une entente de crise est subordonné à des éléments intrinsèques et extrinsèques de l’entente. Le fait que, lors de précédentes crises économiques, les pouvoirs publics soient intervenus non seulement pour encourager les ententes privées mais aussi pour faire exécuter les accords connexes est révélateur de l’importance de l’entrée sur le marché et des mesures incitatives privées, bien connues et qui existent depuis longtemps, visant à dénaturer les accords d’entente.

Aucun élément de comparaison entre l’efficacité des ententes de crise et celle d’autres formes d’intervention publique n’a pu être trouvé. Cette dernière constatation présente un grand intérêt dans le contexte actuel, dans la mesure où les pouvoirs publics semblent avoir eu ponctuellement recours à des aides d’État et à des sauvetages, plutôt qu’à des ententes de crise. La justification des ententes de crise ne doit donc pas reposer sur le fait de savoir si ces accords ont des effets mais sur le fait de savoir s’ils constituent le meilleur moyen d’atteindre les objectifs affichés des pouvoirs publics au cours d’une crise économique.

Sur ce dernier critère, les auteurs de la proposition doivent encore faire la démonstration du bien-fondé des ententes de crise. Par conséquent, il n’y a pas lieu de modifier la présomption générale contenue dans les normes internationales en vigueur selon laquelle les ententes dites injustifiables devraient être découragées. La dernière crise économique mondiale ne donne pas non plus de raisons d’infléchir la tendance, vieille de vingt ans, à renforcer l’application effective de la réglementation à l’encontre des ententes injustifiables.
BIBLIOGRAPHIE


Global Trade Alert. Informations disponibles sur le site www.globaltradealert.org


93


BULGARIA

The current economic crisis reopened the debate on whether competition authorities should accommodate their enforcement standards or even tolerate anticompetitive agreements between firms in order to support “proper” functioning of markets during economic downturns. There also have been discussions during 2010 within the EU on the topic aiming at ensuring a common approach to the problem and in particular trying to better apprehend the notion of the so-called crisis cartels.

For the Bulgarian economy, which has been in transition from a centralized type to a market type for the past twenty years, a correct approach to this problem has an even greater importance due to the fact that such a transition economy is usually strewn with cyclical and structural economic crises. For these reasons, building a sound effective market competition culture among undertakings who virtually always try to justify their anticompetitive actions with economic downturns occurring in a specific sector or in the national economy as whole is even a greater challenge for the Bulgarian Commission on Protection of Competition (the CPC). In order to ensure successful completion of this task, the CPC is striving to adhere to the basic economic principles that govern markets as well as to build upon the significant experience and achievements of EU competition law.

This note will therefore present the approach the CPC adopts when facing anticompetitive arrangements between undertakings that claim legitimacy out of impaired economic circumstances (2) after having elucidated the essence of the so-called crisis cartels (1).

1. The economic essence of the so-called crisis cartels

As a first step, it is necessary to look at how economic downturns usually express themselves on markets (1.1) before explaining the nature of the arrangements, commonly referred to as crisis cartels firms often put in place in order to overcome such distresses (1.2).

1.1 Economic depressions materialize in a fall in demand and occurrence of overcapacity

Without going into deep economic considerations, typically, from a market perspective, cyclical economic recessions express themselves in a fall in demand and occurrence of overcapacities. A shift in the demand and supply relationship would normally be self regulated by prices and consequently when demand falls, the price would do the same. It is perfectly possible that, as a result of a recession, some undertakings, usually the less adapted to the crisis, go bankrupt and exit the market. From market competition point of view this is considered normal market processes and it would be precisely the market competition that it is assumed to correct any situation of cyclical overcapacities. This understanding supports the idea that prices must not, at any circumstances, be artificially maintained at a certain level through coordination between firms.

In a nuance to cyclical, long lasting problems of market overcapacity occur in markets for a number of reasons mainly due to particular policy decisions taken by the market players or to public policy interventions. These long lasting overcapacity situations are referred to as structural overcapacity and they pose the question on whether the market forces alone are able here to overcome such situations. It is commonly agreed that, in most cases, structural overcapacities would eventually be overcome via the consolidating processes of mergers and acquisitions which, again, do not require any particular intervention on behalf of public bodies nor it justifies any coordination between firms in contradiction with
competition rules. The economists stress in this respect that, in real markets, school situations as the notion of “war of attrition” that explain why a structural overcapacity problem will persist on a market resulting in a “prisoner’s dilemma” is likely to occur in very specific cases and under particular circumstances which, from a competition policy perspective, are insignificant to justify a shift in the usual competition law approach to such dysfunctions.

1.2 Arrangements between undertakings trying to deal with overcapacity

The CPC has dealt so far only with cases where undertakings, which were found to be part to anticompetitive agreements, claimed cyclical market dysfunctions in view to justify their unlawful actions. In these cases, the arrangements or agreements put in place, usually through trade associations, mechanisms and information exchanges aimed at maintaining “defensive” prices which the CPC found to be tantamount to fixing prices. These agreements also contained some provisions tending to deal with overproduction (for instance, specified quantity of eggs that instead of being sold as primary product be redirected for transformation into egg powder or reduction of flocks of chickens) whenever they occur in view to guarantee the aforementioned objective of maintaining defensive prices. Interestingly, the latter provisions could be seen as attempts to restructure the industry which brings them closer to the category of agreements we discuss below. However, the primary purpose of these arrangements being to fix prices, they rather represent some transitional type to industrial restructuring agreements.

A typical example of an agreement between undertakings in a sector experiencing a situation of persisting structural overcapacity is provided by the Irish Beef case of the ECJ. This agreement consisted in a series of arrangements, the main of which were 25% reduction of production capacity of the processing industry as a whole, voluntary withdrawal of firms from the market with two-year non-compete clauses, restrictions on use of freed plants and on disposal of equipment. Therefore, this agreement attempted to deal with overcapacity by structurally designing the industry in a way that would ensure a “proper” functioning of the market – by artificially forcing the exit of some market players and raising the barriers to entry while, in the same time, cutting the incentives to compete for remaining market players.

It goes without saying that many variants to the agreement featured in Irish Beef case are possible which would be specific to the industry where they occur. For this reason, it is difficult to draw a list of typical agreements. The main point remains that these, as all other anticompetitive agreements, have for an object or effect to restrict the independence of market players to determine their course of action including adapting their policies in times of economic turmoil. From this point of view, the arrangements between firms trying to deal with cyclical or structural overcapacities are no different from the general understanding of prohibited agreements and concerted practices under article 15 of the Law on Protection of Competition (the LPC) and the article 101 of the Treaty on the Functioning of the European Union (the TFEU).

In this respect, the CPC prefers not to use the term “crisis cartels” as it leaves the impression that “crisis cartels” are a special kind of agreements requiring somewhat special and, particularly, more lenient treatment than “usual” prohibited agreements. Hence, the CPC finds the use of the term “industrial restructuring agreements” when speaking of agreements trying to deal with structural overcapacities more appropriate insofar as they have a specific, common object. On the other hand, anticompetitive agreements between firms that claim legitimacy out of cyclical economic dysfunctions do not require a special categorization within the general notion of prohibited agreements. This note will therefore proceed with the CPC’s approach to such industrial restructuring agreements and other agreements of the type depicted above.

---

1. CPC decision 1150/27.12.2007 – sunflower and cooking oil; CPC decision 601/2008 – poultry products;
2. Case C-209/07 Competition authority v Beef Industry Development Society Ltd. And Barry Brothers (Carrigmore) Meats Ltd.
2. CPC’s approach to anticompetitive arrangements between undertakings that claim legitimacy out of impaired economic circumstances

We will first see that the CPC would apply usual cartel standards when dealing with agreements that firms try to justify by the impaired economic conditions existing on the market (2.1). We will then stress on the CPC’s advocacy approach to government measures aiming to overrule competition standards in order to support sectors experiencing economic downturns (2.2).

2.1 “Normal” application of articles 15-17 of the LPC and article 101 of the TFEU

As stressed out before, the term “crisis cartels” refers to the idea that factors due to economic downturn (whether cyclical or structural) would justify an agreement between undertakings which would otherwise, under “normal” market conditions, be considered as restricting the competition. This is based on the economically erroneous perception that market competition undergoes different, abnormal for the market, processes during market depression. As we previously showed, the phenomena of fall in demand and overcapacity are typical for the markets in depression and, from this perspective, they obey to the same market mechanisms as during times of market equilibrium. There is no raison for the competition law therefore to treat differently prohibited agreements when those occur in times of economic downturns. The opposite would be tantamount to accept that competition law applies double standards to agreements depending on whether they occur when markets go “well” or “bad” (typically, the vision of markets going well or bad is not the point of view of market competition but this of firms running businesses).

This approach is based on the understanding of the case law of the ECJ stating that “the existence of cyclical or structural crisis does not prevent article 81 (currently 101 TFEU) from applying”\(^3\). Moreover, the ECJ stresses that “the fact that the parties pursue a legitimate objective with an agreement does not rule out the existence of a restriction to competition”\(^4\). This vision of the ECJ was reiterated with the pre-cited case of Irish Beef where the court found that industrial restructuring agreements constitute in principle a restriction of competition by object within the meaning of article 101 of the TFEU.

The CPC strictly shares this approach for enforcement of article 101 of the TFEU and the equivalent national provision of article 15 of the LPC. As previously mentioned, so far the CPC has not dealt with industrial restructuring agreements and consequently is not able to share any experience on the substance of such agreements. Notwithstanding, the CPC will clearly face such agreements by applying the “usual” prohibited agreements and concerted practices standards fully in line with the above cited case law of the ECJ and the EC.

For the above reasons as well, any redemption of the anticompetitive agreements or arrangements in question would only be possible under article 101 (3) of the TFEU and the equivalent Bulgarian provision of article 17 of the LPC if they satisfy the four cumulative criteria. The CPC is guided in this respect by the EC Guidelines on the application of article 81 (3) (currently 101 (3) (the Guidelines). Here, same as when deciding whether a particular agreement or practice constitutes a restriction to competition, the fact that the market in review experiences an economic downturn expressed in a cyclical or structural overcapacity is not to modify the analysis of the four criteria. It can be expected however that, as agreements claiming legitimacy out of economic depressions typically contain particularly harmful restrictions to competition, it would be significantly more difficult for such agreements to satisfy all four criteria, in particular the one of providing a fair share of the resulting benefits to consumers. As the Guidelines stress out, the greater the restriction of competition, the larger must be the share of benefits for consumers.

\(^3\) Joined cases T-217/03 and T-245/03 Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d’exploitants agricoles and others v/Commission.

\(^4\) Joined cases 96/82 to 102/82; 105/82; 108/82 IAZ International Belgium & others.
2.2 CPC’s advocacy role when facing State crisis measures that run afoul of the standards of effective competition

The situation where undertakings enter in prohibited agreements during economic crisis conditions as a result of encouraging or even compulsory crisis market measures taken by governments is particularly preoccupying as testified by the fact that ECJ takes this factor under consideration when dealing with such cases. The only possible way for competition authorities to deal with this situation is to use their advocacy competence in order to try and influence governments to implement measures that respect market mechanisms when attempting to correct the conditions in a specific industry.

During 2010, the CPC carried out number of advocacy proceedings as it was already explained in its contribution devoted to “Exit strategies” of the June 2010 gathering of OECD’s Competition committee. In all of these proceedings, the CPC firmly stood behind the opinion that particularly during economic crises, natural market mechanisms alone are perfectly able to correct most cases of market dysfunctions and they should not consequently be superseded by artificial regulatory measures or even allow undertakings to engage in practices that are clearly in contradiction with competition law principles. In all these cases the Commission made the effort to propose alternative means for dealing with the alleged dysfunction that does not restrict market competition.
COLOMBIA

1. Colombian Competition Law Framework

Competition Law was implemented in Colombia with the issuance of Law 155 of 1959, which set the first legal basis for conducts referring to restrictive business practices, as well as a system of prior review of mergers and acquisitions.

In 1991, the issuance of the Political Constitution established competition as a constitutional right by determining private initiative, economic activity and competition liberties as collective rights. In fact, article 333 states the principles of free enterprise, free competition and economic freedom as residing at the top right of all citizens and subject to the limits established by law:

"Article 333. Economic activity and private initiative are free, within the limits of the common good. No one has the right to demand prior authorization or requirements to exercise them, without the authorization of the law.

Free competition is the right of all who assume its responsibilities.

Business, as a basis for development, has a social function that implies obligations. The State will strengthen those organizations in solidarity with business, and will stimulate business development.

The State, under mandate of the law, will prevent the obstruction or restriction of economic liberty and will prevent or control any form of abuse that persons or businesses make of their dominant market position.

The law will restrict the scope of economic freedom when the Nation’s social interest, state of affairs, and cultural patrimony demands it."

Subsequent to the Constitution, a specific competition protection Decree was issued by the Colombian Government (Decree 2153 of 1992), which established a structured antitrust system and reorganized the competition authority, the Superintendence of Industry and Commerce (SIC)\(^1\), by giving it broad powers to investigate anticompetitive behaviors at its own initiative or at the request of third parties, to impose fines and to oblige firms to notify mergers and acquisitions.

The Decree 2153 elaborated on the types of conduct subject to the competition law and refined the legal standards that applied to that conduct featuring a list of punishable acts, including Acts, Agreements and Abuse of Dominant Position.

In 2009, Law 1340 was promulgated as the national competition law, making significant amendments to the competition regime on substantial and procedural topics, and having as principal effect the concession of the Superintendence of Industry and Trade as the sole authority to enforce competition rules.

\(^1\) The SIC is part of the executive branch of the Colombian State, under the supervision of the Ministry of Commerce, Industry and Tourism but with administrative, financial and budgetary autonomy
SIC’s proceedings start based on information that comes to its knowledge, through a third party complain, or when receives a reference from another authority. Then, the information is analyzed in order to determine if the case will be closed or if there is sufficient merit to advance to a preliminary inquiry. From the outcome of the preliminary inquiry its determined the necessity to initiate a formal investigation which will be personally notified to the investigated who will then have the right to request or provide proof means for the case.

After the proof stage, the Deputy Superintendent for antitrust presents the results of the investigation to the Superintendent of Industry and Commerce, who issues the resolution that decides the final outcome of the proceeding. Against this decision, the parties may present an appeal for reconsideration that the Superintendent decides. The SIC’s decision may be challenged before the courts by filing a request for the annulment of the administrative act before a first instance administrative court, the Administrative Tribunal (AT). Furthermore, the parties may appeal the AT’s decision before a second instance court, the State Council.

2. Competition Law Goals

After the Constitution of 1991, the goals of competition legislation are explicitly spelled out as a constitutional norm: The protection of free economic competition, which has been enshrined as a collective right (article 333), in fact, the cited article mandates that the State must “impede the obstruction and restriction of economic liberty and prevent or control any abuse by persons or firms of their dominant position in the national market.”

It follows that Colombian Competition Law will ensure the achievement of a state of real, free and undistorted competition, which will allow entrepreneurs to earn profits while generating benefits for the consumer with goods and services of better quality, greater guarantees, and a real and fair prices.

Moreover, the Decree 2153 of 1992 (amended by Law 1340) orders that the SIC must proceed against deeds that are significant to attain the following goals: i) free participation of firms in the market, ii) consumers' welfare, and iii) economic efficiency.

3. Exceptions

Articles 2 and 4 of the law 1340 of 2009 establish that competition laws are applicable to every person that develops an economic activity or that may affect its performance (independent of its juridical nature) and to every sector and economic activity, without prejudice of sector-specific regulation.

However, the Colombian competition regime exempts specific conducts from the application of competition law and are not considered anticompetitive:

- Cooperation for research and development of new technology;
- Agreements on norms, standards and non-binding measures that don’t limit market entry for competitors;
- Procedures, methods, systems and utilization forms of common facilities;
- Efficiency justifications in mergers cases.

Furthermore, exceptions which are aimed specifically for the agricultural sector are included in the Colombian competition legislation. Certainly, article 31 of Law 1340 of 2009 explicitly mandates that specific forms of State intervention aren’t covered by the scope of the competition regime: i) price stabilization funds; ii) parafiscal funds for the promotion of agriculture; iii) the establishment of minimum
guaranteed prices; iv) the regulation of internal agricultural and livestock markets; v) the “value-chain” agreements; vi) the safe guards regime; and vii) in general all the intervention mechanisms established by the law 101 of 1993 (General Law of Agricultural, Livestock and Fishery Development) and by the law 81 of 1981 (e.g. price control).

Thus, article 32 of law 1340 of 2009 mandates that the State may intervene under the occurrence of external situations or due to situations alien to the national producers that “affect or distort the competition conditions in the national product markets.”

4. Competition in Agricultural Markets

In the period 2000-2010 the SIC adjudicated or settled ten antitrust conduct cases that took place in agricultural markets, which amounted to 7,5% of the overall antitrust conduct cases.

Seven of the studied cases involved investigations on collusive agreements while the remaining three were abuse of dominance cases. Only three cases involved investigations on producers’ behavior while the remaining consisted on investigation on upstream economic agents (processors and retailers).

Despite the fact that Colombia presents explicit and informal agricultural exceptions from antitrust law the competition authority has been very active in this sector.

4.1 Agricultural Cartels in Colombia

4.1.1 Green Onion Cartel: Price Fixing in the Supply Price of Green Onion

Farmers sought to control the over-supply of the product and thus make the market purchase price go up.

All participants in the cartel were clear that the supply reduction would lead to increased prices, therefore, there was a logical correspondence between the type of action taken by the farmers and the objective. That is sufficient to describe the agreement as anticompetitive.

SIC considered that when a group of people meets to agree to reduce supply and thus alter the market outcome in their favor, they are breaching competition rules.

4.1.2 Milk Cartel: Price fixing Agreements in the Pasteurized Milk Market

In January 1997, the president of the Association of Independent Milk Processors gave a press declaration stating that starting that day (January 25th) the price of the one litter milk bag would be COLP$600 in the Bogota market.

In view that by February of the same year, a set of 11 milk processor and distributors had indeed fixed a sale price of COLP$600, the SIC decided to open an investigation for price fixing against these processors and plant owners.

The SIC established that there was price fixing behavior on the part of at least two processing plants. It ordered them to cease the price fixing and fined the firms.

4.1.3 Rice Cartel: Price fixing agreements in the rice sector

In 2000 two rice producers associations complained to the SIC of price fixing by five rice milling companies in their purchasing.
The SIC concluded that the purchase price by the millers was similar across a 591 days period and that occasional price variations were graduated in such a way that average prices were identical between millers. The millers offered guarantees.

In 2004 a complaint signed by about 1,000 farmers alleging an agreement of the purchase price of paddy rice by the mills; a new investigation was opened and the five companies were charged with fines of about USD 1.3 million.

4.1.4  Cocoa Cartel: Price-fixing in the purchase of cocoa

Against two producers of chocolate products.

Price-fixing in the purchase of cocoa and the sale of finished chocolate and cocoa products.

Combined market share in the purchase of cocoa, 86.7 % (54.8% and 31.9% respectively).

The SIC concluded that the price parallelism had no explanation, taking into account that the purchase price was not affected by seasons and that volume of cocoa purchased by the firms was significantly different.

5.  Sugar Cane Cartel

5.1  Sugar Market in Colombia

The Colombian sugar industry plays an important role in the world market. According to data from the International Sugar Organization (OIA), the 2.28 million tons of sugar production of 2007 ranked Colombia as the thirteenth producer, and with an export of 716 thousand tons the country was ranked on the tenth position of the list of main exporters of this product in the world.

The sugar cane production is concentrated mainly in the Valle del Cauca region. This region encloses 26 towns of sugarcane growers, whose urban and rural areas account for 48% of the total area of the region. In Colombia there are thirteen mills (Ingenios) which purchase the product in the Valle del Cauca region.

The main product of the cane agro-industry is the sugar, which along with other products of the production process, such as honey, bagasse, and molasses are used as inputs for various industries, including food and beverages for humans, animal feed, fertilizers, energy, paper, chemistry, biofuels, among others.

The sugar cane transformation process is carried out by the sugar mills, which have integrated their traditional industrial activity of producing sugar, to the ethanol production. (There are 13 main sugar mills in Colombia)

5.2  Anticompetitive Agreement Investigation against 13 Sugar Mills

5.2.1  Agreement on the purchase price of the sugar cane

Investigation opening due to the similarity on sugar cane purchase contracts and the fact that the mills had agreed on a fixed amount of 58 kilos per ton of sugar or on a variable amount depending on the cane yield.
Proven Facts:

- No technical support that explains an average yield of 116 kg of sugar per ton of cane.
- The yield of sugarcane has a growing trend.
- There is no economically reasonable explanation for the mills not offering more than 50% to the supplier (distribution "50-50")
- If the (50-50) distribution between mills and suppliers is maintained, the "fixed amount of reference" should vary according with the variation of the cane yield.
- The databases of suppliers were analyzed, finding that the reference values of 58 kg or 50% yield (on sale) and 25 kg (participation) operate as maximum levels.
- Admitting that 25 kg of sugar per ton of cane is a reference value would mean to assume that the costs of "adjustment, preparation, planting and cultivation, as well as infrastructure investments are identical for each of the mills.
- It was found an “Agreement Act” of November 5/1992 that established:
  - In sales contracts, participation cap of 50% of yield and, in case of paying a fixed amount, a cap of 58 kg / t cane.
  - A cap of 25kg/t in contracts for accounts in participation. It also established guidelines as the term of the contracts and the participation in the costs of adaptation works of the property.
  - Evidence of interaction between competitors (meetings).

5.2.2. Agreement on the purchase price of the sugar cane intended for alcohol fuel production.

Investigation opening because it was found that the contracts used by the mills contained clauses indicating a distribution of sources of supply (terms between 5 and 10 years, penalty clauses and exclusive sale clauses).

Proven Facts:

- The proposals made by the alcohol mills seem to be the result of meetings between representatives of the mills.
- It is unlikely that all the mills have arrived from the manufacturer's information of the distilleries (75 lt / t) to the same three or two modes of settlement of the cane intended to alcohol.
- There is evidence of exchange of sensitive information between competitors, including production costs of each of the mills.

5.3 Agreement to share sugar cane sources of supply.

Investigation opening because it was found that the contracts used by the mills contained clauses indicating a distribution of sources of supply (terms between 5 and 10 years, penalty clauses and exclusive
sale clauses), and that it was required from the provider a letter certifying the termination of his previous contract.

Proven Facts:

- Many communications between CEOs and managers of sugar supply show how they avoid competition through the exchange of information on negotiations with their suppliers.

- In a competitive market the mills would be willing to improve the offers per ton of cane if this is at a shorter distance from the mill.

- Cane exchanges motivated by distance allow the mills to limit competition for nearby properties, reduce transportation costs incurred when harvesting distant canes and agree with the suppliers of a distant land, lower prices justified on higher costs that ultimately are avoided.

6. **Emerging Economies Competition Policy in Times of Crisis**

- Competition may be breached by direct specific State intervention.

- May favor certain undertakings or the production of certain goods (selectivity).

- Advantage it would not have obtained under normal market conditions.
CROATIA

1. Introduction

In the times of economic crisis, by which was also affected the Croatian economy, there could be constantly noticed the attempts of various entrepreneurs to treat into the cartels or cartel-like arrangements in order to close the markets in their respective sectors where they operate and therefore retain the profits and the business results from the past. Such attempts might harm the economy and prevent other entrepreneurs from the free competition in the market, which could ultimately decrease the welfare of the consumers and negatively affect the entire situation on the market.

2. Prohibited agreements among entrepreneurs

The Competition Act (2009), establishes general prohibition to all practices where two or more independent undertakings enter into agreements, or where associations of undertakings close a decision or act in a concerted practice, which actions have as their object or effect the distortion of competition in the relevant market, and in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. ¹

Within the meaning of the definition for prohibited agreements as listed above, there are specially taken into account the contracts, particular provisions thereof, implicit oral or explicitly written down arrangements between undertakings, concerted practices resulting from such arrangements, decisions by undertakings or associations of undertakings, general terms of business and other acts of undertakings which are or may constitute a part of these agreements and similar, notwithstanding the fact if they are concluded between undertakings operating at the same level of the production or distribution chain (horizontal agreements) or between undertakings who do not operate at the same level of the production or distribution chain (vertical agreements).

¹ Author: Dr. Sc. Mirna Pavletic-Zupic, Member of the Competition Council // Art.8 of the CA, aligned to Art.101 of the Treaty on the Functioning of the EU.
However, a certain categories of agreements shall be granted exemption from general prohibition from the Law, if they, throughout their duration, cumulatively comply with the following conditions:

- if they contribute to improving the production or distribution of goods and/or services, or to promoting technical or economic progress,
- while allowing consumers a fair share of the resulting benefit,
- they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and
- they do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of goods and/or services in question.

Finally, agreements that prevent, restrict or distort competition, and which do not fulfill the conditions as listed above, as well as agreements to which could not be applied the rules for block exemptions shall be ex lege void.

The criteria for block exemptions are narrowly specified in the separate regulations, where are defined the conditions under which certain categories of agreements may be exempted from general prohibition, and among others those are particularly: (a) agreements between undertakings not operating on the same level of production or distribution (vertical agreements), such as exclusive distribution agreements, selective distribution agreements, exclusive purchase and franchising agreements; (b) agreements between undertakings operating on the same level of the production or distribution (horizontal agreements), and in particular, research and development and specialization agreements; (c) agreements on transfer of technology; (d) agreements on distribution and servicing of motor vehicles; (e) insurance agreements, and (f) agreements between undertakings in the transport sector.

However, the block exemption regulations referred herewith above shall in particular stipulate: (i) the provisions that such agreements must contain, and (ii) the restrictions or conditions that such agreements may not contain. Based on this, the implementing Authority, namely the Croatian Competition Agency (furthermore: CCA) may, ex officio, initiate the proceedings to assess the compatibility of a particular agreement which has been granted a block exemption, where it finds that the particular agreement, in itself or due to the cumulative effect with other similar agreements in the relevant market, does not comply with the conditions set out above. Should it be established, during the proceeding that the agreement concerned produces certain effects which contravene the conditions as set out in the Law, the block exemption shall be withdrawn.

Croatian Law also recognizes the agreements of minor relevance which are defined as such agreements to which the parties have an insignificant mutual market share, provided that such agreements do not contain hard core restrictions of competition that, in spite of the insignificant market share of the parties to the agreement, lead to distortion of competition.

3. Enforcement record and the issues taken into the consideration when reviewing the cartels

In the further part is described one of the most recent decisions of the Croatian Competition Agency (furthermore: the CCA), in relation to detecting and sanctioning of the cartels.

---

2 Art. 10 of the CA.
3 Art. 11 of the CA, Par. 1.
After it had carried out a market study in the provision of services of driving schools in the territory of the Republic of Croatia and after having received the necessary data from the undertakings in this market, the CCA established the existence of agreements on the basis of which 15 driving schools in the town of Rijeka and Matulji municipality fixed prices of driving lessons fees for drivers of licence category A, A1, B and M and thereby eliminated competition between them.

In spite of the fact that this is a partly regulated market, in other words, a specific ordinance of the Ministry of the Interior regulates the minimum prices for the provision of particular driving school services, nevertheless, these minimum prices do not equal the final price and may not be used as a fixed price by all service providers, in this particular case the driving schools. Given the different operating costs of each service provider, the price of each particular operator must be set in accordance with the actual costs incurred. Thus, regardless of the fact if it had been actually implemented or not, the CCA found this agreement in contravention of Article 9 of the Competition Act, which prohibits “agreements object or effect of which is to prevent, restrict or distort competition in the relevant market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions.”

The CCA made a request to open proceedings against all cartel members – 15 driving schools – for the infringement of competition rules in the period from 1 November 2007 to 30 July 2009 at the competent minor offence courts. Minor offence proceedings are pending. Most driving schools filed the claims against the decisions of the Agency. The cases are pending.
EUROPEAN UNION

1. Introduction

The Commission considers cartels as hardcore infringement of competition law and is very active in taking enforcement actions against them. In 2010 the Commission adopted seven cartel decisions\(^1\) imposing fines totalling over EUR 3 billion on 70 undertakings. As the fight against cartels continues to be one of its main priorities, the Commission focused on making the process more efficient through the application of the settlement procedure, which was applied in 2010 for the first time in two cases. Moreover, against the background of difficult economic conditions, a number of mainly small and medium-sized enterprises were granted a fine reduction in application of point 35 of the Fines Guidelines\(^2\) (Inability To Pay or ITP).

In the context of the current economic downturn, a number of undertakings in various industries across Europe are seeking to justify agreements restricting competition by invoking overcapacity problems or economic crises in their respective sectors.\(^3\) The schemes falling under the notion of "industrial restructuring agreements" (sometimes referred to as "crisis cartels") usually involve scenarios where a significant number of industry players get together to find a joint solution to their common difficulties in times of crisis. This may be achieved by, for example, reducing overcapacity and/or by agreeing on a "fair" price level to avoid that some companies would go bankrupt and leave the market.

The Commission therefore considers that there is a need to ensure a coherent application of the EU competition rules in Europe with respect to such industrial restructuring agreements. For this reason, on 30 March 2010 the Commission submitted written observations, under Article 15, paragraph 3, of Regulation No 1/2003\(^4\), in an Irish case concerning an industrial restructuring agreement in the meat processing industry in Ireland.

This paper reflects the substance of the legal submission lodged by the Commission in the context of the Irish beef proceedings in Ireland. The paper describes the approach for reviewing industrial restructuring agreements under Article 101 TFEU, keeping in mind that the conclusion to be drawn will depend on the specific circumstances of each case.

---

1. Cases COMP/38511DRAMs, COMP/39092 Bathroom fittings & fixtures, COMP/38344 Pre-stressing steel, COMP/38866 Animal Feed Phosphates, COMP/36212 Carbonless paper (re-adoption for Bolloré), COMP/39258 Airfreight and COMP/39309 LCD.


3. The Commission has itself been dealing with such cases and is aware of similar cases being addressed by national competition authorities.

2. The economic problem: Structural (and not cyclical) overcapacity

The term "crisis cartels" is misleading as it may create expectations that competition authorities might envisage to allow cartels in order to protect industry from an economic crisis in general. However, the discussion of industrial restructuring agreements should not be related to the current, or any other, cyclical economic crisis and the recession induced fall in demand. In a properly functioning market economy it should normally be price that influences the changing relationship between supply and demand, and when demand falls it is likely that price would follow as well. If the consequence of a recession is that some undertakings go bankrupt, it would normally be those least adapted to the crisis for a number of reasons. Hence, it can be generally assumed that competition would correct the problem of overcapacity available in the market and, over time, it would bring the market back to equilibrium. Therefore, until this adjustment takes place prices must not be artificially maintained at a high level by means of a cartel. In line with this fundamental economic law of supply and demand, the case law of the Court of Justice of the European Union ("ECJ") generally concludes that a cyclical overcapacity in principle can not justify the formation of cartels.\(^5\)

Irrespective of the existence of a general crisis, however, more long lasting overcapacity problems could exist in industries in decline due to, for example, technological changes in the market, or in industries where firms have been substantially overinvesting for a prolonged period of time. For instance, such difficulties could arise in industries that have been granted state aids for a long time, or where state control prevented the closure of plants because of overriding social or other political factors, such as unemployment. The relevant question to ask in such situations is whether market forces alone would be able to solve the problem or whether some kind of intervention by the affected undertakings in the market concerned is necessary.

There may indeed be market situations where the problem of overcapacity may not be remedied by market forces alone, which would imply that overcapacity is of a structural nature. In the past, the Commission explained in its Annual Report on competition policy for 1982 that "structural overcapacity exists where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term"\(^6\).

There are economic reasons explaining why in situations of overcapacity the problems cannot always be remedied by the free interplay of market forces and the mechanisms of competition alone. This can be best explained by the notion of "war of attrition". This refers to a situation where the object of firms is to induce the rivals to give up and, consequently, they would wait and suffer economic losses for a while until their rivals would effectively exit the market. In such a context, firms try to avoid closing plants and giving up market shares as thereby they would increase their costs. This situation is especially likely to occur in industries characterised by increasing returns to scale and/or high fixed or sunk costs (and thereby high costs of exit and entry).

The undertakings involved in a "war of attrition" expect that sooner or later some firms will leave the market and, therefore, they may not want to close their unused capacity as they would hope to be able to utilise it for production in the future. The persistence of such a situation can be illustrated with the theory

---


6 See Twelfth Report on Competition Policy, point 38.
of a public good, where more production and corresponding investment in capacity than would be socially optimal takes place because of a "free riding" problem. In such situations, even though unilateral or coordinated reduction of overcapacity would be beneficial for everyone in the industry, firms would prefer not to make the first move of reducing their own capacity. Instead, it is possible that they would prefer to wait for other competitors to reduce capacity in order to benefit from the overall fall in capacity in the sector concerned, without incurring the costs of reducing it themselves.

However, this situation, which in game theory is referred to as a "prisoner's dilemma", is generally considered to be sustained in very specific circumstances, such as stable, transparent and symmetric market structures. This is because if it is expected that one firm will suffer more than its competitors from the persistence of overcapacity problems, its incentives to reduce capacity would be higher and it would be more likely to reduce capacity first. Moreover, where there is no symmetry in size and competitiveness, the weaker firms could foresee that they will have to exit first (as soon as they empty their pockets) and therefore it is unlikely that they remain in the wasteful "war". Thereby, in heterogeneous market structures with firms of different sizes and cost structures the problem of overcapacity would normally not persist.7

The waste of economic resources caused by the "war of attrition" may significantly impair the industry's competitiveness which could ultimately result in consumer harm. In this very rare type of situation, and assuming all conditions of Article 101(3) are met (see below) such industrial restructuring agreement could possibly be exempted.

3. Framework for assessment of industrial restructuring agreements under Article 101 TFEU

3.1 Restriction of competition by object (Article 101(1) TFEU)

As is evident from the recent case law of the ECJ in Irish Beef8, industrial restructuring agreements will in principle constitute a restriction of competition by object within the meaning of Article 101(1) TFEU. Restrictions of competition by object are those that by their very nature have the potential of restricting competition.9 It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.10

The Irish Beef case concerned a joint scheme by the ten principal Irish beef processors by which they intended to reduce the total capacity of the industry by 25% within one year. These ten producers represented about 90% of the Irish beef market in terms of sales. The aim of the scheme was to reduce the number of players on the market whereby those companies staying on the market would compensate those leaving the market.

The proposed scheme had been devised by McKinsey, a management consultancy. The Irish competition authority, however, objected to it and brought the case before the Irish courts, which, in turn, referred it to the ECJ by way of an application for a preliminary ruling on the application of Article 101(1) TFEU (then: Article 81(1) EC).

---

7 Note that a limited degree of uncertainty in the industry could compensate for a limited amount of asymmetry in this context.
8 Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd (hereinafter "BIDS"), [2008] ECR I-8637.
9 See, for example, Case C-209/07, BIDS, [2008] ECR I-8637, paragraph 17.
The ECJ held that the proposed agreement to reduce capacity constituted a restriction of competition by object within the meaning of Article 101(1) TFEU. In reaching this conclusion, the ECJ relied on several factors:

- The ECJ stressed that it is irrelevant that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remediating the effects of a crisis in their sector. An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.

- The proposed agreement had as its object to encourage some of the beef processors to leave the market and therefore hindered the independence of these companies’ conduct on the market.

- The proposed agreement obstructed other means to combat the crisis without resorting to industry-wide coordination such as (i) intensified competition between the processors; or (ii) mergers between individual processors.

- Moreover, the ECJ found that the agreement would ultimately also be likely to induce certain processors to freeze their production (i.e., their output).

Last, the proposed agreement dissuaded new entry of competitors in Ireland as the plants which would be decommissioned pursuant to the agreement could not be made available to new entrants.

### 3.2 Assessment under Article 101(3) TFEU

Article 101(3) provides for an exception from the prohibition of Article 101(1). According to the case-law of the EU Courts, any agreement which restricts competition, whether by its object or its effects, may in principle satisfy Article 101(3) TFEU. However, the more severe the restriction of competition the less likely it is that an exemption will be available.\(^\text{11}\)

The application of Article 101(3) is subject to the following four cumulative conditions:

- The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;

- Consumers must receive a fair share of the resulting benefits;

- The restrictions must be indispensable to the attainment of these objectives; and

- The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

According to Article 2 of Regulation No 1/2003, the party claiming the benefit of Article 101(3) TFEU shall bear the burden of proving that the above four conditions are likely to be fulfilled. It is for the national court to determine whether those conditions are satisfied.

---


\(^{12}\) Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 46.
When these four conditions are fulfilled the restrictive effects on competition generated by the agreement can be considered to be offset by its pro-competitive effects, thereby compensating consumers for the adverse effects of the restrictions of competition.

The following sections of this paper will discuss these conditions in the context of capacity-reducing restructuring agreements by drawing on both the jurisprudence of the ECJ and the principles underlying the Guidelines. This paper will not address the condition relating to the elimination of competition.\(^\text{13}\)

### 3.2.1 The first condition – the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress

This condition requires an assessment of the pro-competitive benefits, i.e., efficiency gains, which result from the agreement at issue.\(^\text{14}\) As stated by the ECJ in its GlaxoSmithKline judgment of 6 October 2009, the agreement should lead to "appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition".\(^\text{15}\) The ECJ added that:

> "As the Advocate General observed in point 193 of her Opinion, an exemption granted for a specified period may require a prospective analysis regarding the occurrence of the advantages associated with the agreement, and it is therefore sufficient for the Commission, on the basis of the arguments and evidence in its possession, to arrive at the conviction that the occurrence of the appreciable objective advantage is sufficiently likely in order to presume that the agreement entails such an advantage."\(^\text{16}\)

In order to assess whether the pro-competitive benefits flowing from an agreement being examined under Article 101(3) TFEU outweigh its anti-competitive effects, it is necessary to verify the following:

- The nature of the claimed pro-competitive benefits;
- The link between the agreement and the pro-competitive benefits;
- The likelihood and magnitude of each claimed pro-competitive benefit; and
- How and when each claimed pro-competitive benefit would be achieved.\(^\text{17}\)

---

\(^{13}\) Reference is made to the Guidelines for a comprehensive examination of each of the conditions.

\(^{14}\) Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 50.

\(^{15}\) Joined Cases C-501/06 P et al, GlaxoSmithKline, paragraph 92.

\(^{16}\) Joined Cases C-501/06 P et al, GlaxoSmithKline, paragraph 93. In paragraph 193 of her opinion of 30 June 2009, Advocate General Trstenjak stated as follows: "an exemption, which under Regulation No 17 is granted ex ante for a specified period, may require a prospective analysis regarding the occurrence of the advantages associated with the agreement, and thus contains a prognostic element. A prognosis can ultimately never be made with 100% certainty. It is therefore sufficient for a finding of an appreciable objective advantage for the Commission, on the basis of the arguments and evidence submitted, to arrive at the conviction that the occurrence of the appreciable objective advantage is sufficiently likely in order to presume that the agreement entails such an advantage."

\(^{17}\) Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 51.
This paper will focus on the nature of the pro-competitive benefits which may result from a capacity-reducing agreement. It would appear that any possible pro-competitive benefits in the meaning of the first condition of Article 101(3), which would result from such a capacity-reducing agreement, would generally fall into one of two categories.

First, an agreement reducing capacity may achieve pro-competitive benefits by removing inefficient capacity from the industry. However, any such pro-competitive benefits would need to be properly substantiated by the party seeking the benefit of Article 101(3) TFEU. In particular, that party should be able to establish that the agreement in question ensures that inefficient capacity will exit the market.

As noted above, the precedents in this area are limited. However, in a series of decisions taken before the adoption of the Guidelines, the Commission exempted agreements under Article 101(3) TFEU where those agreements achieved efficiency gains by removing inefficient capacity from the market. More recently, in its 2002 decision to initiate a state aid procedure concerning the rationalisation of pig slaughterhouses, the Commission expressed doubt about applying Article 101(3) TFEU where, inter alia, it could not be shown that "the slaughterhouses which will be closed are (in all cases) the least efficient".

If the restructuring agreement at issue does not ensure that inefficient plants are decommissioned, then any plant, including efficient plants, may exit the market. A situation where efficient plants, rather than inefficient plants, exit the market would fly in the face of the normal competitive process. Not only would this fail to achieve economic benefits, but it would in fact have to be seen as a further competitive disadvantage.

In order to permit an assessment of whether efficient or inefficient capacity will exit the market, the restructuring agreement should provide sufficient indication of what capacity will be removed. Depending on the circumstances, this may be done by actually specifying which firms are to reduce capacity or which firms are to leave the market altogether. Even if the restructuring agreement does not specifically identify exiting capacity or firms, it should set out the criteria under which an assessment can be made as to what capacity is to exit the market.

Second, where a restructuring agreement cuts capacity by facilitating the complete exit of certain players from the market, those undertakings which remain on the market may be able to increase output in

---

18 Commission decision of 4 July 1984 in Case IV/30.810 Synthetic Fibres (OJ 1984, L 207/17), paragraph 39 ("The Agreement also ensures that the shake-out of capacity will eliminate the non-viable and obsolete plant that could only have survived at the expense of the profitable plant through external subsidies or loss financing within a group, and will leave the competitive plants and businesses in operation"); Commission decision of 29 April 1994 in Case IV/34.456 Stichting Baksteen (Dutch Bricks) (OJ 1994, L 131/15), paragraph 26 ("As the capacity closures concern production units that are the least suitable and least efficient because of obsolescence, limited size or outdated technology, production will in future be concentrated in more modern plants which will then be able to operate at higher capacity and productivity levels") and paragraph 29. See also Commission decision of 21 December 1994 in Case IV/34.252 – Philips/Osram (OJ 1994, L 378, p. 37), paragraphs 25-26.


20 Indeed, it may in fact be that efficient undertakings, rather than inefficient undertakings, exit the market in question.
order to win market share previously held by the exiting players. In this scenario, there may be economic benefits through an increased capacity utilisation rate by the remaining players.\footnote{Guidelines, paragraph 68 ("Efficiencies in the form of cost reductions can also follow from agreements that allow for better planning of production, reducing the need to hold expensive inventory and allowing for better capacity utilisation").}

This kind of pro-competitive benefit is premised on increases in output by the undertakings remaining on the market. If the restructuring agreement contains limitations on output increases, then serious questions arise as to whether these kinds of pro-competitive benefits can be obtained. The effect of any output limitation needs to be examined on a case-by-case basis and would appear to depend on the precise nature of the output limitations, including their temporal scope.

In the hypothetical situation where there is no output limitation, it is important to note the type of cost benefits which may arise from greater capacity utilisation in the present context.\footnote{This is of particular relevance in the assessment of whether consumers obtain a fair share of the benefits (see later).} The most frequent kind of cost benefits arising from increased capacity utilisation would relate only to fixed costs (i.e. those costs which do not vary with the amount of goods produced). Specifically, the undertakings remaining on the market may be able to increase their output and thereby spread their (unchanged) fixed costs over a larger amount of output. This will lead to a reduction in total unit costs, nevertheless this would normally not decrease firms' variable costs and hence is unlikely to benefit consumers (see third condition).

It cannot be excluded that variable cost reductions could also result from a capacity reducing agreement. Variable costs are costs which vary with output. Where variable costs decrease with output, increasing output could cause a downward shift along the variable cost curve (i.e. in this case it could be said that the efficiency of production increases with output). This might occur in cases where higher levels of production enable the utilisation of more efficient production technology. It may be that these kinds of pro-competitive benefits can be gained in industries that lend themselves to learning economies – as experience is gained in using a particular production process or in performing particular tasks, productivity may increase because the process is made to run more efficiently or because the task is performed more quickly.\footnote{Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 66.}

While it can not be excluded that industrial restructuring agreements reduce variable costs, it would appear that they are less likely to reduce variable costs than fixed costs because such agreements generally aim at closing of production plants (that is of fixed costs). These types of cost savings are unlikely to benefit consumers. Overall, therefore, the nature of the potential cost benefits needs to be assessed on a case-by-case basis.

\subsection*{3.2.2 The third condition – restrictions must be indispensable to the attainment of these objectives\footnote{Using the approach adopted by the Guidelines, this Note will deal with the third condition (indispensability) before addressing the second condition (pass-on to consumers).}}

As noted in the Guidelines, this condition triggers a two-pronged test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the pro-competitive benefits. Second, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of those pro-competitive benefits.\footnote{Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 73.} This paper will comment only on the first of these
conditions in the context of restructuring agreements designed to reduce capacity. The second condition requires a case by case analysis and it is therefore not possible to deal with it here.

When assessing whether the restrictive agreement as such is reasonably necessary, it needs to be examined whether there are "no other economically practicable and less restrictive means of achieving the efficiencies".26

It needs to be emphasised that the indispensability being considered under this heading is not indispensability to the existence of the agreement itself, but indispensability for the achievement of the benefits identified under the first condition of Article 101(3) TFEU.27

One important question in the context of restructuring agreements is whether market forces could have solved within a reasonable period of time the problem of over-capacity without the collective intervention of individual undertakings being necessary.

So-called "crisis cartels" which aim to reduce industry overcapacity cannot be justified by economic downturns and recession-induced falls in demand. As noted above, a general rule in a well-functioning free market economy is that market forces alone should remove unnecessary capacity from a market. Price should influence the changing relationship between supply and demand. Indeed, when demand falls, it is expected that price should follow as well. In such circumstances, it is for each undertaking to decide for itself whether, and at which point in time, its overcapacity becomes economically unsustainable and to take the necessary steps to reduce it.28 Indeed, as stated by the ECJ, "the concept inherent in the Treaty provisions on competition... [is that] each trader must determine independently the policy which he intends to adopt on the common market...".29 Hence, it can be expected that competition would itself correct overcapacity problems and would bring within a reasonable period of time the market back to equilibrium, without any need for coordination between the undertakings on the market.

Competition in periods of crises may force the least efficient undertakings to exit a market. This is part and parcel of the competitive process. Indeed, the General Court has accepted that "it is impossible to distinguish between normal competition and ruinous competition. Potentially, any competition is ruinous for the least efficient undertakings".30

However, there may be situations where problems of overcapacity are not likely to be remedied by market forces alone within a reasonable period of time which would imply that the overcapacity is of a structural nature (as opposed to the result of a cyclical downturn). As already explained in paragraph 7 of this paper, structural overcapacity exists where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any

26 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 75.
27 Commission decision of 24 July 2002, Visa International – Multilateral Interchange Fee (OJ 2002, L 318, p. 17), paragraph 98 ("it should be emphasised that the indispensability being considered under this heading is not indispensability to the existence of the Visa system, but indispensability for the achievement of the benefits identified under the first condition of Article 81(3)").
28 Alternatively, in the case of a cyclical downturn, the undertakings on the market may decide to maintain capacity in anticipation of increasing output in the expected upturn.
29 Case C-7/95 P John Deere Ltd v Commission [1998] ECR I-3111, paragraph 86. See also Joined Cases C-506 P et al, GlaxoSmithKline, paragraph 34.
lasting improvement can be expected in this situation in the medium-term. To have a structural overcapacity problem, it may not be necessary in all circumstances for the firms to have incurred substantial operating losses. However, it would seem atypical in cases of structural over-capacity that firms would make sustained profits.

Economic theory can help to illustrate why the problem of structural overcapacity cannot always be remedied within a reasonable time period by the free interplay of market forces and the mechanisms of competition. As already explained in paragraphs 8 to 10, this could be explained by a kind of "war of attrition" analysis in the context of game theory, where the aim is to induce the rival(s) to exit the market and where, in order to achieve this aim, firms are willing to suffer economic losses for some time. Specifically, in certain circumstances, firms will not want to reduce or close down unutilised capacity because they anticipate that, sooner or later, other firms will leave the market, thus presenting an opportunity to increase production and gain market share. In such situations, even though reducing overcapacity would be beneficial for everyone in the industry, firms prefer not to make the first move of reducing their own capacity. Instead, they would prefer to wait for another player on the market to reduce capacity in order to benefit from the overall fall in capacity in the industry, without incurring the costs of reducing it themselves. In essence, this is a type of "prisoner's dilemma" in game theory.

It would appear that situations where structural over-capacity cannot be remedied by market forces alone within a reasonable period of time are most likely where:

**Giving up capacity is costly for the firms.** This can occur in increasing returns industries where firms have large fixed or sunk costs and/or marginal costs which decrease with output. For these firms, surrendering capacity is costly because it means a lost opportunity to gain market share and thereby reduce costs of production.

**Stable, transparent and symmetric market structures.** Firms are unlikely to participate in a costly "war of attrition" unless they anticipate that they have a good chance of winning. Therefore, the war will tend to take place between firms of similar sizes and cost structures and in relatively stable and transparent environments, where their interests (and perceptions thereof) are sufficiently aligned to maintain capacity at an excess level. On the contrary, in heterogeneous market structures some firms would normally suffer more than others from over-capacity and would have a higher incentive to reduce capacity and would be more likely to move first and reduce or close down capacity.

In looking at the first limb of the indispensability condition, it would also need to be assessed whether there is a credible possibility that excess capacity could not be reduced by way of mergers or specialisation agreements. These would generally also constitute a structural consolidation of the industry but would normally cover a smaller share of the market than a full scale restructuring agreement, and hence could constitute a less restrictive remedy. Moreover, it can be assumed that mergers and acquisitions as well as specialisation agreements could in most cases solve the problem of **structural overcapacity in an industry. This is because the "war of attrition" would end as soon as firms form "coalitions" as thereby the necessary condition of the firms' symmetry would no longer be fulfilled.

31 See, for example, in the decision to open State aid proceedings with respect to the rationalisation of pig slaughterhouses (OJ C 37, 9.2.2002, p. 19), it is stated that: "It has not been shown that the production process is characterised by high fixed costs, which was one of the reasons to accept that the market was not capable of bringing about the capacity reduction in the decision 'Stichting Baksteen'.

32 Similar factors are relevant to the assessment of potential coordination in the merger context. See the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p.5) at paragraphs 48 and 49.
In fact, if an industrial restructuring agreement is not concluded with the aim to remedy a persistent overcapacity problem, normally the most likely scenario in the market is that any failing firms would be purchased by their competitors or other interested investors. A process of mergers and acquisitions is likely to gradually eliminate inefficient plants and therefore reduce overcapacity in the market, nevertheless generally involving a structural consolidation of a smaller share of the market than in case of an industrial restructuring agreement.

In fact, merger control explicitly provides for an appropriate tool to facilitate the consolidation of industries facing structural problems such as overcapacity, namely the failing firm defence. It can be applied in situations "where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger." 33

The burden of proof for the failing firm defence is on the parties and, in order to be successful, the failing firm defence would need to fulfil the following three criteria: "First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market." 34

Similarly, specialisation agreements could possibly result in a more efficient reallocation of productive resources and a consequent reduction of structural overcapacity, in particular in multi-line industries where firms produce several different products. In terms of economic effects this would be less restrictive as it would involve smaller coalitions of firms still competing with each other, while an industry-wide restructuring agreement would normally lead to a single group of entities covering a major part of the relevant market and eliminating competition to a much larger extent. Since industrial restructuring agreements generally involve physical closures of plants, and often complete withdrawals of some competitors from the market, they also constitute a structural consolidation of the industry, which, however, covers a larger part of the market more quickly.

In fact, the Specialisation Block Exemption Regulation 35 allows competitors to enter into agreements by virtue of which one or more parties agree to cease production of certain products while another party agrees to produce these products. The conditions for the regulation to apply are that (i) the parties to the agreement do not have a combined market share in excess of 20%; and (ii) that the party which continues producing the products in question agrees to supply the other parties which remain active in the downstream selling market. Hence, by way of specialisation agreements industry players could react to a situation of persistent overcapacity without resorting to one single agreement between virtually all competitors in the market. Moreover, such an approach would be likely to achieve that the least efficient plants would be closed and that the downstream selling market would at the same time remain competitive. Last, specialisation agreements could be a means to reduce the risk of bankruptcies, thereby mitigating the adverse effects of a consolidation process in an industry.

---

33 Joined Cases C-68/94 and C-30/95 Kali and Salz, paragraph 114; see also Case COMP/M.2314 BASF/Pantochim/Eurodiol, paras. 157-160.

34 The inevitability of the assets of the failing firm leaving the market in question may, in particular in a case of merger to monopoly, underlie a finding that the market share of the failing firm would in any event accrue to the other merging party. See Joined Cases C-68/94 and C-30/95 Kali and Salz, paras. 115-116.

3.2.3 The second condition – consumers must receive a fair share of the resulting benefits

**Pass-on and the sliding scale.** The party seeking to obtain the benefit of Article 101(3) TFEU needs to show that consumers would receive a fair share of any pro-competitive benefits resulting from an agreement between undertakings to reduce overcapacity. The concept of a "fair share" implies that the pass-on of benefits must at least compensate for any actual or likely negative impact caused to consumers by the restriction of competition found under Article 101(1) TFEU.\(^{36}\) Thus, under the sliding scale envisaged by the Guidelines, the greater the restriction of competition found under Article 101(3) TFEU, the greater must be the pass-on of pro-competitive benefits to consumers.\(^{37}\)

**The nature of the cost benefits.** It is also important to note that consumers are more likely to receive a fair share of the resulting cost pro-competitive benefits in the case of reductions of variable costs than in the case of reductions of fixed costs.\(^{38}\) This is because profit maximising firms are expected to price at a point where marginal revenue equals marginal costs. Marginal revenue is the revenue gained by selling an additional unit of output. Marginal cost is the incremental cost of producing that unit and is a function only of variable costs (fixed costs are not affected by output). Therefore, as a general rule, output and pricing decisions of a profit maximising firm are normally not determined by fixed costs but by its variable costs.

As discussed above, agreements between undertakings to reduce overcapacity are less likely to reduce variable (marginal) costs, and will generally tend to reduce the fixed cost component of unit costs. This needs to be examined on a case-by-case basis.

**The degree of competitive constraint.** The degree of competitive constraint on the market players is a central element in the assessment of pass-on. When the agreement in question "causes a substantial reduction in the competitive constraint facing the parties, extraordinarily large costs efficiencies are normally required for sufficient pass-on to occur".\(^{39}\)

In assessing competitive constraints, it is important to consider actual competition, potential competition and buyer power.

First, with respect to actual competition on the market, a restructuring agreement may go beyond simply reducing capacity on the relevant market and may also lead directly to the withdrawal of certain undertakings. Depending on the facts of the case, this reduction in the number of independent operators on the market has the potential to significantly alleviate competitive pressures on the undertakings which remain.

Second, with respect to potential competition, where entry barriers are increased as a result of a restructuring agreement, particularly in an industry with high fixed or sunk costs, the impact of potential competition on the behaviour of undertakings already on the market will be reduced.

Third, buyer power is obviously an important competitive constraint. As a general rule, undertakings with excess capacity tend to be subject to greater competitive pressure from purchasers than undertakings on markets with low overcapacity.\(^{40}\) Specifically, an agreement between undertakings to reduce

---

38 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 98.
40 See Case C-209/07, BIDS, opinion of Advocate General Trstenjak of 4 September 2008, paragraph 70.
overcapacity would generally strengthen their hand against the buyers of their product because of the coordinated decrease in supply on the market. However, this of course depends on the nature of the market in question.\footnote{See Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 97.}

4. Conclusions

An agreement to reduce overcapacity amounts in principle to a restriction of competition by object under Article 101(1) TFEU. To obtain the benefit of the Article 101(3) TFEU exception, the parties will have to show that the agreement leads to pro-competitive benefits which offset the restriction of competition and meets the other conditions mentioned in paragraph 3 of Article 101.

It is evident from the discussion in this paper that it will be very difficult for parties to succeed with a defence under Article 101(3). There is generally no need for this type of coordinated action between competitors because normally the competitive process alone would remove excess capacity from the market.

If increasing capacity utilisation rates indeed reduces undertakings' costs, they would normally have unilateral incentives to close their excess plants and therefore will generally not need any coordinated action with competitors for that purpose. Unless the firms incentives are aligned to keep the unused capacity, despite suffering corresponding economic losses, because they hope that they will be able to take over the market share of their competitors who will exit the market, it seems illogical that firms would choose to only partly utilise their available plants, rather than just releasing the unused capacity and concentrating production to use plants fully.

Therefore, when attempting to defend a restructuring agreement on efficiency grounds the parties would need to establish that the industry concerned indeed suffers from a structural overcapacity problem, i.e. market forces alone cannot remove that excess overcapacity. It would appear that this type of overcapacity market failure, though rare, could occur in particular situations of stable, transparent and symmetric market structures and where giving up capacity is costly for the firms.

Under Article 101(3) TFEU, the parties will also have to substantiate the nature and magnitude of the pro-competitive benefits resulting from reducing capacity and demonstrate that those pro-competitive benefits will be passed on to consumers in the affected relevant market. It important to note that consumers are more likely to receive a fair share of the resulting cost pro-competitive benefits in the case of reductions of variable costs than in the case of reductions of fixed costs.\footnote{See Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 98.} This can happen when the industrial restructuring agreement allows firms to produce more efficiently due to higher capacity utilisation in situations of important learning economies, or, for example, in situations where the restructuring enables modernisation of plants.

The Commission will have to make a detailed assessment under Article 101(3) TFEU of the causal link between the agreement and the pro-competitive benefits, the likely "pass on" of the claimed pro-competitive benefits to consumers and of the indispensability of the agreement for obtaining those pro-competitive benefits. Industrial restructuring agreements imposing restrictions on output or entry barriers are very unlikely to fulfil conditions of 101(3) TFEU.
GERMANY

This submission summarizes the German experience with crisis cartels, provides an overview of recent enforcement activities and touches on the issues of international cooperation as well as the need for competition advocacy in times of an economic crisis.

1. Introduction

In the recent financial and economic crisis, Germany suffered the most serious recession since the Second World War. Price-adjusted gross domestic product (GDP) slumped by 4.7%.\(^1\) The adjustment process inevitably involved painful consequences for society, such as bankruptcies and mass layoffs. The reaction of the German government has been to cushion negative effects for employment and assist companies by means of labour market and social policy instruments such as subsidized short-time work. The German economy has shown an impressive rebound. With 3.5% the increase in the price-adjusted GDP in 2010 was larger than ever since German reunification.\(^2\)

The enforcement of competition law has not been perceived as an obstacle but rather as a necessary condition for successful recovery. The Bundeskartellamt continued to vigorously enforce the prohibition of anti-competitive agreements as laid down in Section 1 of the German Act against Restraints of Competition (“ARC”) throughout the crisis.\(^3\)

2. Governmental policies towards cartels during crises

In the course of a business cycle, economy-wide fluctuations in production or economic activity occur around a long-term trend, typically involving shifts between periods of economic growth and periods of relative stagnation or decline. Market forces trigger an adjustment of available capacity which may in turn lead to the bankruptcies of affected companies. Distortive state interventions or the cartelization of certain sectors rarely offer a comprehensive, long-term solution to a business-cycle contraction (“recession”).\(^4\)

2.1. Crisis cartels before the 7th Amendment of the ARC

The German Act against Restraints of Competition (ARC) has traditionally contained a general ban on cartels, providing only for narrowly defined exemptions.\(^5\) Until the 7th amendment of the ARC in 2005,

\(^1\) Source: DeSTATIS.

\(^2\) Ibid.

\(^3\) In 2008 the German legislator enacted the “Finanzmarktstabilisierungsgesetz” (Act on the Stabilization of Financial Markets) which exempts certain rescue measures in the financial sector from the application of competition law, notably merger control; for further details see OECD DAF/COMP(2009)11, Germany.

\(^4\) Statisticians often define a recession as negative GDP growth during two consecutive quarters.

one of the possible exemptions from the general prohibition of cartels as laid down in Section 1 ARC was a so-called “structural crisis cartel” ("Strukturkrisenkartell").\(^6\) The underlying rationale was to avoid cut-throat competition in the event of a structural crisis – in which not necessarily the most efficient market participants but those with the deepest pockets would survive – and enable the affected companies to quickly reduce overcapacities. According to Section 6 ARC\(^{old}\) the Bundeskartellamt could render an exemption decision: “[In] the event of a decline in sales due to a lasting change in demand, [...] provided the agreement or decision is necessary to systematically adjust capacity to demand, and the arrangement takes into account the conditions of competition in the economic sectors concerned.” It is important to note that Section 6 ARC\(^{old}\) was not applicable to a mere business cycle contraction (“recession”), but only in circumstances where a long-term recovery was not to be expected because of a fundamental change of structural parameters (“structural crisis”).\(^7\)

Although informal consultations took place on numerous occasions, in more than five decades the Bundeskartellamt has received merely ten formal applications based on Section 6 ARC\(^{old}\), two of which were finally approved.\(^8\) In 1983 a cartel for the production and sale of welded steel mesh used in the construction industry was legalized for a period of three years and consecutively extended for another two years.\(^9\) In 1987 a cartel for the production and sale of lightweight building boards, also used in the construction industry, was legalized for a period of six months.\(^10\) Both cartels successfully contributed to the reduction of existing overcapacities in a relatively short time period.\(^11\) Both cartels were extremely difficult to set up and involved the creation of various steering committees as well as a trustee in order to ensure that conditions of competition were not distorted.

Because of the painful restructuring process, combined with a freeze of the market conditions during the cartel period, however, in most instances companies affected by an economic crisis do not reach a viable agreement to pursue a crisis cartel. One of the latest of the more substantial attempts to establish a structural crisis cartel dates from 2005. The Bundeskartellamt was approached by the ready-mixed concrete industry which is characterized by significant overcapacities due to gradually declining demand. Following informal discussions, however, the affected companies failed to submit a detailed plan on how they intended to reduce capacity without discriminating against individual companies. Given the stringent requirements to be met in establishing a structural crisis cartel, the project was abandoned.

### 2.2. Crisis cartels following the 7th Amendment of the ARC

Considering that in a globalized economy a structural crisis will almost always affect inter-state trade and taking into account the supremacy of European competition law according to Article 3 Council

---

\(^6\) See [Federal Ministry for Economics and Labour](https://www.bmwi.de/), 12 August 2004, 7th amendment of the ARC, Statement of the bill, BT-Drucks. 15/3640, p. 27.

\(^7\) See [Braun in Langen/Bunte](https://www.bundesregierung.de/Content/DE/Startseite/Archiv-2004/Bundesregierung-2004-Ehrungen/2004-Braun.pdf), nach § 2 para. 36f with further references.


Regulation (EC) 1/2003, the German legislator abandoned Section 6 ARC\textsuperscript{old} in 2005, noting that the provision had rarely been applied in practice.\textsuperscript{12}

Accordingly, since the 7th amendment of the ARC, any crisis cartel would have to satisfy the general conditions laid down in Section 2 ARC which correspond to the exemptions provided by Article 101 (3) of the Treaty on the Functioning of the European Union (TFEU). While European competition law does not provide for special provisions dealing with an economic crisis, however, the position of the European Commission appears not to differ significantly from the German practice under Section 6 ARC\textsuperscript{old}.\textsuperscript{13}

Since it is not excluded that a coordinated reduction of overcapacities may “contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”, it appears that under European as well as German law there is still room for a legal crisis cartel. Notably, the systematic adjustment of the available capacity in a structural crisis may create a more efficient market structure which ultimately benefits consumers more than a temporary, ruinous price war.

Even if the current crisis could be qualified as a structural crisis as opposed to a cyclical economic crisis, however, the discussion appears rather theoretical. Because of the inherent difficulties related to the creation and management of a crisis cartel, it remains to be seen whether affected industries are really interested in reducing overcapacities by forging a crisis cartel without discriminating against individual companies.

4. Enforcement record on cartels during the recent crisis

The Bundeskartellamt has not observed changes in the types of cartels formed or incentives of cartel participants to seek leniency as a result of the economic crisis. The number of leniency applications filed with the Bundeskartellamt remains high and the recent economic crisis has not softened the Bundeskartellamt’s enforcement practice towards cartels. With the assistance of the Sonderkommission Kartellbekämpfung (“Special Unit for Combating Cartels”), two Decision Divisions are exclusively dedicated to the prosecution of cartels and other hard-core infringements of competition law. Over the last two years, the Bundeskartellamt has conducted dawn raids at more than 170 companies and uncovered a large number of cartel agreements. Following administrative proceedings the Bundeskartellamt imposed fines totaling approx. € 300 million in 2009 and approx. € 170 million in 2010.

5. International cooperation on cartels

In a globalized economy with many multinational corporations, the topic of international cooperation among competition authorities is high on the agenda. Notably within the European Competition Network (“ECN”), close collaboration is commonplace and the Bundeskartellamt continues to work closely with competition authorities around the world to the benefit of consumers. In addition, the Bundeskartellamt is actively involved in international organizations and fora such as the OECD but also UNCTAD and ICN, which provide valuable platforms to promote the adoption and enforcement of sound competition laws.

\textsuperscript{12} See Federal Ministry for Economics and Labour, 12 August 2004, 7th amendment of the ARC, Statement of the bill, BT-Drucks. 15/3640, p. 27.


123
In times of severe economic downturns combined with lower liquidity levels, however, the problem has arisen that the successfully prosecuted participants of a cartel may have difficulty in paying a fine. If participants of a cartel are faced with fines from multiple agencies and/or for different infringements, the “inability to pay” also has an international dimension. Under these circumstances the question arises, whether and how the (potential) fines of other agencies have to be factored into the calculation of a given fine without risking under-enforcement.

In order to avoid a race among competition agencies to become the first to render and enforce an infringement decision, the Bundeskartellamt has the necessary flexibility and welcomes an open dialogue with all stakeholders in order to come to adequate solutions. According to its 2006 fining guidelines, “[T]he Bundeskartellamt takes into account the undertakings’ financial capacity. If an undertaking proves that it is unable to pay the fine in the short or medium term without jeopardizing its existence the Bundeskartellamt can issue a debtor warrant or allow payment of the fine to be deferred. A reduction of the fine, however, will only be considered in exceptional cases if a company proves that, even on a long-term basis, it would be unable to pay the fine without jeopardizing its existence.”\textsuperscript{14}

6. **Competition advocacy on cartel-related matters**

Especially in times of economic crisis the Bundeskartellamt strongly supports competition advocacy as a counterweight to calls for government measures to protect certain sectors. In Germany, for example, independent experts such as the German Monopolies Commission (Monopolkommission), raised their voice to counter advocates of sectoral interests to ensure that the beneficial effects of competition such as innovation are not forgotten by those responsible for overall economic policy measures.\textsuperscript{15}

\textsuperscript{14} Bundeskartellamt, 15 September 2006, Notice No. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the ARC against undertakings and associations of undertakings.

\textsuperscript{15} See Monopolkommission, 22 January 2009, Press Release “Staatliche Reaktionen auf die Wirtschaftskrise stellen Marktwirtschaft und Wettbewerbsordnung in Frage”.

124
1. **Introduction**

   This paper attempts to cast light on the main principles of the Industrial Restructuring Agreements (hereafter “IRA” or crisis cartels) from a Greek perspective. For this purpose we will explore the basic fundamentals of theory of harm concerning the formation of cartels during periods of economic downturn and we also analyse some basic characteristics of European cases. Then, we will analyse the recent Greek fish farm crisis cartel case.\(^1\)

2. **Economic analysis of industrial restructuring agreements in heterogeneous markets**

   An IRA during a period of economic downturn which aims at reducing overcapacity may be considered lawful only in case of structural and not cyclical overcapacity.\(^2\)

   Cyclical overcapacity does not cancel the law of demand (when demand falls, market price decreases). Therefore, it is assumed that market forces (supply & demand) as well as competition will bring economy back to the equilibrium and firms that go bankrupt are those least adapted to the new economic environment due to the crisis.

   For structural overcapacity to exist, the following minimum conditions must be met, over a prolonged period of time:

   - A significant decline of the firm’s capacity utilisation;
   - A reduction in output;
   - Crucial operating losses for all undertakings concerned; and
   - No alteration of the economic environment in the short-run.

   It may prevail in declined economic environments where the market forces cannot solve the phenomenon of cyclical overcapacity and the market is characterised by a stable, transparent and symmetric structure. In such a situation, incumbents in the market are engaged in a “prisoner’s dilemma” game so as to force the competitor to exit the market.

   Suppose the following game between two symmetric\(^3\) incumbents in a Cournot oligopoly market.\(^4\) The payoffs and the game matrix are given below:

---

\(^1\) ECN Case number 2116.

\(^2\) See Georgios Rounis, *Competition or Cooperation? The Limits of Firms’ Activity within the Community Area* (Athens/Komotini, 1992), p. 77 [in Greek].

\(^3\) We assume that marginal cost for both firms is zero.
Each firm has to simultaneously decide whether to build a big, small or not to build a new plant. The strategy of building a plant, either a big or a small, means that each incumbent has the opportunity to expand its production and hence the supply in the market. The structure of the payoffs of the 1st incumbent is the following:

\[
\begin{align*}
&\text{1st Incumbent} & \text{2nd Incumbent} \\
&\text{Build a big plant} & a, \alpha & b, \beta & c, \gamma \\
&\text{Build a small plant} & d, \delta & e, \varepsilon & f, \zeta \\
&\text{Not build a plant} & g, \eta & h, \theta & i, \iota \\
\end{align*}
\]

The Greek letters denote the payoffs of 2nd Incumbent.

Also, the structure of the payoffs of the 2nd incumbent is the below:

\[
\begin{align*}
&\alpha < \beta < \gamma \\
&\delta < \varepsilon < \zeta \\
\end{align*}
\]

From relationships (1) and (2) above and the game matrix in Table 1 we see that the strategy “build a big plant” is a dominated strategy for each firm. Since the dominated strategy cannot be played by the two incumbents (both of them maximise their profit) we can eliminate it from the game matrix. By doing that we reduce the game to matrix in Table 2 below:

Table 2. A reduced static ‘capacity expansion’ game

<table>
<thead>
<tr>
<th>1st Incumbent</th>
<th>2nd Incumbent</th>
<th>Not build a plant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Build a small plant</td>
<td>f, \varepsilon</td>
<td>g, \zeta</td>
</tr>
<tr>
<td>Not build a plant</td>
<td>i, \theta</td>
<td>j, \iota</td>
</tr>
</tbody>
</table>

For the payoffs of both incumbents see relationships (1) and (2).

---

4 We do not assume that the market is stable, transparent and symmetric. We rather prefer to concentrate on the impact of the structure of the market (Cournot, Bertrand, Stackelberg markets) on the overcapacity phenomenon.

5 A dominated strategy exists when each firm has another strategy that gives it a higher payoff no matter what the other firm does. In Table 1 both incumbents prefer to build a small plant and not to build a plant, rather than building a big plant, since their payoffs are smaller in the latter than in the former case.
It is clear from the reduced game matrix that both firms have a dominant strategy which is “build a small plant”.\(^6\) The 1\(^{st}\) incumbent will always choose to expand its supply in the market since its payoffs \(e \& f\) are higher than \(h \& i\) correspondingly. Similarly, the 2\(^{nd}\) incumbent will always choose to expand its supply in the market since its payoffs \(e \& i\) are higher than \(\zeta \& \iota\) correspondingly. In the reduced game matrix, the Nash equilibrium is dominant strategy equilibrium.\(^7\)

However, payoffs \((i, \eta)\) are higher than payoffs \((e, \varepsilon)\) which constitute the aforementioned Nash equilibrium. The “myopic” behaviour of both incumbents is due to the fact that each of them prefers to expand the supply in the market and in the long-run to lose part of its profits until the other incumbent effectively exits the market. Therefore, both of them prefer to function in a non-equilibrium point rather than giving up market shares and consequently incurring higher their costs.

The “myopic” behaviour of the incumbents leads to an overcapacity phenomenon in the future. Even though the strategy “built a big plant” is a dominated strategy and cannot be chosen by the incumbents, the latter prefer to build a small plant and hence to expand their production by a small proportion.

Suppose that the static reduced game matrix becomes a dynamic reduced game matrix and in each period both firms decide to expand their production by the same small proportion. That will result in supply being higher than demand and market price going down. If the number of periods tends to infinity, market price might be lower than average variable cost and hence incumbents may be forced to exit the market.

Let us now suppose that the market consists of a leader and a follower (so called Stackelberg market).\(^8\) The leader decides first whether to build or not to build a new plant and the follower, after the choice of leader, decides whether to follow the leader’s strategy and hence limit its own actions or to choose a different strategy which may cause a non-equilibrium optimal decision point.\(^9\)

In Scheme 1 below, the 1\(^{st}\) incumbent is the leader and the 2\(^{nd}\) incumbent is the follower. Scheme 1 depicts the transformed sequential expansion capacity game tree of game matrix in Table 1 above. It is obviously from the payoff structures of both firms in the market that the Nash equilibrium in the transformed game tree is the “built a big plant” strategy for the leader and the “not build a plant” strategy for the follower.

Especially, we use the “backward induction” technique to find the Nash equilibrium. The follower’s optimal decisions in each point at the game tree is “build a small plant” in case the leader decides not to build or to build a small plant and “not to build a plant” in case the leader chooses to build a big plant. Therefore, the leader by choosing not to build a plant knows that the follower will decide to build a small plant since it maximises its payoff \((i < \theta \& \theta > \eta = i\), where \(\theta\) is the payoff of the follower if it decides to build a small plant). Similarly, if the 1\(^{st}\) incumbent selects to build a small or a big plant, the follower will choose to build a small or not to build a plant correspondingly (when the follower chooses the first, \(\xi < \varepsilon\), \(\varepsilon > \delta < \zeta\), where \(\varepsilon\) denotes the payoff by building a small plant and when the follower decides the second, \(\gamma > \beta > \alpha\), where \(\gamma\) denotes the payoff by not building a plant).

---

\(^6\) A dominant strategy is a strategy that is better than any other strategy that a firm might choose, no matter what strategy the other firm follows. In the reduced game matrix \(e \& f\) are higher than \(h \& i\), therefore, the 1\(^{st}\) incumbent will always choose to expand its supply in the market.

\(^7\) A dominant strategy equilibrium occurs when each firm uses a dominant strategy.

\(^8\) The leader differs from the follower in terms of market shares (size). Therefore, the two incumbents are not symmetric firms.

\(^9\) Such games are called “sequential move games” and for each decision point the firms must choose the optimal decision that maximises their profits at that point.
Since the leader knows the follower’s optimal choice in every single point of the second stage of the game tree, it will follow a strategy that maximises its payoff. That strategy is to build a big plant and the incumbent not to build a plant (the payoff of building a small plant (e) is higher than the payoff of not building a plant (h), but both payoffs are smaller than the payoff of building a big plant (c)).

Comparing the results of simultaneous and sequential games, we conclude that both situations may result in overcapacity, due to the “myopic” behaviour of the incumbents. Indeed, in Stackelberg markets with perfect information and cost-asymmetries among firms (due to the size), the overcapacity problem may be the only outcome, due to the “myopic” behaviour of the leader. However, the total supply in Stackelberg markets may be lower than in Cournot fashion markets. The latter depends on the number of the firms in the market. The higher the number of Cournot oligopolists, the higher the level of the overcapacity problem in the market.

Scheme 1. A sequential “capacity expansion” game tree

3. The European experience in dealing with “Crisis cartels”

The European Union Courts and the European Commission are generally reluctant to recognise any exception to the rule of the prohibition of cartels and emphasise that

“undertakings must use only means that are consistent with the competition rules. Price fixing and market sharing are certainly not legitimate means of combating difficult market conditions. Nor are undertakings entitled to flout [EU] competition rules because of alleged overcapacity.”

The position is, generally, that crisis cartels are serious infringements of the competition rules that by definition restrict competition “by object” in the Article 101(1) TFEU sense. Such agreements will not be

---

considered as *per se* illegal, since it is theoretically possible that they satisfy the criteria of Article 101(3) TFEU,\textsuperscript{12} however, in practice, this is unlikely to happen. Indeed, the more severe the restriction of competition, the less likely it is that an exemption will be available.\textsuperscript{13}

In particular, the Commission, in most cases, does not recognise that overcapacity as such can lead to the justification of crisis cartels. In the *Industrial tubes* case, the Commission stated that the specific sector was an expanding sector with an increasing compound growth annual rate between 1991 and 2000. It also emphasised that the main Member States such as Germany, Italy, France, U.K. and Spain experienced an expansion of the growth rate during the same period and the “capacity increase was the result of the investments carried out during the demand boom, between 1999 and the early months of 2001”.\textsuperscript{14} Therefore, it concluded that the sector of industrial tubes during the infringement period was not in a structural overcapacity crisis.

The overcapacity problem was also not considered by the Commission as a serious problem that would justify the creation of a cartel in *ICI* or in *Tokai Carbon*. In the former case, the General Court emphasised that

“the fact that in previous cases the Commission had considered that, in view of the factual circumstances, account had to be taken of the crisis affecting the economic sector in question cannot oblige the Commission to take similar account of such a situation in the present case since it has been proved to the requisite legal standard that the undertakings to which the Decision is addressed committed a particularly serious infringement of Article [101(1) TFEU]”.\textsuperscript{15}

Similarly, the Court held in the latter case that

“the Commission is not required to regard as an attenuating circumstance the poor financial state of the sector in question. [J]ust because the Commission has taken account in earlier cases of the economic sector as an attenuating circumstance it does not necessarily have to continue to observe that practice [...] [A]s a general rule cartels come into being when a sector encounters problems. If the applicants’ reasoning were to be followed, the fine would have to be reduced as a matter of course in virtually all cases”.\textsuperscript{16}

Then, in *SGL Carbon*, it is mentioned that

“the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be


\textsuperscript{16} Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, Tokai Carbon Co. Ltd. v. Commission, [2004] ECR II-1181, para. 345.
tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions”. 17

In the past, however, the European Commission has exceptionally found that some structural crisis cartels met the conditions for exemption laid down in Article 101(3) TFEU. 18

In some other cases, the Commission has considered the existence of a structural crisis as attenuating circumstances. 19

In general, the Commission has considered that a “crisis cartel” could exceptionally be accepted only in front of a structural crisis with overcapacity

“where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilization and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term”. 20

Such “crisis cartels” could, according to the Commission, be accepted if they involve all or a majority of the undertakings in an entire sector and solely aim at achieving a coordinated reduction of overcapacity, while not restricting the commercial freedom of the firms involved. Alternatively, such agreements could be concluded by a small number of firms, while providing for reciprocal specialisation to enable them to close excess capacity. In both solutions, the arrangements to reduce capacity must not be accompanied or achieved by unacceptable means such as price- or quota-fixing, or market-sharing. 21

In the Seamless steel tubes, the Commission emphasised the following:

“Since the 1970s, the Community steel market has been affected by a long, serious crisis, the most notable features of which have been the continuous fall in demand and the collapse of prices. These market conditions have brought with them serious problems of overcapacity, low plant-utilisation rates and prices failing to cover total production costs and ensure the profitability of firms. The crisis in the steel market has not just hit ECSC steel but has also affected the non-ECSC sectors, which include the pipes and tubes covered by this decision [...]”

With regard in particular to the pipe and tube industry in the Community, since 1980 Community production has been severely restructured in order to adapt capacity to changing market

---


19 Case T-30/05, William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v. Commission, [2007] ECR II-107 (summ.pub.), para. 207. See e.g. Commission Decision of 21 January 1998 (Alloy surcharge), OJ [1998] L 100/55, paras 83-84: “[T]he economic situation in the sector at the end of 1993 was particularly critical. The price of nickel was rising rapidly, while the price of stainless steel was very low [...] These factors justify a reduction in the basic amount [of the fine]”.


conditions. By the end of 1990, seamless pipe and tube production capacity had been reduced by about 20%. Between 1988 and 1991, more than 20000 jobs were lost. Since early 1991, the worsening situation of Community production, combined with the growing influx of imports, has resulted in draconian decisions having to be taken concerning the continued reduction of capacity to core levels and in the closure of several production mills in Germany, Italy and the United Kingdom”.

In ENI/Montedison, the agreements between ENI and Montedison to reduce capacity met the conditions for exemption laid down in Article 101(3) TFEU, since they contributed to improving the production and distribution of goods and to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefit. It also emphasised that

“The exemption is justified because the agreements are an essential first step in the rationalization of ENI’s and Montedison’s petrochemical business which forms part of an industry suffering serious structural overcapacity in the whole Community. As a result of the agreements, the parties were able to restructure their businesses more quickly and fundamentally than would have been possible individually […] The agreements thus produce objective benefits - notably in reducing the excess capacity in an industry suffering from structural overcapacity - which outweigh the abovementioned restrictions of competition”.

4. The Greek fish farm crisis cartel case

4.1 Summary of the Case

The five biggest Greek fish farming undertakings notified an agreement to the Hellenic Competition Commission (“HCC”), stating that, due to overproduction, they jointly agreed to limit/control the sales and fix the selling prices of gilthead sea bream, for a limited period of six months, in order to rationalise production and to restore the prices to a level that covers the production cost. Following this notification, the HCC initiated an ex officio investigation.

The HCC defined as relevant product markets the market for the production and distribution of fresh fish of Mediterranean fish farming (more specifically gilthead sea bream) and the market for the production and distribution of fry and eggs for fish farming.

In their defence, the companies concerned claimed that overproduction of goods in their sector has forced many undertakings to sell their products at prices substantially below production cost. The parties allege that by limiting/controlling the sales and by fixing the selling prices of gilthead sea bream, for a limited period of six months, they aimed at rationalising production and at restoring prices to a level that covers their costs, thus securing the viability of many undertakings of the sector, which would be beneficial for competition in the long-run.

4.2 Analysis of the Overcapacity Problem: The Market of Mediterranean Aquaculture in Greece

The market for aquaculture in Greece is a dynamic sector of the Greek economy. Greece has been the biggest producer of fresh fish of Mediterranean fish farming in recent years. The market for Mediterranean aquaculture constitutes one of the four major export sectors of Greece; it consists of 100 big and small

24 Between 2008 and 2009.
firms, in terms of market shares, with the former accounting for the 60% of the total production. During the period 2006 - 2007, the total value of sales increased by almost 20%, the operating profit increased by almost 28% and the profit pre taxes decreased by almost 2%.

The financial analysis of the aforementioned market indicates that 70% of the profitable firms of the market (almost 65% - 70% of the total participants) were responsible for the 93% of the total value of sales. The non-profitable firms of the market (almost the 30% of the participants) were responsible for the remaining value of the total sales. During the period 2003 - 2007, the 10 biggest firms of the market exhibited an increased mark-up of operating profit\(^\text{25}\) of almost 7% and an increased mark-up of net profit of almost 7%.\(^\text{26}\) At the same time, EBITDA remained stable, from 16.92% to 17.15%.

However, on the same period under scrutiny, the total number of firms (including the small and non-profitable firms) showed a decreased mark-up of operating profit of almost 5.5%, a decreased mark-up of net profit of almost 10% and a decreased EBITDA of almost 10.5%.

In terms of efficiency, the general, specific, and cash flow indexes remained at the same level during the same period. In particular, the cash flow index of the 10 biggest firms in the market increased from 0.06 to 0.11, while the same index for the total number of firms in the market decreased from 0.18 to 0.13.

During the period 1990 - 2002, a lot of firms entered the market intending to take advantage of the opportunities of a rapidly growing and dynamic sector. The consequence of that was an increase of the supply above the level of demand, especially for gilthead sea bream, while its price decreased dramatically.

Diagram 1 below shows the structure of the market for the production and distribution of fresh fish of Mediterranean fish farming (more specifically gilthead sea bream) in 2007.

**Diagram 1. Structure of the market for the production and distribution of fresh fish of Mediterranean fish farming: 2007**

\[ \text{Operating mark-up} = \left( \frac{\text{Total Sales}}{\text{After tax operating profit}} \right) \times 100 \]

\[ \text{Profit pre taxes} = \left( \frac{\text{Total Sales}}{\text{After tax operating profit}} \right) \times 100 \]

Source: HCC’s elaboration of data

\(^{25}\)\(^{26}\)
The above diagram clearly illustrates that the market for the production and distribution of fresh fish of Mediterranean fish farming is characterised as a heterogeneous market in terms of the size (market share) of its participants.

Consumption during the period 2004 - 2008 exhibited a rate reduction, especially during the last two years. Imports did not play a crucial role in the domestic market, while exports accounted for more than 50% of the production of gilthead sea bream and bash fish (see Table 3).

Table 3. Domestic consumption and exports of gilthead sea bream and bash fish: (2004-2008)

<table>
<thead>
<tr>
<th>Year</th>
<th>Production of gilthead sea bream (tns)</th>
<th>Production of bash fish (tns)</th>
<th>Total production</th>
<th>Imports</th>
<th>Exports</th>
<th>Consumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>44,200</td>
<td>40,800</td>
<td>85,000</td>
<td>1,500</td>
<td>48,000</td>
<td>38,500</td>
</tr>
<tr>
<td>2005</td>
<td>48,400</td>
<td>39,600</td>
<td>88,000</td>
<td>1,300</td>
<td>54,500</td>
<td>34,800</td>
</tr>
<tr>
<td>2006</td>
<td>51,300</td>
<td>38,700</td>
<td>90,000</td>
<td>2,500</td>
<td>55,000</td>
<td>37,500</td>
</tr>
<tr>
<td>2007</td>
<td>55,000</td>
<td>34,000</td>
<td>89,000</td>
<td>5,500</td>
<td>70,000</td>
<td>24,500</td>
</tr>
<tr>
<td>2008</td>
<td>62,000</td>
<td>33,000</td>
<td>95,000</td>
<td>6,200</td>
<td>72,000</td>
<td>29,200</td>
</tr>
</tbody>
</table>

Source: ICAP (2009)

Diagram 2 below depicts the average rate of annual production change of gilthead sea bream from 1987 to 2008.


The evolution of the price for gilthead sea bream and bash fish shows that it followed the law of demand. Diagrams 3 & 4 show that an increase in the average production of both products decreases the price of both of them, assuming that all other factors which may affect demand, remain stable. The decrease of the price is more severe in the gilthead sea bream rather than in the bash fish.
Diagram 3. Rate of % change of average price and production of bass fish: 1991-2008

Diagram 4. Rate of % change of average price and production of gilthead sea bream: 1991-2008

Source: HCC’s elaboration of data

The black solid line in both diagrams shows the natural logarithm of average price and production per year for both products. It is obvious that average price and production moved in different directions during the period under scrutiny. The decrease of the average price of both products was more severe in the first years of the period under analysis, reflecting the overcapacity problem at the period.

As to the market for the production and distribution of fry and eggs for fish farming, the annual average rate of total production increased by 21.4% during the period 1991 - 2008. Diagram 5 below illustrates the average rate of annual production change of fry and eggs for fish farming during the period 1991 - 2008.
Moreover, the evolution of domestic consumption of fry and eggs for gilthead sea bream and bream fish during the period 2004 - 2008 has shown a positive trend, except for 2007. In particular, during the first 3 years of the aforementioned period, the consumption increased, on average, by almost 10% per year (see Table 4).

Table 4. Domestic consumption and exports of fry and eggs for gilthead sea bream and bream fish: (2004-2008)

<table>
<thead>
<tr>
<th>Year</th>
<th>Production of fry and eggs for gilthead sea bream (tns)</th>
<th>Production of fry and eggs for bream fish (tns)</th>
<th>Total production</th>
<th>Imports</th>
<th>Exports</th>
<th>Consumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>180,500,000</td>
<td>99,500,000</td>
<td>280,000,000</td>
<td>12,000,000</td>
<td>0</td>
<td>292,000,000</td>
</tr>
<tr>
<td>2005</td>
<td>219,000,000</td>
<td>122,000,000</td>
<td>341,000,000</td>
<td>15,000,000</td>
<td>20,000,000</td>
<td>336,000,000</td>
</tr>
<tr>
<td>2006</td>
<td>235,000,000</td>
<td>135,000,000</td>
<td>370,000,000</td>
<td>16,000,000</td>
<td>22,000,000</td>
<td>364,000,000</td>
</tr>
<tr>
<td>2007</td>
<td>223,000,000</td>
<td>130,000,000</td>
<td>353,000,000</td>
<td>16,000,000</td>
<td>55,000,000</td>
<td>314,000,000</td>
</tr>
<tr>
<td>2008*</td>
<td>217,000,000</td>
<td>145,000,000</td>
<td>362,000,000</td>
<td>17,000,000</td>
<td>57,000,000</td>
<td>322,000,000</td>
</tr>
</tbody>
</table>


During the period 1990 - 2007, the average price of fry and eggs for gilthead sea bream and bream fish decreases as soon as the supply of the market increases. In particular, the average price of fry and eggs for gilthead sea bream was below 4 euro during the period from 2000 to 2007, while at the same time, the average production of fry and eggs for gilthead sea bream remained in high levels (see diagram 6).

Source: Data elaboration by the HCC.

The same picture holds for the average price of fry and eggs for bash fish. There is a decline, but in absolute terms prices are higher than the average price of fry and eggs for gilthead sea bream (diagram 7).

Finally, the cost of production for gilthead sea bream and bash fish did not differ dramatically among the five Greek fish farming undertakings that participate in the agreement. Therefore, the only source of asymmetry among the firms in the market is their size, in terms of market share, between the group of largest firms and the group of smallest firms in the market.


Source: Data elaboration by the HCC.
4.3 Assessment of The Overcapacity Problem

In its decision, the HCC held that the above agreement to limit/control sales and to fix the selling prices of gilthead sea bream for a period of six months, constituted a hard core restriction of competition, i.e. a restriction of competition “by object” in the sense of Articles 1(1) L. 703/1977 and 101(1) TFEU. Although an exemption under Articles 1(3) L. 703/1977 and 101(3) TFEU is not theoretically excluded, price-fixing and output-limiting agreements are most unlikely to fulfil the criteria for an individual exemption. As a general rule, such agreements do not bring about objective economic advantages, nor can they be deemed indispensable for the attainment of such advantages. It is further unlikely that the restriction of competition can be counter-balanced in a proportionate manner by measurable benefits that are passed on to the consumers.

The market for Mediterranean aquaculture in Greece is an export-oriented sector. The firms that agreed to form the “crisis cartel” constitute almost 30% of the world market for Mediterranean aquaculture. From Table 3, we see that 50%-60% of the production of gilthead sea bream and bash fish is export-oriented rather than destined for domestic consumption.

The analysis of the market shows a decline in the rate of percentage change of gilthead sea bream production from 2003 to 2008, following a decline of the level of consumption from 2004 to 2008 (diagram 2 and Table 3 correspondingly). Nonetheless, there was no significant drop in demand and/or output over a prolonged period of time. To the contrary, production and consumption indexes generally continued to exhibit a positive trend.

The evolution of the price for gilthead sea bream and bash fish further indicates that it followed the laws of offer and demand, such that there was no reason to believe that market forces would be likely to discipline expansion of capacity and bring back the market to an equilibrium point.

Moreover, market participants did not incur substantial operating losses over a prolonged period of time. In terms of efficiency, the general, specific, and cash flow indexes remained generally stable during the same period, with the key players exhibiting sustained profits (albeit relatively reduced in the last 2 years). In particular, the cash flow index of the 10 biggest firms in the market increased from 0.06 to 0.11 during the period from 2003 to 2007.

In addition, the relevant market was not characterised by stable and symmetric structures, such that it could be assumed that weaker (least efficient) firms would be forced out of the market and the problem of overcapacity would not persist, bringing the market back to equilibrium.

In any event, the agreement in question was not limited to a reduction of overcapacity, based on a concrete restructuring plan with objective criteria for the removal of inefficient capacity. To the contrary, it contained no specific restructuring plan, while essentially extending to output-limitation and price-fixing restrictions – the primary aim being to achieve the increase of selling prices in the short run (to the benefit of producers and to the detriment of consumers).

More importantly, the HCC concluded that the poor economic performance of the market under scrutiny was a result of the actions of the undertakings concerned. At their own admission, the undertakings concerned set over-ambitious targets, while failing to foresee that the consumption growth would slow down at higher pace.

The firms in the market should have foreseen that such an expansion of the market capacity may not be absorbed by demand and hence, the market price may decrease, reaching the level of the cost of production and, in some circumstances, going even below it. The participating firms believed that such a “myopic” behaviour would increase their power (by increasing their market share) in the market, while
failing to realise that the result of such a development coincided with a non-equilibrium point (see Table 1). Instead, market players should have taken individual steps to decrease capacity and/or reacting to the current downturn by pursuing consolidation and/or by engaging in efficiency-enhancing specialization agreements or similar actions. Consolidation could have helped to eliminate misallocation of resources, increase efficiency and decrease supply.

According to the HCC, although the financial position of the firms concerned may have somewhat deteriorated in recent years, that was mainly because of (a) the fact that participants in the agreement were least-adapted to market conditions, (b) the economic crisis that negatively affected major sectors of the Greek economy, among them the market for Mediterranean aquaculture and (c) the reduction of the level of financing in the last two years (again a result of the economic crisis).

Overall, based on the specific circumstances at hand, the HCC concluded that the market for Mediterranean aquaculture and, in particular, the market for the production and distribution of fresh gilthead sea bream in Greece, was not in a structural crisis. Its recent poor performance was mostly a result of the economic crisis negatively affecting the Greek economy in the last 2.5 years, as well as of the “myopic” behaviour of the firms concerned, which set over-ambitious production targets.
IRELAND

1. Introduction

In January 2011, the Competition Authority (the “Authority”) won court proceedings in which it challenged the compatibility with EU and Irish competition law of an agreement between competitors to reduce capacity in the Irish beef processing industry.

The Authority initiated the proceedings in 2003 and in July 2006 the Irish High Court decided that the agreement did not have the object of restricting competition and therefore did not infringe Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”) or the equivalent section in the Irish Competition Act, 2002 (the “2002 Act”). In view of that finding, the High Court considered it unnecessary to decide whether the agreement satisfied the conditions for exemption in Article 101(3) and in its Irish equivalent. The Authority appealed this decision to the Irish Supreme Court. In March 2007, the Supreme Court sought a preliminary ruling from the European Court of Justice (the “ECJ”) on the question as to whether such an agreement, providing for a restructuring of an entire industry by agreement between the competitors in that industry, has the object of restricting competition. In November 2008, the ECJ held that such an agreement did, indeed, have such an object. Following that preliminary ruling, the Supreme Court referred the case back to the High Court for a decision as to whether the agreement satisfied the conditions of Article 101(3) TFEU. In the end, the High Court did not have to rule on this issue as the parties to the agreement decided not to implement it and withdrew from the proceedings.

This submission is primarily focused on the application of competition rules by the different courts involved in the proceedings to the agreement at issue in the Irish case. However, it also addresses some other issues which are relevant in the context of agreements aimed at reducing capacity in specific industries. In particular, it considers the application of competition law to crisis cartels; it deals with recent developments in Ireland regarding situations of reduced consumer demand and overcapacity; and, it suggests a response from an advocacy perspective for times of economic difficulties.

2. Application of competition law to crisis cartels

2.1 Crisis cartel terminology and historical context

The term “crisis cartel” has traditionally been used to refer to agreements or other forms of cooperation between competing undertakings aimed at addressing difficulties arising in the context of industries suffering from overcapacity in times of economic recession and/or declining demand.

The European Commission’s (the “Commission”) traditional approach to the application of competition law to crisis-cartels has been to draw a distinction between cyclical over-capacity and structural over-capacity.

Cyclical over-capacity is the result of the drop in demand that occurs during a business cycle downturn. In such circumstances, supply and demand can be brought into equilibrium relatively quickly through the normal play of market forces, with the least efficient players leaving the market either by their own choice or as a result of insolvency.
Structural over-capacity is, however, generally recognised as having quite different characteristics. As long ago as 1982, in its annual report on competition policy, the Commission defined structural over-capacity as existing where “over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium term” (emphasis added).

The issue of how EU competition law should be applied to "crisis cartels" is not new. It has arisen during every economic downturn or recession suffered by the European Union since at least the 1970s. There is, of course, an obvious tension between competition law and the measures that industry (and politicians) often wish to adopt in order to resolve the problems created by serious over-capacity in particular industrial sectors, whether those problems relate to the insolvency of local firms, increased unemployment or the threatened loss of “national champions”. The question as to how competition law should be applied in such circumstances therefore remains a matter of some controversy.

In the past, the Commission has reviewed agreements aimed at reducing capacity throughout an entire industry. For example, in Synthetic Fibres\(^1\) the Commission dealt with an agreement notified by the main European producers of synthetic fibres to reduce capacity in the synthetic fibres industry. In *Stichting Baksteen*\(^2\) (also known as the *Dutch Bricks* case) the Commission dealt with a restructuring agreement providing for a collective reduction in capacity in the Dutch bricks industry.

As indicated above, the European Commission’s consistent approach has been to draw a distinction between cyclical over-capacity and structural over-capacity, emphasising that it is only where an industry is suffering from structural over-capacity that agreements between market participants to reduce capacity in the sector could satisfy the conditions for exemption set out in Article 101(3) TFEU\(^3\). Whether this is a distinction that should still be considered relevant following the adoption by the European Commission of its Guidelines on the application of Article 101(3)\(^4\) (the “Guidelines”) is discussed at 4.2.2 below.

2.2 Observations of the Competition Authority

Competition law as rules of general application to all sectors of the economy with few exceptions are intended to be applied in good and bad economic times. Nevertheless, where an industry or even an entire economy is experiencing difficult times, there is pressure on competition agencies not to apply competition laws or to apply them in an attenuated way. Sometimes, governments are invited to enact laws exempting certain conduct or certain sectors from the application of competition laws on the grounds that the application of competition laws will hinder industry-led efforts to address the crisis in which there may be a persistent low level of demand coupled with chronic excess capacity in the sector. Where the industry is important to the economy including being a major source of employment, governments are called upon to act.

From the perspective of competition law, there is no place to apply a different set of analytical principles to examining a ‘crisis cartel’ that would be different from any form of collaboration among businesses who are competitors of each other. In the Authority’s view, it is irrelevant in applying competition laws to crisis cartels to determine whether the crisis is (a) cyclical, being a result of a

---

3. Being the same conditions as appeared in the corresponding Article of the EC Treaty (numbered Article 81(3) initially and later Article 85(3)).
temporary drop in demand, or (b) chronic, being a product of a low level of demand coupled with a chronic excess productive capacity⁵.

Thus, a crisis cartel as with all types of competitor collaborations can be examined under the laws prohibiting anti-competitive agreements and the laws prohibiting anti-competitive mergers and acquisitions. For Ireland, the relevant laws are section 4 of the Competition Act 2002 (“2002 Act”) and Article 101 TFEU with respect to anti-competitive agreements and Part III of the 2002 Act and EU Merger Regulation with respect to anti-competitive mergers or acquisitions.

With respect to section 4 of the 2002 Act or Article 101 TFEU, a critical question in analysing a crisis cartel is whether the collaborative conduct contemplated by the cartel will meet the cumulative requirements of Article 101(3) TFEU (the so-called “efficiency defence”) (or section 4(5) of the 2002 Act), assuming the conduct infringes Article 101(1) TFEU (or section 4(1) of the 2002 Act) by object or by effect.

In such circumstances, industry-wide agreements to reduce capacity may be justifiable in terms of consumer welfare, for example where the agreements speed up the removal of inefficient plants, allowing the remaining efficient plants to increase production using the same plant, thereby reducing total unit costs. Such an increase in efficiency would not, however, be sufficient to warrant an exemption under Article 101(3) TFEU. The other conditions for exemption would also need to be met.

Thus the parties to the agreement would have to show that the agreement and the restrictions it contains are indispensable for the achievement of the claimed efficiencies – that the desired outcome could not be achieved by any less restrictive means or, indeed, through the normal operation of market forces.

They would also have to show that the benefit of the claimed efficiencies will be passed on to consumers (in the broadest sense of that term). This requires a rigorous analysis of the nature of the efficiencies which are likely to be achieved and of the likelihood that the benefits will accrue to consumers. Such an agreement will only satisfy this condition if it can be demonstrated that the benefits of the agreement for consumers will at least compensate them for the negative effects of the restrictions of competition resulting from the agreement.

Finally, the parties will have to show that the agreement will not result in the elimination of competition. This will depend on the nature and extent of the competitive constraints that will apply in the market after the agreement has been implemented (e.g. in the form of actual and potential competition and buyer power). The market analysis required to demonstrate this is similar to the analysis that needs to be undertaken when reviewing mergers.

This approach to the analysis of industry restructuring agreements is consistent with (and, indeed, follows) the approach adopted generally by the Commission in the Guidelines, in which great emphasis is placed on the economic analysis of the likely effects of restrictive agreements.

There is, however, very little recent case law of direct relevance to the assessment of “crisis cartels” under Article 101(3) TFEU. The precedent cases most commonly cited when considering the application of the competition rules to crisis cartels are Synthetic Fibres⁶ and Dutch Bricks⁷, in both of which the

---

⁵ See further at 4.2.2 below.
Commission granted exemptions under Article 101(3) TFEU \(^8\). However, both cases were decided long before the adoption of the Guidelines and, in the Authority’s view, should no longer be regarded as providing authoritative guidance on the application of EU competition law to “crisis cartels”.

In the Authority’s view, there is also a not insignificant risk inherent in the Commission’s traditional distinction between cyclical and structural over-capacity in the context of “crisis cartels”. This is that it may encourage an assumption (for example, by national courts) that industry restructuring agreements/crisis cartels are generally acceptable in situations of structural overcapacity and that their assessment under Article 101(3) TFEU in such cases should be a generous and relatively benign one. The approach adopted by the Commission in its Guidelines, which insists on a rigorous economic analysis of the compliance of such an agreement with the conditions in that Article, shows that such an assumption would be quite wrong. Insofar as it remains relevant, the distinction should instead be seen as one which emphasises that industrial restructuring agreements will rarely, if ever, qualify for exemption where the over-capacity is the result of relatively short-term cyclical factors.

3. Recent developments in Ireland

Like many other countries, Ireland has experienced a sharp decline in economic activity over the last number of years. One implication of the economic downturn is that a mis-match was created between supply and demand in many sectors. Under normal conditions, markets would be expected to adjust to a new equilibrium. For example, in response to falling demand, with fixed capacity in the short run, prices would be expected to fall. As prices fall, the least efficient operators would fail and capacity would adjust as firms exit. While this story of how markets may move from one equilibrium to another is simplistic, it does illustrate that price and capacity play key roles.

Different sectors of the economy have attempted to manage the effects of reduced consumer demand differently, with some sectors focussing on price, and others on capacity. For example, publicans operating in the licensed alcohol trade have attempted to collectively manage the impact of reduced consumer demand by limiting price competition. At the end of 2008, the publican trade associations issued a joint press release, announcing “a one year price freeze in drinks prices in pubs with immediate effect”; this encouraged members not to exceed the existing price levels that they applied to drinks products over the following twelve months.

The announcement took place at a time when general price deflation was expected throughout the economy. The Authority’s view was that a freeze in prices, when prices are expected to fall, is as harmful to consumers as an agreement to raise prices is in a normal inflationary environment. Moreover, the Authority’s resolve to take action with respect to the publicans’ associations actions was not driven only by concerns arising solely in the drinks industry. If the price freeze policy adopted by the publicans were to be replicated in other sectors of the economy, consumers and businesses alike would suffer.

In July 2009, the High Court held that the announcement breached an undertaking which had previously been given to the High Court by the associations concerned in which they had agreed not to recommend prices to its members. It was therefore unnecessary for the Court to rule on whether there had been a breach of the 2002 Act.

In other sectors, the level of capacity has been a focus of industry representative groups. For example, in the hospitality sector, the Irish Hotels Federation commissioned a report to analyse options for the industry in light of the economic downturn and the fall in the number of tourists visiting Ireland. A report entitled Over-Capacity in the Irish Hotel Industry and Required Elements of a Recovery Programme was

\(^8\) Formerly, Article 81(3), EC Treaty.
published in 2009. The report contains a number of recommendations aimed at reducing capacity in the sector and calls on the government to drive this programme:

“It is imperative that a planned programme of closure must first identify the optimal future structure of the hotel sector in terms of location, grade, etc. It is recommended that a group be convened as soon as possible to begin this work including representatives of the hotel industry, tourism development agencies and the financial sector. It is recommended that the aim should be to agree a speedy and orderly decommissioning of supply in a manner that leaves the profile of substantially reduced supply appropriate to the long term demand for Irish tourism.

As far as the Authority is aware, the Irish Government has resisted attempts by the sectoral interests to involve it in a coordinated attempt to reduce capacity in the sector. In addition to competition law implications, the Government’s approach is perhaps informed by the view that surplus capacity in the sector will drive prices down and help the Irish hospitality sector recover some of its lost competitiveness internationally.

4. **Competition Authority v Beef Industry Development Society**

The above case involved an agreement\(^9\) between competitors to reduce capacity in the Irish beef processing industry (i.e., the slaughter of cattle and de-boning of meat). The structure of the proposed scheme (which was never implemented) involved the establishment by the principal participants in the sector of a corporate vehicle, the Beef Industry Development Society Limited (BIDS).

The Authority took the view that the scheme was incompatible with both section 4(1) of the 2002 Act and Article 101(1) TFEU. The case has been a long-running saga involving one High Court trial, one Supreme Court judgment and a judgment from the European Court of Justice (ECJ). Following a ruling by the ECJ that an agreement of this kind is illegal, the Supreme Court held that the BIDS agreement had infringed Article 101(1). The Supreme Court remitted the case to the High Court to allow BIDS the opportunity to argue that the agreement should be exempt from the prohibition in Article 101(1) on the grounds that it satisfied the conditions for exemption set out in Article 101(3). In January 2011, BIDS decided not to implement the agreement and withdrew its claim for exemption under Article 101(3). This meant that the High Court did not have the opportunity to reach any decision on the application of Article 101(3) to the BIDS agreement.

The background to the case is that, in the late 1990s, there was significant over-capacity in the Irish beef-processing industry. Following a market study in 1998, a task force set up by the Minister for Agriculture and Food recommended a reduction in the number of beef processors from 20 to between 4 and 5. In May 2002, the 10 largest processors established BIDS in order to implement a rationalisation plan which provided for a reduction in processing capacity of about 25%. The plan was to be implemented by means of agreements between processors under which some of them agreed to leave the industry (the “goers”) in consideration of the payment of compensation by those who stayed (the “stayers”). In return for this compensation, the goers would: (i) decommission their plants and agree to restrictions on the future use of their equipment; (ii) refrain from using their lands for beef processing for five years; and (iii) enter a two year non-compete clause in respect of processing on the island of Ireland.

The essential terms of the BIDS arrangements are set out in Annex 1.

---

\(^9\) A summary of the essential terms of the agreement is provided in the Annex to this submission.
4.1 Application of Section 4(1) and Article 101(1)

4.1.1 High Court trial (1)

In 2003, the Authority brought a civil action before the High Court alleging that the BIDS arrangements infringed Irish and EU competition law, in particular, section 4(1) of the 2002 Act and Article 101(1) TFEU.

After an 11 day hearing, the Irish High Court issued a judgment in July 2006 in which it dismissed the Authority’s application for a ruling that the proposed scheme infringed Irish and EU competition law. The Court held that the Authority had not demonstrated, on the balance of probabilities, that the proposed scheme had the object or effect of restricting competition in the upstream market for the purchase of cattle for slaughter and the de-boning of meat or in the downstream market for the sale of processed beef. (Interestingly, since the defendants had conceded that the scheme was liable to have an appreciable effect on trade between Member States, the High Court also found that the case was “an Article 101 case and not one requiring independent consideration under section 4 of the 2002 Act”.)

4.1.2 Supreme Court appeal (phase 1)

The Authority appealed to the Supreme Court, but the appeal was suspended in March 2007 when the Court decided to refer a question to the European Court of Justice (“ECJ”) under the preliminary ruling procedure in Article 267 TFEU. In essence, the Supreme Court asked the ECJ whether agreements with features such as those of the BIDS arrangements were to be regarded, by virtue of their object alone, as being anti-competitive and prohibited by Article 101(1) or whether it was necessary, in order to reach such a conclusion, first to demonstrate that such agreements had anti-competitive effects.

4.1.3 ECJ ruling

In its judgment, the ECJ pointed out that it was settled case law that there is no need to take account of an agreement’s actual effects once it appears that its object is to prevent, restrict or distort competition within the common market. That examination must, however, be made in the light of the agreement’s content and economic context.

Having reviewed the arguments of the parties, the ECJ said that it was apparent that:

“the object of the BIDS arrangements is to change, appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors”.

It also said that the arrangements were intended:

“to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability.... That type of arrangement conflicts patently with the concept inherent in the [TFEU] provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article [101(1) TFEU] is intended to prohibit any form

10 Formerly Article 234, EC Treaty.
11 Case C-209/07, Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd. (November 20, 2008),
of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition.”

The Court therefore concluded that an agreement with the features of the BIDS agreement had as its object the prevention, restriction or distortion of competition within the meaning of Article 101(1) TFEU. The precise wording of its conclusion was as follows:

“An agreement with features such as those of the standard form of contract concluded between the 10 principal beef and veal processors in Ireland, who are members of the Beef Industry Development Society Ltd, and requiring, among other things, a reduction in the order of 25% in processing capacity has as its object the prevention, restriction or distortion of competition within the meaning of Article [101(1) TFEU].”

4.1.4 Supreme Court appeal (phase 2)

Following this ECJ ruling, the matter returned to the Supreme Court for the application of the ruling to the specific facts of the case. In its judgment of 3 November 2009\(^{12}\), the Supreme Court noted that, in light of the ECJ’s judgment, the parties accepted that the only issue which remained to be determined was whether or not the BIDS arrangements could benefit from an exemption under Article 101(3). It therefore referred the case back to the High Court for determination of this question. In doing so, it emphasized that the High Court would need to consider this issue de novo, having regard, in particular, to the terms of the ECJ’s judgment in which the very object of the BIDS arrangements was found “to conflict patently with the concept inherent in the Treaty regarding competition”\(^{13}\).

4.1.5 High Court trial (2)

As indicated above, the Supreme Court referred the case back to the High Court for determination of the application of the exemption under Article 101(3) TFEU to the BIDS agreement. The onus was on BIDS to prove that all four conditions under Article 101(3) TFEU were satisfied to avail of the exemption under Article 101(3) TFEU.

In January 2011, BIDS withdrew its claim before the High Court in respect of the application of Article 101(3) TFEU to the agreement. Consequently, the High Court did not reach any decision on the application of Article 101(3) TFEU to the BIDS agreement.

Notwithstanding BIDS’ withdrawal of the proceedings, the developments before the High Court in relation to Article 101(3) are set out below.

4.2 Application of Article 101(3)

During the High Court proceedings (High Court trial (2)), the parties asked the Court to issue directions (prior to the hearing of the Article 101(3) conditions) in respect of the period in time at which the Article 101(3) assessment must be made. In particular, the High Court was asked to decide whether the four conditions must be satisfied at the time of the proposed implementation of the BIDS arrangements (i.e. 2010) or at the time of the earlier proceedings before the High Court (i.e. 2005/2006).

Furthermore, the Commission decided to intervene as Amicus Curiae in this case and submitted written observations to the Court pursuant to Council Regulation (EC) No 1/2003. The primary objective

---


of the Commission’s intervention in this case was to ensure a coherent application of Article 101(3) in respect of agreements to reduce capacity. The rationale behind the Commission’s decision to intervene was, on one hand, the likelihood of agreements to reduce capacity in various industries across Europe in the context of the current economic downturn and, on the other hand, the limited precedents available in respect of the application of Article 101(3) to this type of agreement since the adoption by the Commission of its Guidelines on the application of Article 101(3). This was only the fourth time that the Commission has intervened as Amicus Curiae before a national court.

4.2.1 The period in time relevant for the Article 101(3) assessment

The Authority is of the view that the four conditions under Article 101(3) must be satisfied at the time of the proposed implementation of the agreement. The evidence and data used to demonstrate that the four conditions are satisfied must be valid in the date of implementation of the agreement and not some earlier date.

The Authority’s view is supported by paragraph 44 of the Guidelines:

“The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case. (Paragraph 44) (Emphasis added)

The Guidelines advise further (Paragraph 45) that in the case of an agreement which is irreversible (in other words, where the ex ante situation cannot be re-established), the Article 101(3) assessment must be exclusively on the basis of the facts pertaining at the time of the implementation.

In light of the above, the Authority considers that, the BIDS arrangements must meet the four conditions of Article 101(3) as of the date of their implementation, that is to say, 2010. It is irrelevant that the BIDS arrangements, had they been implemented at some past date, might have satisfied Article 101(3).

4.2.2 Commission’s decisions in Dutch Bricks and Synthetic Fibres

In the past, the Commission dealt with agreements concerning the restructuring of the synthetic fibres and Dutch bricks industries in the Synthetic Fibres14 (1984) and Dutch Bricks15 (1994) cases, respectively. However, in the Authority’s view, the reasoning in both cases, to the extent that it is apparent from the decisions, is inconsistent with the current approach of the Commission to the application of Article 101(3) as set out in its own Guidelines.

In the Authority’s view, neither case is indicative or representative of the Commission’s current approach to the application of Article 101(3) for the following reasons. First, the Commission decisions contain little analysis under Articles 101(1) and 101(3): the Synthetic Fibres decision consists of 55 short paragraphs and the Dutch Bricks decision consists of 45 short paragraphs. Second, the economics-based approach adopted in the Guidelines in respect of the application of Article 101(3) is absent in both cases. Third, neither case is cited in the Guidelines. Fourth, both cases contain inaccurate statements of the law on Article 101(3), particularly on the interpretation of the indispensability criterion.

---

The Authority considers that the Commission’s interpretation of the indispensability criterion (further discussed below) in both Synthetic Fibres and Dutch Bricks was incorrect. In both cases, the Commission seemed to consider that the third condition is satisfied where the restrictions are indispensable to the objective of capacity reduction and not, as the text of Article 101(3) makes clear ought to be the approach, to the objectives of attaining efficiencies and providing a fair share of them to consumers. As the Guidelines point out at paragraph 74:

"[...] The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction."

4.2.3 First condition: Contributing to the improvement of production or distribution of goods or to promoting technical and economic progress

The first condition of Article 101(3) is that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress.

The purpose of the first condition of Article 101(3) is to ascertain the efficiency gains resulting from the agreement. In assessing the efficiency gains that are claimed to flow from the agreement, it is important to remember that they must outweigh its anti-competitive effects. Accordingly, all efficiency claims must be substantiated. This involves verification of the following matters:

- First, it must be demonstrated that the claimed efficiencies are of objective value.
- Second, a causal link between the agreement and the claimed efficiencies must be demonstrated. The Authority is of the view that this normally requires that the efficiencies result from the economic activity that forms the object of the agreement. Furthermore, the causal link must be sufficiently close. It follows that in the BIDS case, the Court must be satisfied that the claimed efficiencies result directly from the restructured beef processing industry.
- Third, the likelihood and the magnitude of each claimed efficiency must be demonstrated. The Authority considers that the undertaking seeking the benefit of Article 101(3) must, as accurately as reasonably possible, calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. It must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise and the undertaking(s) involved must explain how and when each claimed efficiency will be achieved.
- Fourth, the undertaking seeking the benefit of Article 101(3) must substantiate any projections as to the date from which the efficiencies will become operational so as to have a significant positive impact on the market.

The Authority is of the view that mere speculation or general statements on cost savings are not sufficient to discharge the onus under the first condition under Article 101(3). Furthermore, in the context of restructuring agreements under which a number of undertakings will leave the industry, the Authority considers that knowing the identity of either the undertakings leaving the industry or the undertakings

---

16 Synthetic Fibres, paras. 42 to 47 and Dutch Bricks, paras. 32-37.
17 Guidelines, paras. 50 and 51.
staying in the industry is essential to estimate the likely efficiency gains (if any) with the degree of accuracy necessary for the purposes of Article 101(3).

Any calculation of cost savings requires knowing the output produced by the undertakings leaving the industry and the costs of producing that output. Similarly, one would need to know which of the undertakings staying in the industry (if any) will increase output consequent upon implementation of the agreement, the amount of such increase in output and the cost of producing the additional output. Cost savings are more likely to be achieved if the rationalisation agreement ensures that the least efficient plants exit the industry.

4.2.4 Third condition: Indispensability of the restrictions

The third condition under Article 101(3) (which, as in the Guidelines, we discuss before the second condition) is that the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives of improving the production or distribution of goods or to promoting technical or economic progress. In other words, the restrictions must be indispensable to achieving the claimed efficiencies.

The Authority considers that the third condition under Article 101(3) will be satisfied if the restrictions are shown to be indispensable to achieve the claimed efficiency gains, not the attainment of the goals intended by the parties to the agreement.

In this particular case, one of the Supreme Court judges who heard the BIDS appeal, Mr. Justice Fennelly, also seems to understand it in this way, as is clear from his judgment in the instant case, where he says:

“Finally, compliance with Article 81(3)(a) requires it to be demonstrated that the restrictions imposed by any arrangements being examined under the provisions be “indispensable to the attainment of these objectives,” i.e., the objectives whose attainment enables them to survive Article 81(1).” [Emphasis added]

Indeed, the Guidelines also make this point clear at paragraph 73, which says:

“According to the third condition of Article 81(3) the restrictive agreement must not impose restrictions which are not indispensable to the attainment of the efficiencies created by the agreement in question.” [Emphasis added]

As the Guidelines explain, the third condition under Article 101(3) implies a twofold test.

- First, it must be shown that the overall arrangement itself is necessary\(^{18}\). In order to prove this, it must be shown that the efficiencies are specific to the arrangement and that there are no other economically practical and less restrictive ways of achieving them; and
- Second, it must be shown that each individual restriction flowing from the arrangement is necessary in order to achieve the efficiencies\(^{19}\). The restrictions must be clearly explained, because if they are indeterminate, the Court will not be in a position to assess whether they are indispensable\(^{20}\).

---

\(^{18}\) Guidelines, para. 73.

\(^{19}\) Guidelines, para. 73.

In the case of restructuring agreements, some questions that might be asked concerning alternative ways of achieving efficiencies are whether the claimed efficiencies could be realised through a merger or whether the claimed efficiencies can be achieved by closing less efficient plants.

4.2.5 Second condition: Consumers must receive a fair share of the resulting benefits

According to the second condition under Article 101(3), consumers must receive a fair share of the efficiencies generated by the restrictive agreement.

The Guidelines explain that the term “consumers” encompasses both direct and indirect users of the products covered by the agreement. The concept of “fair share” implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 101(1).

The Authority is of the view that, under this second condition, the following test must be satisfied. First, it must be shown that consumers will not be worse off as a result of the agreement, and second, that the efficiencies must be balanced against and compensate for the negative effects of the agreement on consumers. This balancing exercise explained in the Guidelines implies, as has already been indicated in the section dealing with the first condition under Article 101(3), that the efficiency gains must be quantified.

Paragraphs 95 to 101 of the Guidelines describe in more detail the analytical framework for assessing consumer pass-on and the balancing of cost efficiencies. This framework is particularly important in cases where it is not immediately obvious that the competitive harms exceed the benefits to consumers or vice-versa.

Paragraph 96 notes that cost efficiencies may lead to increased output and lower prices for consumers. In assessing the extent to which cost efficiencies are likely to be passed on to consumers and the outcome of the balancing test contained in Article 101(3), factors such as the characteristics and structure of the market, the nature and magnitude of the efficiency gains, the elasticity of demand and the magnitude of the restriction of competition should be taken into account.

According to the Authority, to answer the question of whether consumers will get a fair share of any purported efficiencies, it is crucial to understand the effect of the agreement on marginal costs. It is well understood in economic theory that, once a firm has decided to produce (i.e. has incurred any relevant fixed costs and decided to either enter or remain in a market), marginal costs are the principal supply side determinant of what level of output will be produced and at what price. In essence, a firm will produce where marginal cost equal marginal revenue, or in other words, a firm will produce up to the point where the cost of producing an additional unit of output is not less than the revenue that will be generated from selling that last unit.

In this regard, paragraph 98 of the Guidelines states:

"According to economic theory undertakings maximise their profits by selling units of output until marginal revenue equals marginal cost. Marginal revenue is the change in total revenue resulting from selling an additional unit of output and marginal cost is the change in total cost resulting from producing that additional unit of output. It follows from this principle that as a general rule output and pricing decisions of a profit maximising undertaking are not determined

---

21 Guidelines. para. 84.
22 Guidelines. para. 85.
by its fixed costs (i.e. costs that do not vary with the rate of production) but by its variable costs (i.e. costs that vary with the rate of production). After fixed costs are incurred and capacity is set, pricing and output decisions are determined by variable cost and demand conditions.”

In the context of restructuring agreements where the undertakings staying in the industry must pay a levy linked to their output levels, it is important to bear in mind that the effect of this levy on marginal costs could result in reduction in output which could lead to higher prices to consumers.

4.2.6 Fourth condition: Possibility of eliminating competition in a substantial part of the products in question

According to the fourth condition of Article 101(3) the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned.

As the Guidelines explain, notwithstanding the possibility of exemption for agreements that would otherwise offend Article 101, ultimately priority must be given to the protection of rivalry and the competitive process over efficiency gains arising from anti-competitive agreements.23

The Authority considers that, in assessing whether undertakings will be afforded the possibility of eliminating competition, the Court must consider both actual and potential competition, and must examine the state of existing competition. The question that must be decided is whether there is a possibility of elimination of competition in a substantial part of the market. The fact that competition remains in the rest of the market is not relevant to satisfy the requirement.

As stated in the Guidelines, the application of the ‘no elimination of competition’ condition of Article 101(3) requires an assessment of the competitive process and the impact of the agreement:

“a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint. Both actual and potential competition must be considered.

As the Guidelines highlight, the elimination of competition condition is not fulfilled if competition with respect to an important dimension is eliminated.

Restructuring agreements which involve a large number of players accounting for a large market share and which prevent the possibility of expansion or entry of productive capacity are unlikely to satisfy the requirement that there is no elimination of competition.

5. Policy response: Good times bad times

Transparent, open and competitive markets deliver benefits to consumers, producers and the wider economy generally. Competition law and policy exists to ensure that these benefits (improved efficiency, innovation and competitiveness) are not undermined by cartelisation, monopolisation and other anticompetitive practices. The realisation of these benefits, however, takes time and, when juxtaposed with the very tangible and instant impacts of recession, can and does result in calls for a relaxation of the implementation of competition policy.

23 Guidelines, para. 105.
“In a recession, the short-run may be prioritised:... the immediate costs of competition to existing business, employees and consumers may be up-front and visible, with the benefits delayed and less visible. Tolerance for this will be lower in a recession.”

Frequently this is manifest through the promotion by government of soft competition between competitors and/or the development of national ‘frameworks’ to achieve wider macroeconomic policies such as the creation of national champions. These policy objectives are then advanced more vigorously than competition policy under the belief that they will lead to economic recovery and growth. On the contrary, history teaches us that the relaxation and/or suspension of competition law leads to cartelisation and other anticompetitive activities that achieve precisely the opposite.

Romer’s analysis of the impact of the National Industrial Recovery Act (“NIRA”) in the US during the 1930s confirms this. The NIRA provided for the establishment of industry wide agreements, as long as certain other policy objectives were achieved, that allowed competitors to come together and agree prices, output levels, investment plans and labour costs. In Romer’s view the removal of price competition deprived the economy of the essential mechanism whereby declining prices act as a signal to industry to adjust output accordingly and to dispense with inefficient companies:

“it prevented the economy’s self-correction mechanism from working. Thus the NIRA can be best thought of as a force holding back recovery... .”

Thus, far from being a contributor to recession, competition policy can be one of the solutions for recovery.

It is this message that needs to be clearly advocated by competition agencies amidst the opportunistic calls by vested interests that the current economic situation requires the setting aside of competition rules:

“Keeping markets competitive is no less important during times of economic hardship than during normal times.”

In this vein there are a number of competition advocacy steps that agencies can and should pursue:

- reinforce the lesson outlined above in discussions with other government departments and agencies;
- encourage pragmatism and flexibility in the implementation of competition rules through quick decision-making, and the development of transparent case selection and prioritisation criteria;
- upskill staff such that they can readily identify and react to the wider economic context; and
- maintain active and informative communication with government, industry and other external stakeholders.

---

25 For example the US financial ‘Panic of 1907’ and the ‘Great Depression’ of the 1930s.
27 Carl Shapiro. Competition Policy in Distressed Industries, pp1, Remarks prepared for the ABA Antitrust Symposium: Competition as Public Policy, May 2009
ANNEX

The essential features of the BIDS arrangements were the following:

(i) Goers killing and processing 420,000 animals per annum, representing approximately 25% of active capacity would enter into an agreement with Stayers to leave the industry and to abide by the following terms;

(ii) Goers would sign a two year non-compete clause in relation to the processing of cattle on the entire island of Ireland;

(iii) The plants of Goers would be decommissioned;

(iv) Land associated with the decommissioned plants would not be used for the purposes of beef processing for a period of five years;

(v) Compensation would be paid to Goers in staged payments by means of loans made by the Stayers to the society;

(vi) A voluntary levy would be paid to the society by all Stayers at the rate of EUR 2 per head of the traditional percentage kill and EUR 11 per head on cattle kill above that figure;

(vii) The levy would be used to repay the Stayers’ loans; levies would cease on repayment of the loans;

(viii) The equipment of Goers used for primary beef processing would be sold only to Stayers for use as back-up equipment or spare parts or sold outside the island of Ireland; and,

The freedom of the Stayers in matters of production, pricing, conditions of sale, imports and exports, increase in capacity and otherwise would not be affected.
1. Introduction

Implemented as part of a policy designed to democratize Japan’s post-war economy, the Antimonopoly Act (“AMA”) took root in Japan’s economic society while the country struggled through the turmoil of the post-war economic situation. Consequently, the necessity of proactively developing competition policies is now widely recognized. In contrast, the establishment of systems allowing exemptions from the AMA should be limited to the minimum necessary because the use of such systems, coupled with a variety of subsidies and aids which are often implemented concurrently, might have the effect of protecting incumbents in the concerned industries and making new entries more difficult, thus inhibiting the rationalization of business operations due to insufficient efforts of improving management, which may end up damaging consumers’ interests.

In Japan, a system of “Depression Cartels”, etc., was approved in the past, in which an exemption, etc., from the AMA was applied to cartels under conditions of economic depressions. However, this system was repealed in 1999 because of the troubles it caused, such as protecting marginal entrepreneurs, discouraging efforts of companies to reduce prices, and as a result, entailing insufficient management efforts for the provision of good and reasonably-priced products and services through the market mechanism and harming consumer interests. As the importance of developing competitive environments, as well as promoting competition, are widely acknowledged now, even after the most recent global financial crisis, crisis cartels are not allowed in Japan. This contribution paper introduces Japan’s past experiences regarding crisis cartels which were once approved under conditions of economic crisis¹.

2. Approval of cartels as countermeasures against economic crises

2.1 Introduction of the systems of “Depression Cartels”, etc., under the AMA (1950s)

The immediate challenges for post-war Japan were to achieve economic independence, and accordingly, government policy first and foremost focused on fostering and strengthening domestic industries. In addition, facing strong criticism that the ban on shareholdings by companies was too rigorous, the original AMA was relaxed and amended in 1953 in response to the deterioration of the economic situation starting from around 1951. This amendment eased regulations against cartels as well, and systems of “Depression Cartels” and “Rationalization Cartels”² were established, by which implementation of cartels were allowed with the approval of the Japan Fair Trade Commission (JFTC). The “Depression Cartels” under the then Article 24-3 of the AMA exceptionally allowed, under certain


² When cooperation among companies is required to effectively promote rationalization that cannot be easily achieved only by the efforts of individual companies because of their limitations, or when rationalization is realized without impeding substantial competition among companies such as product standardization and restriction on product varieties, cartel implementation is approved when the case satisfies certain requirements.
conditions after JFTC approval, the implementation of joint action by enterprises manufacturing products, etc., to restrict production volume or sales volume, limit facilities, or set prices during economic depressions.

Those cartels were not allowed immediately after the amendment of the AMA; however, when the economy declined due to the tightening of the monetary policy in June 1957, the JFTC approved depression cartels under the AMA in the fields of production of yeast, vinyl chloride tubes, etc.

In this period, other laws exempting certain cartels from the application of the AMA were established one after another in a wide range of industries. In addition, under repeated economic recessions, anti-competitive administrative measures, such as the recommendation of curtailing operations, were introduced in various industries in order to prevent excessive competition and stabilize the market situation. Furthermore, while the number of cartels applying for exemptions from the AMA for JFTC approval increased as part of the subsequent countermeasures against economic recessions, cartels which were illegally formed (and not permitted by the AMA or other laws) were also widespread. In the meanwhile, the market structure changed to a more oligopolistic one in Japanese industries and took on a “non-competitive” direction, which resulted in problems such as less competition, concerted increases in prices, and so on. In line with these problems, many companies tended to pass on the amount of increased cost of materials and wages, etc., to the demand side by means of cartels.

2.2 Structural depression and temporary approval of cartels for scrapping facilities (between the latter half of the 1970s and the first half of the 1980s)

Between the late 1970s and the early 1980s when the oil crisis triggered a slowing down of its economic growth, Japan faced structural depression problems such as a huge gap between supply and demand, etc. In response, the disposal of excess facilities for solving the gap between supply and demand became a policy issue to be taken up by the government. However, there were concerns that enterprises would be reluctant to dispose of their facilities if facility disposal was left to the enterprises’ own discretion because they would have to bear a large cost while it would influence other enterprises who would not participate in the disposal. Consequently, temporary legislation was enacted, including the introduction of systems which allowed cartels on facility disposal instructed by relevant ministers (instructed cartels) and exempted from the application of the AMA as a measure for industries suffering from structural depression.

At the same time during this period, the government also encouraged jointly scrapping facilities through the operation of the “depression cartels” system under the AMA, because the government judged that it would meet the purpose of the depression cartels system as an emergency measure to narrow the supply-demand gap through promoting the disposal of excess facilities rather than production reduction cartels, which might make enterprises more prone to cartels in industries suffering from structural depression.

However, as instructed cartels would cause serious damage to competition, some competition policy considerations were made to treat each of the so-called Structurally Depressed Industry Laws as temporary legislation with the condition that JFTC agreement was required. Furthermore, in legislation in the late 80s, the system of instructed cartels was abolished. At the same time, with regard to the relevant minister’s approval of business alliances, the consideration of competition policy resulted in the development of a

---

3 Recommendations by which administrative agencies order all the enterprises to curtail their operations.

coordination scheme between the relevant minister and the JFTC in order to make business alliances implemented within the framework of the AMA.

3. **Review of exemption systems from the AMA such as “Depression Cartels”**

3.1 **Background**

In the latter half of the 1980s, the Japanese economy steadily recovered thanks to the recovery of the entire world economy. However, the following problems gradually posed huge challenges surrounding the Japanese economy both internally and externally: the gap between the strong economic power of the national economy and people’s actual feeling of quality of life internally, as well as trade-imbalances and the structural issues of the Japanese market externally.

Under such circumstances, it was thought all the more important to further promote fair and free competition and to make the market mechanism fully functioning in order to open the Japanese market with an economic structure in harmony with the world economy.

Moreover, no case of a “Depression Cartel” was approved after 1989 around the time the Japanese economy turned around thanks to the rapid economic expansion of the world economy. One of the reasons behind this seemed to be the difficulty of ensuring the effectiveness of the depression cartels with the development of a borderless economy. More specifically, at that time in Japan, the ratio of imported products rose in the manufacturing industries and Japanese companies advanced the internationalization of their activities. Consequently, it was thought that maintaining the effectiveness of cartels in this situation was impossible because cartels formed within Japan would be under competitive pressures from overseas and production abroad was out of the subject of depression cartels, etc.

3.2 **Reasons for reviewing “the Depression Cartel System” and “the Rationalization Cartel System”**

The JFTC detected illegally formed cartels one after another and imposed administrative sanctions (cease and desist orders) on them. However, there was also a concern due to the existence of the depression cartel system in certain industries that companies would be prone to take a coordinated approach by considering that the cartel would be approved by the exemption system. Furthermore, this might lead to a problem of moral hazard of the management because they might feel they could rely on cartels as a last resort even without efforts for efficiency, which would risk efficient company management based on the principle of self-responsibility.

On the other hand, the “Rationalization Cartel system” also faced similar problems, and since the concerned cartel enabled the restriction of production by limiting technologies and product varieties, such restrictions were thought not to be allowed.

As explained above, because both “Depression Cartels” and “Rationalization Cartels” lost effectiveness themselves and there were concerns about the potential harm of perpetuating the system, it was concluded to abolish them.

3.3 **Review of exemption systems from the AMA**

In order to review the exemption systems from the AMA including “Depression Cartels” and “Rationalization Cartels”, “The Study Group on Government Regulations and Competition Policy” compiled a report called the “Review of Exemption Systems from the AMA,” which emphasized the need to limit the implementation of the exemption system and drastically revise it. Around before and after this period, a review of the exemption system was also included in a report by the Provisional Council on
Administrative and Fiscal Reform and consequently, an approach toward review was gradually taken by the entire government.

As a result, three legislations were enacted in 1997, 1999, and 2000 to reduce the exemption systems under the AMA, among which, in the “Bill for Reducing the Exemptions from the AMA” enacted in 1999, the system of “Depression Cartels” and “Rationalization Cartels” under the AMA were abolished. At the same time, the review of the exemption system led to the reduction in the number of exemptions from 89 systems under 30 laws in 1996, to 21 systems under 15 laws as of the end of 2010. In addition, with a view to limiting the exemption systems to a minimum level, the range of exemptions was confined for the remaining exemption systems, while provisions were included to provide the JFTC with the right to be involved and to claim remedial measures for preventing abuse of the exemption systems.

4. Conclusion

After the abolishment of the so-called Structurally Depressed Industry Laws and depression cartel systems, etc., Japan underwent a series of economic crises such as the economic stagnation caused by the collapse of the bubble economy and followed by the so-called “Lost Decade,” as well as the recession triggered by the recent worldwide financial crises.

However, no revision to the AMA was made in a competition-restrictive direction under such economic difficulties. Instead, the enforcement of the AMA has been strengthened by the introduction of leniency systems and expansion of the scope of the types of violations subject to surcharge payment orders. Moreover, the JFTC has engaged in necessary coordination within the government so that anti-competitive policies are not allowed to approve cartels by using the recession as an excuse.

The fair and free competition by enterprises will promote an appropriate distribution of economic resources, contributing to not only the interests of consumers but also the entire national economy. There is no growth without competition and competition is essential for rational and effective investment, technological innovation, as well as for obtaining consumers.

As explained above, with the review of the exemption systems under the AMA, such as “Depression Cartels”, etc., the JFTC has been promoting fair and free competition in the Japanese market and making efforts to foster competitive environments where entrepreneurs can develop originality and ingenuity.

---

5 The application of those remaining exemptions is indifferent as to whether it is requested under a period of economic crisis or not.
JORDAN

1. Introduction

Jordan's economy suffered during the year 2010 that was reflected in the budget deficit and the increase in debt. This had directly impacted many economic sectors which were already suffering from recession as a result of the global financial crisis.

On the other hand, a slowdown in economic growth is facing the Jordanian economy. Moreover, attracting foreign investment had declined during the past two years, with net foreign investment flowing to Jordan during the first half of 2010 cut down to 903 million dollars compared with 1.5 billion dollars during the first half of 2009. And decreased foreign investment in 2009 increased by 17%, compared to the previous year, and the value of net direct investment from $ 2.3 billion, compared with 2.83 billion U.S. dollars in 2008, which is no doubt that 2011 will involve the economic challenge of a great test on the ability to face challenges, most notably to try to boost the wheel of growth in many economic sectors and restrain the raise of unemployment ratio.

Another aspect of the economy after the crisis is to strengthen the role of the state in economic activities. It was so clear that without the intervention of monetary authorities and financial authorities by providing the required liquidity and incentives necessary to lift the economic activities of the repercussions of the crisis, then the economic situation will be worse than we have seen so far. Therefore, the lessons of the crisis to the next stage that reliance on market forces in controlling the rhythm of economic activities may not be sufficient alone, but needed to achieve a balance between ensuring the freedom of economic activity while ensuring a minimum level of state intervention to address the imbalances and restore requested economic balance.

Competition is considered a cornerstone of a free market economy and an effective element to ensure the sustainability of this economic system, so as benefits are reflected to all market parties, whether consumers who have access to goods and services at lower prices and higher quality or supporting producers to compete for getting a larger share from the market. In addition to, the incentives provided for continuous development and innovation.

2. Exemptions from the implementation of Jordanian competition law

There is no doubt that competition is not a goal but a tool used for achieving progress and economic recovery. As a result of this principle, the Jordanian Competition Law has passed the anti competitive agreements that would contribute to the achievement of progress and economic prosperity. These agreements and cartels are exempted of from the implementation of the provisions of the law upon the request of the institutions in concern. Some anti competitive practices, agreements, cartels and decisions are permitted in order to achieve specific and clear benefits for the national economy such as: improving the competitiveness of the institutions, production and distribution systems distribution, or to achieve certain benefits to consumers outweigh the effects of limiting competition. Within this perspective, the Competition Directorate analysis is always based on the case situation and the establishment of an economic balance between the pros and cons of each exercise separately, if pros were more than the cons, the Minister of Industry and Trade may grant the exemption upon the recommendation of the Competition Directorate.
Moreover, the law has also exempted the practices arising from an enforced law which was not considered a distortion of competition within the law provisions, where these laws have provisions that limit the freedom of competition such as determining the prices of some goods and services. Also, the establishment of trade and professional unions with mandatory membership in order to exercise an economic activity, also some of them have the powers of fixing services prices and compensations.

With regard to exceptional circumstances such as economic crisis and emergency situations, the Jordanian law states to exempt practices falling within the temporary actions established by the Council of Ministers to meet these conditions. These proceedings are to be reconsidered within a period not exceeding six months from the beginning of the application. As a result of this economic crisis, the Jordanian government has taken a series of decisions such as stating minimum goods prices and services fees, in order to maintain price levels and ensure reasonable profit rates for producers and service providers. These decisions will ensure the continuity of the exercise of economic activities and maintain the labor of the risk of unemployment.

3. Dealing with cartels with regard to the economic crisis (practical issues)

3.1 Current losses in road freight transport

The economic recession has resulted in a significant decrease in the demand for freight transport services in Jordan, leading to a lower transportation fees. The individual owners of trucks were highly affected by the bulk of this decline, and met with transport companies, and both of them decided to form a coalition to address the problems of drivers and raise fees by tying transport companies to stop transporting by the current fees, which led to accumulated losses threatened the collapse of the road transport sector of the goods.

In order to address this crisis, the government intervened in order to maintain this vital sector, where the study of operating costs for trucks was conducted, and a decision was issued by setting minimum fees and a margin of reasonable profit for the transport of goods and containers from the port of Aqaba to the Kingdom by truck for six months, and this decision will be reconsidered after the expiration of this period.

3.2 Determine the prices of rice and sugar

The Kingdom witnessed a sharp rise in the prices of rice, sugar, ethylene, where the Competition Directorate studies showed that retailers are developing a very high profit margin which is exploited to the needs of consumers of these commodities. Since the Competition Law No. 33 of 2004 may take into consideration the interests and public benefits to consumers in addition to the protection of competition, as the importers of rice and sugar trader with price-fixing resale will contribute to the protection of consumers from the practices of some retailers and of excessive prices.

A decision was issued by the Minister of Industry and Trade which allows traders and importers of rice and sugar to print end consumer selling price on the packaging and bind retailers by that price.

3.3 An exemption request by the Jordanian Society of Chartered Accountants

The Jordanian Society for Chartered Accountants requested an exemption from the implementation of the provisions of Article (5) of the Competition Law No. 33 of 2004, to a practice justified by the public benefit by setting the minimum audit fees, according to the nature of the facility that has requested this service. The Society has taken into consideration, that the minimum audit fees for private sector companies with relevance to the volume of work, according to the type of company, whether public shareholding or limited liability company or an individual institution and others, where the type of company is an indication of the volume of financial transactions.
The study prepared by the Competition Directorate that an exemption to the exercise of the Jordanian Society of Chartered Accountants of setting minimum fees for the audit in accordance with the nature of the facility requested the service will lead to positive results, with a public benefit as follows:

- Promoting the auditing profession, maintain the principles and strengthen the independence of the auditor.
- Increase the appeal for this profession and attract qualified personnel.
- Improve the quality of services provided by audit firms.

Accordingly, the Jordanian Society of Chartered Accountants as been granted this exemption for one year and this exemption will be reconsidered after the expiration of this period.
KOREA

1. Overview

The Korea Fair Trade Commission (KFTC) has been operating “Cartel Approval System” since 1986 under which potentially anticompetitive concerted acts are allowed in specific circumstances such as economic recession. But in practice, the system is rarely in use. The KFTC has not given permission to cartel conduct requested in the pretext of economic recession\(^1\) even in crises that affected the world economy like the 1997 Asian financial crisis and the recent global financial turmoil.

This report examines Cartel Approval System under the Monopoly Regulation and Fair Trade Act (MRFTA), Korea’s competition law, the recent relevant case involving the ready mixed concrete (RMC) industry, and relationship between economic recession and cartel.

2. Cartel Approval System

2.1 Introduction

Under the MRFTA, collusive acts that unlawfully lessen competition are prohibited in principle. However, certain acts that are given the green light from the KFTC in advance for specific purposes such as recovery from an economic slump or industrial rationalization are exceptionally exempted from the application of competition law.

2.2 Requirements of cartel approval

Korea’s competition law sets forth six purposes of cartels that can be approved – rationalization of industry, research & development, recovery from economic recession, industrial restructuring, rationalization of transaction terms and boosted competitiveness of small- and medium-sized enterprises (SMEs). Each of the purposes has different requirements for approval. Concerted acts are allowed only if every requirement set for the concerned purpose is satisfied.

---

\(^1\) Since 1988, the KFTC has not granted permission to cartel conduct.
<table>
<thead>
<tr>
<th>Purpose of Cartel</th>
<th>Approval Requirements</th>
</tr>
</thead>
</table>
| Rationalization of Industry       | • The concerned conduct is expected to bring clear positive effects such as technological development, higher product quality, cost reduction and enhanced efficiency.  
  • The purpose of industrial rationalization is hard to achieve in any other way than the cartel conduct.  
  • Benefits from industrial rationalization outweigh potential anticompetitive effect of the cartel. |
| Research & Development            | • The concerned R&D activity is much needed for boosting industrial competitiveness and has significant economic impact.  
  • The R&D activity incurs enormous costs to the extent that a single company alone cannot finance the activity.  
  • There is a need for risk diversification due to uncertain results of the R&D.  
  • Benefits of the joint R&D exceed its potential anti-competitiveness. |
| Recovery from Economic Recession  | • Demand for certain products or services has continued to decrease over a long period of time, and was kept far below the supply, and it is certain that the situation remains unchanged.  
  • Transaction prices of the products or services have been below the average production cost for an extended time.  
  • A considerable number of companies in the concerned industry have difficulty continuing business operation from the economic recession.  
  • The aforementioned difficulties cannot be overcome through industrial rationalization efforts. |
| Industrial Restructuring          | • The concerned industry’s supply capacity far exceeds the appropriate level in the changing economic environment at home and abroad, or production efficiency or global competitiveness of the industry has become weakened due to its outdated facility or production techniques.  
  • The aforementioned difficulty cannot be overcome through industrial rationalization efforts.  
  • Consequent benefits of industrial restructuring are greater than potential anti-competitiveness of the cartel conduct. |
| Rationalization of Transaction Terms | • The concerned conduct rationalizes transaction terms, contributing to improvement of production efficiency, trade facilitation and increased consumer benefits.  
  • Most of the undertakings in an industry can technologically and economically afford to join the efforts for rationalizing transaction terms.  
  • The consequent benefits of rationalization of transaction terms outweigh anticompetitive effects of the cartel conduct. |
| Boosted Competitiveness of SMEs    | • The concerned conduct is certain to bring enhanced productivity such as better product quality, further advanced technology, or to strengthen bargaining power of SMEs on transaction terms.  
  • All the participants of the conduct are SMEs.  
  • Any other way than the concerned conduct cannot ensure effective competition between SMEs and large companies. |
2.3 Additional requirements

Even if the aforementioned requirements are satisfied, the KFTC shall not grant approval for cartel conduct if:

- the concerned concerted act goes beyond the level necessary to achieve its purpose;
- the conduct has the potential of unfairly undermining benefits of consumers or relevant companies;
- the cartel unfairly discriminates some members in favor of other participating members; or
- there is unlawful limitation in joining or leaving the cartel.

2.4 Procedures of cartel approval

Companies which intend to seek approval for their concerted acts shall submit an official application along with other necessary documents to the KFTC.

When deemed necessary, before granting approval or making changes in approval, the KFTC can disclose details of application or changes in application during the designated period not exceeding 30 days to collect opinions from the interested parties.

3. Case: Cartel approval request from the ready mixed concrete industry

3.1 Introduction

As mentioned above, for concerted acts to be allowed under the Cartel Approval System, the conduct on which application is filed should fit into one of the six purposes designated above and meet all the requirements imposed for the purpose. There are also additional conditions that need to be satisfied.

As cartel approval is subject to various sets of requirements under the relevant law, even if companies apply for approval for cartel conduct, it is very hard to get clearance from the KFTC. Until now, the KFTC has approved cartel conduct only once.

---

2 The application should include such information as the number and names of participating companies, location of business premises, names and addresses of representatives of the companies, reasons for applying for cartel approval, time period of cartel for which they seek approval and business areas of participants.

3 Other documents that should be submitted to the KFTC include business report, balance sheet and income statement of the recent two years, a copy of a written agreement or resolution on the concerted act, supporting documents that verify the request meets imposed requirements, etc.

4 The only cartel approval ever granted by the KFTC after the introduction of Cartel Approval System in December 1986 was for valve manufacturers. In the case, the valve manufacturers were allowed to engage in coordinated interaction for 5 years from September 1988 to September 1993 with restriction of product items and standards, production volume allocation for each item and joint purchase of raw materials.
The most recent case where the KFTC made a decision on cartel approval was in January, 2010 following a request from the ready mixed concrete (RMC) industry of September, 2009. Here is further explanation on the RMC industry case\textsuperscript{5}.

### 3.2 Cartel approval request

#### 3.2.1 Background

As decreased demand from the slowdown in the real estate and construction markets and deteriorated profitability caused by higher commodity prices and lower bid prices adversely affected the RMC industry after 2007, RMC companies, mostly small and mid-sized companies, felt their individual efforts were not enough to get through the difficult time. They recognized the need to coordinate their response to cut costs, boost profitability and enhance quality, which led them to file an application for approval for concerted acts.

#### 3.2.2 Participating companies

The total of 388 companies and 11 industrial associations from 30 regions in Korea, except for Seoul, Gyeonggi and Incheon (provinces around Seoul), jointly filed an application for purposes of rationalizing the business and boosting competitiveness of SMEs. Among them, 193 companies and 8 associations from 15 regions suggested “recovery from economic recession” as their purpose besides the ones mentioned above.

#### 3.2.3 Cartel conduct requested for approval

They requested permission for coordinated interaction broadly in three areas; purchase of raw materials, sales activities (volume allocation, joint transport, etc.) and quality control ∙ R&D (research and development) activities.

### 3.3 Collection of opinions from the interested parties

Regarding the request submitted by the RMC companies, the KFTC heard opinions from relevant Ministries such as the Ministry of Land, Transport and Maritime Affairs and the Ministry of Knowledge Economy and related business associations including construction association comprising construction companies which are buyers of ready mixed concrete and cement industry association which supplies cement, the raw material of ready mixed concrete (Sep. 2009).

Moreover, on October 14, 2009, the KFTC held a public hearing by inviting professors, lawyers and experts on this issue as well as relevant business associations of RMC, cement and construction industries.

The construction companies’ association and cement industry association were opposed to giving the green light to RMC companies for concerted acts. The cement association pointed out that their joint purchase of cement would hit the cement industry hard.

\textsuperscript{5} The RMC industry filed applications twice before 2009, but all their requests were turned down due to failure to meet approval requirements. The first application was made from “Jeollabuk-do RMC Industry Cooperative” in March 2002 which sought approval for joint sale, joint establishment and operation of research labs and coordinated transport for purpose of recovery from economic recession. And the second one was filed from 9 member companies of “Gwanju and Jeollanam-do RMC Industry Cooperative” in October 2007. The nine companies requested approval for coordinated pricing, volume allocation and joint quality control to rationalize the industry and boost competitiveness of SMEs.
Relevant Ministries also expressed opposition for fear of possible price increases in RMC, disruption in public construction projects and decreased profitability from the rise in the number of RMC companies.

### 3.4 Examination of each requirement for approval

Here is close examination on whether the industry’s circumstance satisfies each condition set under the law especially for the purpose of “recovery from economic recession” among other purposes that RMC industry submitted.

#### 3.4.1 Condition 1: Demand for certain products or services has continued to decrease over a long period of time, and was kept far below the supply, and it is certain that the situation remains unchanged

The condition 1 was not satisfied considering the following facts.

First, the volume of RMC released into the market showed the cycle of increase and decrease rather than steady decrease over a long period of time. It fell between 2004 and 2005, increased during the time of 2006 and 2007 and dropped again in 2008.

The operating rate, which indicates output performance assessed based on production capacity, had remained low at 32.8% from 2000 to 2008, resulting in supply in excess of demand. It should be noted, however, that the low operating rate was attributable to unique feature of the RMC industry where most of the companies build facilities based on a peak season and competitively increase facilities to win orders, rather than sudden plunge in demand caused by economic downturn.

#### 3.4.2 Condition 2: Transaction prices of the products or services have been below the average production cost for an extended time

The total turnover of 30 requesting companies was more than the sum of cost of goods sold and selling & administrative expense between 2006 and 2008. When examining companies by regions which cited “recovery from economic recession” as a reason for making the request, in 2008, only three regions showed the total turnover of applicants less than their sum of cost of goods sold and selling & administrative expense (Dangjin of Chungcheongnam-do, Gosung of Gyeosangnam-do, Busan). And only one region (Busan) recorded turnover less than the combined amount of cost of goods sold and selling & administrative expense for two consecutive years from 2007 to 2008.

This suggests that the industry was not in the situation where transaction prices remained below average production cost for a significant period of time.

#### 3.4.3 Condition 3: A considerable number of companies in the concerned industry have difficulty continuing business operation from the economic recession

It was not believed that the condition 3 was satisfied for the following reasons.

First, examination of operating income and net income in the requesting companies’ balance sheets showed that only 5.19% of them recorded net operating loss for two consecutive years from 2006 to 2008, and 3.9% posted negative net income during the same period. Based on this, the requesting companies could not be seen as being in the situation where many of them had trouble maintaining business operation.

Secondly, if a considerable number of companies are faced with difficulty of maintaining business, the number of companies operating in the industry should naturally decrease or, at least, maintain the status quo. The RMC industry, however, was seeing a 2.86% rise in the number of companies on annual average.
3.4.4 Condition 4: The aforementioned difficulties cannot be overcome through industrial rationalization efforts

If companies meet all the conditions from 1 through 3, an examination is carried out on whether the problems plaguing the companies cannot be resolved through an effort of rationalizing the industry. In this case, however, the last requirement is meaningless, because all the aforementioned conditions were not satisfied at all.

3.5 Decision of the KFTC

After reviewing all the purposes they submitted including ‘recovery from recession’, the KFTC decided to allow only the activity of joint quality control and R&D for two years (starting from Feb. 1, 2010) and rejected the other two requests (Jan. 20, 2010).

But KFTC’s decision did not take effect as the applicants withdrew the request before it was delivered to them.

4. Implication of the RMC Industry Case

4.1 Definition of recession

To give the green light to concerted acts on the grounds of economic recession, there should be an understanding on what “economic recession” exactly means and when it can be said that companies are in recession that is accepted in approving cartel conduct.

Those who seek cartel approval on the grounds of economic recession would pursue broad definition while a competition agency, which should decide whether to give the nod to what is usually seen as No.1 enemy of the market economy, prefer defining the term narrowly.

The problem is that what kind of situation can be seen as economic recession is not always clear given that the market economy is inevitably subject to the boom-and-bust cycle by its nature. To give clarification, the MRFTA sets forth three conditions all of which are to be satisfied for a certain situation to be considered economic recession. Under the MRFTA, the economy is considered to be in recession, if:

- there is oversupply in the market currently, and it seems clear that the market situation remains the same in the future;
- transaction prices of the product have been less than the average production cost for a significant period of time; and
- a considerable number of companies have trouble maintaining business

In other words, temporary downturn or economic shock which is confined to just a few companies in an industry is not regarded as “recession”. For companies to be seen as being in economic recession, difficulties companies face should meet objective criteria such as the number of companies affected or the level of transaction prices, and at the same time, the current difficulty should continue over an extended period of time.

6 The KFTC sent written decision and approval certificate (at around 14:30 on Jan. 27, 2010) by mail. But the companies withdrew their application before receiving them. When checking with their legal representative, the KFTC was told that the industry dropped the application because joint R&D alone was meaningless and they did not want to go through follow-up measures after the approval.
Korea’s competition law, however, does not give consideration of whether the recession is limited to a certain domestic industry or affects the overall national economy or the global economy.

4.2 Economic recession and cartel

Even if criteria have been established on how to define recession, one of the prerequisites for cartel approval, there are additional factors that should be considered before granting permission for concerted acts.

First, there should be a close examination on whether allowing cartel conduct on the grounds of recession will be helpful for the concerned industry.

Here, a question of the meaning of “helpful” is raised again. From the perspective of companies requesting for approval, enhanced profit margin would be considered helpful.

However, for a competition agency, which should approve cartel as an exception to the law enforcement, the mere effect of narrowing deficit is not “helpful” enough. Cartel conduct allowed at the expense of competition, profound principle of the market economy, should help the concerned industry regain competitiveness, or the companies would come to request approval whenever falling into recession. This could create a sort of vicious cycle where an industry depends on cartel conduct every time it faces a downturn which comes inevitably in an economic cycle rather than making their own efforts to get through the time.

Second, a competition agency needs to consider whether the cartel conduct allowed for a certain industry for the reason of recession would help the overall national economy.

If the recession is a result of economic crisis that sweeps all over the world just as the Great Depression of the 1930s or oil shock of the 1970s, most of the sectors will be slip into “recession”. In this case, permitting cartel on the grounds of “recession” would make cartel practices the “norm”, hampering creation of growth engine that would help overcome recession in the long run.

Even if economic recession is confined to a certain industry, a competition agency should take strict and conservative approach in deciding whether the cartel conduct is an unavoidable option for emerging from the recession. That is because giving the green light to cartel in one industry could serve as a precedent for other industries when they are affected by recession in the future.

Third, there is a need for close analysis on why the recession was caused in the first place instead of just accepting it as a precondition, since cyclical economic fluctuation is an unavoidable feature of the market economy.

For example, if an industry suffers from recession and the recession is caused by oversupply in the market, this is probably a matter directly related to industrial restructuring. In this case, an attempt to resolve the problem through concerted acts, exceptionally permitted practice in the market economy, instead of competition, the main principle of the market economy, would only prolong the recession. It is just like putting a scalpel to an arm when a patient complains of pain in the leg.

In other words, if it is oversupply that brought about recession, the affected industry should pull itself from the recession by driving out marginal firms even though it causes pain in the short run, not by keeping them barely afloat, dragging down the whole industry. Otherwise, innovation would give its way to “parasitism”.

167
4.3 **KFTC’s position on cartel at the time of recession**

There has been no case where the KFTC changed its cartel enforcement approach or strengthened advocacy efforts for administrative guidance that induces cartel conduct in the pretext of economic recession.

But it closely monitors companies’ behavior, as they have more incentives to engage in cartel conduct at the time of recession.
1. Cartel enforcement in Mongolia

If several competing enterprises co-ordinate their market conduct for the purpose of eliminating competition this is called a “cartel”. Coordination on prices, quantities (for instance through production quotas) or the allocation of markets are examples of cartel conduct. The companies involved in this type of conduct achieve higher profits because the competitive pressure that would otherwise exist is reduced or removed. Cartels are particularly damaging to society in that they usually raise prices for consumers and are not neutral to the distribution of wealth in society. In short, cartels are serious offenses that undermine the market based economic order. Based on this assessment, the aggressive pursuit of cartels is on top of the AFCCP’s enforcement agenda.

Since the enactment of the “Law of Mongolia on Prohibiting Unfair Competition” in 1993, including its amendment in 2000, cartels are outlawed in Mongolia. However, this competition law lacked enforcement actions until 2005, when the government appointed an agency to oversee the enforcement of the “Law of Mongolia on Consumer Protection”, enacted in 2003. Since then, the government agency was renamed to become the Authority for Fair Competition and Consumer Protection, as it is known today. In July 2010, the State Great Khural (Parliament) passed a new law on competition providing more powers and a wider scope for enforcement and advocacy to the AFCCP. In addition, it also entrusted the AFCCP with enforcing additional laws, including the law on procurement and the law on advertisement (unfair competition).

The prohibition of cartels is designed to prevent agreements between undertakings insofar as they perceptibly restrict competition between them. According to Article 11 of the new competition law, the establishment of contracts and agreements aimed at restricting competition are prohibited.

- Article 11.1 Hard core cartels are prohibited

  Agreeing to set price, dividing the market by territory, restricting the production, supply, sale, shipping, transportation and market accessibility of products, investment, technical and technological innovation, agreeing in advance on the price of products and conditions and criteria when participating in the activity of procuring products, works, services by a tender, auction and state or locally owned property are prohibited.

- Article 11.2 Soft cartels shall be prohibited where they contradict the public interests or create circumstances restricting the competition.

  Refusing to establish economic relations without economic or technical justifications, limiting the sale or purchase of products by third parties, refusing to cooperate to enter into deals and agreements important to competition, impeding the competitor to accede into membership of an institution for the purpose of profitable operation of the business.

The law of Mongolia on Competition also forbids business entities to support and participate in any form in the contracts and agreements specified under Article 11.
In terms of investigatory powers to enforce the ban on cartels, the AFCCP has increased its powers compared to the previous competition law. It may request documents, data, explanations and any other information for the purpose of establishing unlawful conduct and to understand the market situation from companies but also from national and local public authorities and administrations. In addition the authority may inspect business premises, search companies and seize evidence.

If a cartel is detected, the AFCCP may impose high fines on the companies involved. Article 11 of the new competition law specifies that companies may be fined up to 6% of the concerned products’ sales revenue in the preceding year in addition to the confiscation of the illegal gains. This is a substantial change to the previous maximum fines of USD 200.

However, there are exemptions from the administrative penalty:

- Article 28.1. *Business entities voluntarily disclosing the breach specified in 11.1-11.3 of this law may be exempted by 100% from the administrative penalty and business entities voluntarily admitting the breach within 30 days since the day of commencing the inspection activities may be exempted by 50%.*

In addition, there is a monetary reward equivalent to 5% of the monetary sum of the fine for those individuals submitting authentic and relevant evidence on the companies that have entered into or have made a decision to enter into contracts and agreements restrictive of competition.

Until August 2010 due to the outdated and inefficient (in cartel enforcement sphere) competition legislation and methodologies, the AFCCP did not manage to expose cartel and collusive behaviour and impose preventive fines towards them very frequently as it operated without any standardised methodology and techniques to be used to detect cartels. Nevertheless, the AFCCP investigated a few major cases also under the previous competition law regime that are briefly outlined below.

2. **Case 1: Price fixing by 43 auditing companies (2010)**

The AFCCP received a written complaint that The Mongolian Institute of Certified Public Accountants (MICPA) and the Association of Auditors facilitated and led to price fixing involving the directors of 43 auditing companies for a period of 4 years. Inspectors of the AFCCP co-operated with the whistleblowers and also smaller competitors, such as the accountants of some small and new auditing companies, that were forced to fix prices against their will. The Inspectors gathered the following key documents despite the absence of inspection powers from whistleblowers and undercover informants: Rule of the MICPA, Code of Ethics of the MCPA, a copy of the minutes of the MICPA meetings, the signed price fixing agreement and some other documents. After this evidence was secured, the inspectors required MICPA and the cartel members to provide the evidence, showing the copies organized beforehand. The AFCCP won the case in the administrative court and imposed fines of 10 million tugrugs /about USD 10000 in total on 43 companies.

3. **Case 2: Price fixing by 43 mobile operators (2009)**

In 2009, G-mobile, the latest entrant in the mobile sector negotiated with Telecom Mongolia to charge calls from G-mobile to a landline at 1 Togrog (equivalent to USD 0.001), basically rendering the service free. In response, 3 other operators disconnected their services to G-mobile consumers arguing that G-mobile is stealing their market share by charging prices below the cost. In reaction, G-mobile made a counter complaint to the AFCCP arguing that three incumbent operators stopped to provide phone/internet service to their customers in an effort to force G-mobile to increase their prices for mobile services. As a result of the subsequent investigation conducted by the AFCCP 750,000 togrog (equivalent to about USD
700) in total were imposed on the other three incumbent companies for breaching the Law of Mongolia on unfair competition and having collusively agreed to disconnect their services to the new entrant.

4. **Case 3: Price fixing by 6 petroleum companies (2008)**

In 2008, petroleum companies had simultaneously raised prices by similar amounts and at similar moments in time. In order to determine the origin of the conduct, the AFCCP initiated an investigation revealing that 6 petroleum companies had collusively raised the petroleum prices through meetings organised by the Mongolian “Oil and Gas” association. The AFCCP issued orders to stop the cartel through exchange of information and imposed surcharges of 1.500 million togrogs (approximately USD 1000) in total.

According to the new competition law, the AFCCP has to draft a Leniency program and put it into practice in order to increase the effective detection of cartels in Mongolia.
NORWAY

1. Government policies towards cartels during crises: Assessment and evolution

1.1 Norwegian competition law

The Norwegian Competition Authority’s (the NCA hereafter) main task is to enforce the competition law. The primary enforcement tools of the Norwegian Competition Act of 2004 are sections 10 and 11 (equivalent to Article 53 and 54 of the EEA agreement and Article 101 and 102 TFEU) and section 16 concerning merger controls (similar to Article 57 in the EEA agreement).

It can also be mentioned that according to Section 14 of the Act, the competition authorities may, if it is considered necessary, promote competition in the national markets, intervene by regulation against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act. The purpose of the Act is to further enhance competition and thereby contribute to the efficient utilization of society’s resources. The NCA shall also, according to Section 9e, supervise competition in the various markets, among other things by calling attention to any restrictive effects on competition of public measures and, where appropriate, submit proposals aimed at further enhancing competition and facilitating market access by new competitors.

The Ministry provides the framework for the NCA’s activities. The Minister has the overall responsibility for the sector crossing instruments in the government's competition policy. This includes competition law and regulations for businesses, regulations on public support and regulations on public procurement.

However, the NCA enforces the competition law independently from the Ministry. The Ministry is the appellate body of the NCA’s merger decisions and prohibitions not involving fines. The courts are the appellate body of decisions according to the prohibition regulations involving fines.

Furthermore, undertakings operating in Norway are obliged to comply with two sets of competition legislation: The Norwegian Competition Act and the competition rules applicable to undertakings of the EEA Agreement. Thus, the EEA Agreement will for border-crossing cases act as an institutional constraint with respect to competition policy.

1.2 Treatment of cartels during severe economic downturns

The Norwegian competition law does not allow for different treatment of cartels during severe economic downturns. On the contrary, during the financial crisis, the NCA repeatedly advocated that competition and its enforcement should not be relaxed with reference to the crisis. The competition policy should stand firm.
1.3 Have cartels or cartel-like arrangements been permitted previously? Experiences from the Great Depression in Norway

The great depression hit Norway with full force in 1931. That year, Norway left the gold standard, a move that was followed by an increase in the key policy rate to 8 per cent to prevent capital flight. Moreover, Norway had for some time experienced massive labour market unrest, and high and rising unemployment, and the gold standard move coincided with one of the most encompassing labour market conflicts in the 1930ies. Thus, when the Wall Street crash of ’29 hit Europe and Norway, with its bank failures and bankruptcies, the result was a GDP falling with more than 8 per cent from 1930 to 1931.

Norway did not however experience the same bank and currency crisis as many other countries in this period. Following the acute liquidity crises in the major banks, Norges Bank (Norway’s central bank) approved a three months moratorium and provided credit to the banks worst hit, providing a shield against collapse. The fiscal policy to counteract the crisis was Keynesian in nature, generating purchasing power through public spending.

What is interesting from a competition policy point of view is the wilful suspension of competition in important sectors. Actually, Norway got a Trust law in 1926, but this was not really an anti-trust law: The law was practiced in a way that it accepted agreements restricting competition insofar as they were considered beneficial from a socio-economic perspective. According to Nordvik (1995), the Director General of the Trust Control Authority was rather trust friendly, and, in practice, it was he who decided which agreements were beneficial.

As in the U.S., the depression led to an impaired belief in markets and competition. Thus, to counteract the crisis, several special laws were introduced suspending competition and cartelising important industries, in particular in the primary sectors of fishing and farming. Forced cartels were implemented in e.g. primary fish trading, exports of salted and dried cod and canned herring. Cartels created in the 1890s were revitalised, together with the creation of new cartels within production of margarine, painting, canned food and tin can production, as well as tobacco. Minimum prices and measures to secure a certain profit were introduced for many products, often at the expense of consumers.

Norwegian industry did also participate in many international cartels, e.g. pulpwood, shipping, timber and steel. This was accompanied by protectionist policies with e.g. trade barriers regulating imports through tariffs and preferential treatment of Norwegian firms. All this was approved, and even encouraged by the Trust Control Authority. The Director General of the Trust Control Authority even suggested implementing a paragraph in the Trust law giving the office powers authority to force cartel creation, if considered necessary. Based on the recommendations from a committee led by the Director, the government put forward a proposition to Storting. However, the Committee for Justice advised against dealing with it both in 1937 and 1938, and in 1939 the motion was withdrawn.

US experience from the great depression and the measures undertaken, e.g. the National Industrial Recovery Act (the NIRA Act) in 1933, indicate that it did not contribute to the restoration of the US economy; rather, on the contrary, it made the situation significantly worse and counteracted any progress.  

---

1 This section is based on the joint report from the Nordic competition authorities „Competition Policy and Financial Crises“ from 2009, available for download from www.kt.no.


3 See, for example, Wallace, S. W. (2004). “The Antitrust Legacy of Thurman Arnold”, St. Johns Law Review, vol. 78 no.3: “The goal of the NIRA was to restrict production, raise price, create profits, and restart business investment. Not surprisingly, to the extent prices were increased, the increase further limited production, employment, and the purchasing power of consumer, leaving the country in even worse
It has been pointed out that after the enactment of the Act, the cost of doing business in the United States increased on average by 40 per cent and industrial production contracted by one quarter.\textsuperscript{4} Studies by economists at the University of California point in the same direction. The research states that the NIRA Act and the policy of the US government against competition prolonged the Great Depression by seven years.\textsuperscript{5} The US economy was on the brink of a recovery but the NIRA Act and the restriction of competition resulting from this Act counteracted the recovery and the reconstruction of the industrial sector.

Two important lessons can be learned from these experiences. One is that suspending competition can actually prolong the crisis. Furthermore, in Norway, as mentioned above, several special laws were introduced suspending competition and cartelising important industries to counteract the severe effects of the great depression. To what extent these measures actually prolonged the crisis in Norway remains to be clarified. Nevertheless, many of the cartels and a host of agreements restricting competition existed (and were registered in the “Cartel register”) until the approvals started to be withdrawn in the late 1970s, and the belief in competition was again revitalised in Norway.

Thus, another lesson to be learned is that such exemptions from competition tend to be long lived, and are hard to reverse.

1.4 Current position on policies towards cartels during severe economic downturns

The Norwegian competition authority’s current position on policies towards cartels during severe economic downturns is reflected well in the joint report from the Nordic competition authorities “Competition Policy and Financial Crises” published in 2009.\textsuperscript{6}

As in a large part of the world, the Nordic countries experienced a serious economic downturn in the wake of the financial crisis. Businesses struggled to keep their operations going and to preserve their assets in a climate where financing was hard to come by. Important markets have seen and will probably see a further reduction in the numbers of companies because of bankruptcies.

There is a clear rationale for the Nordic countries to share a common view on the role and importance of competition and active competition policy in the present economic crisis. Being relatively small and open economies, the international competitiveness of our economies is vital to protect and sustain the Nordic welfare model. This competitiveness is preserved or improved, when we both allow and provide incentives for mechanisms that increase both productivity and innovation in our economies. There is enough evidence for us to say, that protection of competition is a proper means to serve these ends.

This report substantiated why, during the global economic crisis, continued and watchful competition enforcement was important to boost recovery from the crisis. The crisis is global and the report underlined that the solution is not to limit or distort competition or trade. Protectionist measures will only prolong the

\textsuperscript{4} See, for example, Reed, L. W. (2005). “Great Myths of the Great Depression”, Mackinac Center

\textsuperscript{5} Cole & Ohanian (2004), op.cit. See also the announcement by the UCLA because the publishing of this paper, dated 8 August 2004: “FDR’s policies prolonged Depression by 7 years, UCLA economists calculate”.

crisis, and state aid initiatives must comply fully with EU/EEA rules and guidelines. The result: A sound competitive environment with efficient firms well suited to compete in global markets can only be achieved if we actually succeed in facilitating competition through vigilant enforcement and advocacy of competition.

The report points out that there is nothing to suggest that competition in itself has caused or contributed to the crisis. On the contrary, academics who have assessed other economic crises have pointed to the importance of competition for the speedy economic recovery of the state in question.\(^7\) The impetus for rationalisation and innovation that comes with the discipline of competition is considered to be of great importance.\(^8\) In this respect one may also take into account the emphasis the EU Commission has placed on the importance of competition and competition codes in view of the economic difficulties that the European nations are now faced with.

Consequently, the Nordic competition authorities unanimously stressed that effective competition is important to boost the recovery from the crisis, and create a better basis for employment and long-term growth. Firm competition policy is an important and integral part of the solution to this problem.\(^9\)

2. Enforcement record on cartels during the recent crisis

Even though the crisis does not alter the rationale for competition policy as such, it alters the economic realities in which competition policy works. Here, two issues will be addressed, i.e. the change in cartel-related enforcement priorities as well as the change in merger activity following the crisis.

2.1 Change in cartel-related enforcement priorities

The NCA expected early that an area where the crisis could have potential consequences for enforcement was illegal cooperation, e.g. in relation to the various fiscal stimuli measures introduced by government.

An overall fiscal stimulus in 2009 amounting to 55 bill NOK or 3.0 per cent of mainland, non-oil GDP from 2008 to 2009, consisting of i.e. an increase in the communications budget, increases in municipal budgets as well as many new major construction projects, will obviously imply challenges both relating to potential bid rigging as well as public procurement.

As an effective competitive process in markets in general and tenders in particular, is a prerequisite for efficient use of the crisis measures and means, the NCA budget was increased extraordinarily by almost 3 MNOK in 2009 in order to intensify the fight against cartels. This increase resulted in increased investigating capacity, intensified market surveillance as well as information campaigns. This extra funding supplemented the more than 4 MNOK allocated extraordinarily in 2008.


\(^8\) In this respect you can take into consideration that Porter a.o. have pointed out that in the wake of the economic difficulties in Japan only those industries in Japan that were confronted with domestic competition have been able to compete in the international market. See Porter, Takeuchi & Sakakibara, Can Japan Compete?, MacMillan Press 2000.

\(^9\) See the speech made by Neelie Kroes EU Commissioner for competition policies, In defence of competition policy, 13. October 2008: “As we face the uncertainty of this financial crisis, we are fortunate to know that competition policy not only has a proven track record, but is proving to be part of the solution. … In the clearest possible terms I say that competition policy is here for consumers, here for jobs, here for growth and here to stay.”
The NCA had a strong commitment to ensure that the Government's package of measures could have the intended impact on production and employment without competition crime reducing its impact.

The results of the investigative projects into the building and construction trades have provided the basis for new projects in 2010.

The authority has in the first nine months of 2010 conducted 3 dawnraids in 17 different locations. In the same period, 5 leniency applications have been received, of which three are granted. These ongoing cases draw heavily on the authority’s resources.

**2.2 The role of merger review procedures in the recent crisis**

The financial crisis affected economic activity, and this can be seen in the Competition Authority's statistics. During the crisis there was a substantial reduction in the number of notifications of company mergers: down from 440 in 2008 to 293 in 2009. The implementation ban was challenged on several occasions, even though the Competition Act provides for dispensation if circumstances so dictate.

Based on the dramatic changes relating to major international banks and finance institutions since 2007, it was actually expected an increase in merger and acquisition activity in this sector also in Norway. This did not happen. As Figure 1 clearly shows, the number of merger notifications has been significantly reduced throughout 2008, but the decline seems to have stopped somewhat in 2009.

**Figure 1. Merger notifications in Norway, monthly running average**

![Source: Konkurransetilsynet](image)

As the crisis evolved and deepened, the NCA expected to be challenged on two specific merger related issues:

i) the failing firm defence and

---

Running average over three months. The significant drop between 2006 and 2007 is due to a change in notification rules effective from January 1st, 2007.
The failing firm defence has so far not been invoked. Apart from the Glitnir collapse which led to Glitnir ASA being bought by banks in the Sparebank 1-alliance, and that RS Platou ASA took over Glitnir Securities AS in 2008, no notified mergers in the financial sector can be clearly related to the financial crisis. It can be mentioned however, that even though none of the above mentioned cases were challenged by the NCA as such, or the failing firm defence invoked, an infringement fine was imposed on a firm for infringing the implementation prohibition in section 19 in the Norwegian Competition Act. The firm argued that a fast implementation of the acquisition was necessary to avoid bankruptcy. Furthermore, the company claimed that it was not aware that NCA actually could grant exemptions from the implementation prohibition in individual cases on its own initiative, in this case within the time limits necessary to avoid further uncertainty relating to the continued operations of the acquired firm. Thus, the firm chose to implement the transaction and immediately notify the NCA that the transaction was implemented in breach of section 19.

However, the same section in the Competition Act also state that the Competition Authority can make exemptions from the prohibition against implementation in individual cases. Exemptions have been granted in a few cases in the first part of 2009, which illustrates that the NCA has the necessary tools to act expedient in merger control in times of crisis.

The increase in bankruptcies led banks to enforce its security interests in different companies. This was, however, not something that so far has happened to a worrying degree, neither did it seem to lead to an increase in concentration creating or strengthening a significant restriction of competition.

3. International cooperation on cartels

The crisis did not affect the quantum and nature of cross-border cooperation with other competition authorities on cartel-related matters in any significant way.

4. Competition advocacy on cartel-related matters

An important advocacy initiative was undertaken jointly by the Nordic competition authorities, as referred to above. The Directors General of the Nordic competition authorities acknowledged the need to substantiate why competition policy is important for fast economic recovery from the crisis. This resulted in the report “Competition Policy and Financial Crises”.

The conclusion and the recommendations in the report were clear: Our competition legislation was well equipped to meet the financial crisis and its effects, and more importantly, competition policy should remain in place: Too much competition was not the cause of the crisis, but healthy competition was certainly a part of the solution.

An important point in this regard is that a joint report from the Nordic competition authorities, containing clear advices against policies implying more lax enforcement in times of crises or allowing crisis-cartels, has a much stronger political impetus than a report prepared in isolation.

---

11 This section states that concentrations not can be implemented before the deadline to order submission of a complete notification has expired. If an order to submit a complete notification is received by the parties, or a complete notification is submitted, the concentration can not be implemented until the Competition Authority has processed the case.
PERU

1. Governmental policies towards cartels during crises: assessment and evolution

The Peruvian competition law (Legislative Decree Nº 1034) prohibits any agreement, decision, recommendation or concerted practice which aims at restricting, impeding or distorting free competition, whether it was done by economic agents that compete among them or by economic agents operating in different levels of the production chain.

It should be noticed that the Peruvian competition law and enforcement is relatively young. In fact, it was not until 1991 when the first competition law was enacted and enforced through the creation of INDECOPI. As a result, INDECOPI’s practice toward cartels have been to consider price-fixing agreements *perse* illegal without making any differentiated treatment for cartels during severe economic downturns. For all other type of cartelization, not involving directly or indirectly the price and/or quantities in the market, a rule-of-reason approach is applied.

In general, INDECOPI’s position toward cartels has been endorsed by the Government. To some extent, the fact that the Peruvian economy has been relatively resilient to the current market turmoil has contributed to this policy (see section 2).

In few occasions where a Government branch has intended directly to agree with industry some sort of concerted practice, which in the view of the Government may help consumers, INDECOPI’s role has always being to inform both the Government branch and the private sector about the prohibition on concerted practices which aims at restricting, impeding or distorting free competition.

2. Enforcement record on cartels during the recent crisis

There was no change in Peru’s cartel-related enforcement priorities during the recent economic crisis. In addition, there were no noticeable differences in the types of cartels investigated in this period. However, it is important to consider that the economic downturn experienced worldwide had a relatively low impact on Peruvian economy. In fact, Peru was one of the least affected countries in Latin America and it was precisely because of its ability to withstand external shocks that Moody’s Investors Services

---

1. For comments or question please refer to sdavilap@indecopi.gob.pe.
2. Legislative Decree Nº 1034 was enacted on June 24, 2008.
3. It should be mentioned that in the case of economic agents operating in different levels of the production chain, the prohibition of this kind of practices is conditioned to the existence of a dominant position in the relevant market by at least one of the involved agents prior to the exercise of the practice.
4. Legislative Decree Nº 701 was enacted on November 5, 1991. It was repealed by Legislative Decree Nº 1034.
raised the credit rating of Peru to investment grade on December 2009, following other credit ratings agencies⁶.

3. **International cooperation on cartels**

   Indecopi has signed cooperation agreements with the competition authorities of Panama, El Salvador and Chile, which provide cooperation in the investigation of practices that may distort competition. Furthermore, we are negotiating similar agreements with Ecuador and Colombia. Nonetheless, there has not been any request of foreign competition authorities for cooperation on cartel-enforcement matters during the crisis.

4. **Competition advocacy on cartel-related matters**

   During the current crisis, Indecopi has not undertaken any cartel-related competition advocacy. However, as we mentioned before, Indecopi is always informing all economic agents and political authorities about the prohibition on practices that may distort free competition.

   Furthermore, it should be mentioned that the treatment of cartels during economic downturns is an issue on Indecopi’s competition agenda, as well as the treatment of public aids for industries in crisis.

PHILIPPINES

1. Introduction

The Philippines's Price Act of 27 May 1992 hews closely to the concept of crisis cartels. Instead of organizing or sanctioning the fixing of prices or rationing of production and production during shortages, it provides for a mechanism of price stabilization of basic necessities and prime commodities during emergency situations and like occasions.

While doing so, it still recognizes the right of private business to a fair return on investment at the same cracking down on hoarding, profiteering and cartels. Emergency situations include periods of calamity and widespread illegal price manipulation.

2. Coverage

"Basic necessities" are defined by enumeration and includes rice, corn, bread, fresh, dried and canned fish and other marine products, fresh pork, beef and poultry meal, fresh eggs, fresh and processed milk, fresh vegetables, root crops, coffee, sugar, cooking oil, salt, laundry soap, detergents, firewood, charcoal, candles and certain drugs.

On the other hand, "prime commodities" covered include fresh fruits, flour, dried processed and canned pork, beef and poultry meat, dairy products not falling under basic necessities, noodles, onions, garlic, vinegar, patis (a local shrimp-based sauce), soy sauce, toilet soap, fertilizer, pesticides, herbicides, poultry, swine and cattle feeds, veterinary products for poultry, swine and cattle, paper, school supplies, nipa (dried coconut leaves) shingles, sawali, cement, clinker, galvanized iron sheets, hollow blocks, plywood, plyboard, construction nails, batteries, electrical supplies, light bulbs, steel wire and all drugs not classified as essential drugs.

Exclusions from these lists made by made for basic necessities and prime commodities which may be deemed as nonessential goods or luxury goods but may be reinstated during occasions of acute shortage in the supply of the basic necessity or prime commodity to which the excluded type or brand used to belong.

3. Price controls and price ceilings

A regime of automatic price control is mandated which freezes the prices of basic necessities in an area at their prevailing prices when:

- it is proclaimed or declared a disaster area or under a state of calamity;
- it is declared under an emergency;
- the privilege of the writ of habeas corpus is suspended in that area;
- it is placed under martial law;
- it is declared to be in a state of rebellion; or
If the prevailing price of any basic necessity is excessive or unreasonable, a price ceiling may be imposed. Price control shall be in effect for the duration of the condition that brought it about but not for more than sixty (60) days.

Mandated price ceilings may also be imposed on any basic necessity or prime commodity if any of the following conditions warrants:

- the impendency, existence, or effects of a calamity;
- the threat, existence, or effect of an emergency;
- the prevalence or widespread acts of illegal price manipulation;
- the impendency, existence, or effect of any event that causes artificial and unreasonable increase in the price of the basic necessity or prime commodity; and
- whenever the prevailing price of any basic necessity or prime commodity has risen to unreasonable levels.

The determination of the reasonable price ceiling considers the following factors:

- the average price, in the last three (3) months immediately preceding the proclamation of the price ceiling, of the basic necessity or prime commodity under consideration;
- the supply available in the market;
- the cost to the producer, manufacturer, distributor or seller including but not limited to:
  - the exchange rate of the peso to the foreign currency with which a basic necessity or prime commodity or any component, ingredient or raw material thereof was paid for;
  - any change in the amortization cost of machinery brought about by any change in the exchange rate of the peso to the foreign currency with which the machinery was bought through credit facilities;
  - any change in the cost of labor brought about by a change in the minimum wage; and
  - any increase in the cost of transporting or distributing the basic necessity or prime commodity to the area of destination.
- such other factors or conditions which will aid in arriving at a just and reasonable price ceiling.

4. **Buffer fund**

A "buffer fund" is set up as a contingent fund in the budget of the implementing agency which shall not be used in its normal or regular operations but only for purposes of the Price Act.
5. **Price Coordinating Council**

A Price Coordinating Council shall (1) coordinate the productivity, distribution and price stabilization programs, project and measures and develop comprehensive strategies to effect a general stabilization of prices of basic necessities and prime commodities at affordable levels; (2) report to the President and to Congress the status and progress of these programs; (3) advise the President on general policy matters for promotion and improvement in productivity, distribution and stabilization of prices of basic necessities and prime commodities; (4) Whenever automatic price control of basic necessities is imposed, it shall cause the immediate dissemination of their prevailing prices or the price ceilings imposed.

6. **Illegal Acts**

It shall be unlawful for any person habitually engaged in the production, manufacture, importation, storage, transport, distribution, sale or other methods of disposition of goods to engage in the following acts of price manipulation of the price of any basic necessity or prime commodity:

- **Hoarding**, which is the undue accumulation by a person or combination of persons of any basic commodity beyond his or their normal inventory levels or the unreasonable limitation or refusal to dispose of, sell or distribute the stocks of any basic necessity of prime commodity to the general public or the unjustified taking out of any basic necessity or prime commodity from the channels of reproduction, trade, commerce and industry.

  There shall be *prima facie* evidence of hoarding when a person has stocks of any basic necessity or prime commodity fifty percent (50%) higher than his usual inventory and unreasonably limits, refuses or fails to sell the same to the general public at the time of discovery of the excess.

- **Profiteering**, which is the sale or offering for sale of any basic necessity or prime commodity at a price grossly in excess of its true worth.

  There shall be *prima facie* evidence of profiteering whenever a basic necessity or prime commodity being sold: (a) has no price tag; (b) is misrepresented as to its weight or measurement; (c) is adulterated or diluted; or (d) whenever a person raises the price of any basic necessity or prime commodity he sells or offers for sale to the general public by more than ten percent (10%) of its price in the immediately preceding month.

- **Cartel**, which is any combination of or agreement between two (2) or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price.

  There shall be *prima facie* evidence of engaging in a cartel whenever two (2) or more persons or business enterprises competing for the same market and dealing in the same basic necessity or prime commodity, perform uniform or complementary acts among themselves which tend to bring about artificial and unreasonable increase in the price of any basic necessity or prime commodity or when they simultaneously and unreasonably increase prices on their competing products thereby lessening competition among themselves.
7. **Penalties**

Penalties are laid out for acts of illegal price manipulation [imprisonment for five (5) years to fifteen (15) years and a fine of P5,000 pesos to P2,000,000 pesos] and violation of price ceiling [imprisonment for one (1) year to ten (10) years and a fine of P5,000 pesos nor more than P1,000,000 pesos] or both.

**REFERENCE**

RUSSIAN FEDERATION

With the adoption of the Federal Law of 26.07.2006 No. 135-FZ “On Protection of Competition” (hereinafter referred to as the Law on protection of competition) the Russian Competition Authority received new opportunities and tools to fight against the gravest violations of the antimonopoly legislation – cartels.

The Russian competition legislation contains the per se prohibition of the hard core cartels (part 1 Article 11 of the Law on protection of competition). The Law on protection of competition sets forth conditions meeting which prohibited agreements or concerted actions can be admitted as permissible (rule of reason). Moreover, the Law contains a right of the Government of the Russian Federation to introduce block exemptions for agreements and concerted actions that meet certain criteria. A number of Resolutions of the Government were adopted with regard to providing block exemptions to certain types of agreements.

Within the frameworks of the administrative proceedings cartelists can be imposed with turnover fine from 1 % till 15 % of the company’s turnover on the relevant product market.

In order to enhance detection of cartels the leniency program was introduced.

With regard to the procedural aspects the antimonopoly authority has a right to:

- initiate and consider cases on violation of antimonopoly legislation;
- issue binding instructions on termination of violation and transfer to the federal budget of profit gained as a result of the violation;
- conduct inspections of economic entities during which it can make photo, video record, make copies of any documents, as well as require to provide any documents;
- contact police and prosecutor’s office in order to request them to conduct actions aiming at gathering evidence of cartel activity;
- bring economic entities and their managers to the administrative liability for their cartel activity.

In 2008 the Federal Antimonopoly Service (FAS Russia) created a special Anti-Cartel Department that acts in close cooperation with the other structural Departments of the FAS Russia and police and prosecutor’s office of the Russian Federation.

The results of the application of the system approach with regard to the anti-cartel activity clearly showed the necessity to introduce certain amendments to the Law on protection of competition, as well as to the Code of the Russian Federation on Administrative Violations (CoAV) and to the Criminal Code of the Russian Federation, for the purposes of introduction of more clear definitions and more severe sanctions for participation in cartels.
Main activity on elaboration of the so-called “second antimonopoly package of laws” coincided with the beginning of the economic downturn. And the amendments were adopted in summer 2009 – during the high point of crisis.

These amendments introduced more severe sanctions for cartel activity thus showing governmental support for the strict application of antimonopoly legislation in Russia during the global economic and financial downturn.

On July 29, 2009 the President of the Russian Federation signed a law that introduced changes to the Article 178 of the Criminal Code of the Russian Federation that established criminal liability for violation of the antimonopoly legislation.

This Article is applied not only with regard to businessmen introducing imprisonment for the cartel activity or repeated abuse of dominance, but also with regard to the officials who conducted anti-competitive actions that resulted in large damage for the citizens or society.

With adoption of this Law punishment for violation of competition legislation became more severe that allowed for more effective fight against the hard core violations of the competition legislation.

Moreover, in order to increase effectiveness of the anti-cartel activity the amendments envisage exemption of vertical agreements from the prohibited per se, which can be see as liberalization of the incumbent competition regime and at the same time it provided for the more resources of the antimonopoly authority to be devoted to detection of cartels.

There were also introduced adjustments to the provisions of the leniency program (now only the first company that applied to the FAS Russia is subject to gaining immunity; collective applications are no longer accepted).

Amendments also envisage extension of the powers of the FAS Russia on conduction of inspections of economic entities under the strict regulation of its activity during such inspection.

As a result of adopted amendments the number of cases initiated under Article 11 of the Law on protection of competition (agreements and concerted actions) in the first half of 2010 has increased in 1,55 times in comparison with the same period in 2009 – from 179 cases in the first half of 2009 to 277 cases in the first half of 2010.

In 2009 there were initiated 738 administrative cases with regard to economic entities that violated competition legislation (92% more than in 2008) and there were imposed about 35 mln euro fines on them.

Aiming at increasing effectiveness of competition enforcement the FAS Russia has elaborated the “third antimonopoly package of laws” that, inter alia, includes certain amendments with regard to enhancing anti-cartel activity. The most important of them are the following:

iii) Introduction of a notion of “cartel” in the Law on protection of competition.

1. Currently one should operate with the more general notion of “anti-competitive agreement”. In the “third antimonopoly package of laws” there is given a precise notion of “cartel”, as well as what characteristics it has and which anticompetitive agreements can be considered as cartel.

iv) Separation of notion of “anticompetitive agreement”, including notion “cartel”, from the notion of “anti-competitive actions”.

186
2. There is a strong need for enforcers and market participants to understand where the border between these two notions is.

v) Exemption of concerted actions from the provision of the Criminal Code of the Russian Federation (subject to separation of notions described above).

3. Presently Article 178 of the Criminal Code of the Russian Federation envisages criminal liability both for agreements and concerted actions. At that agreements are more dangerous than concerted actions therefore it is suggested to exempt concerted actions from the Criminal Code of the Russian Federation.

vi) Joint actions of companies under single management are suggested not to be considered as “cartel”.

vii) Change of basis for calculation of turnover fine for the bid-rigging.

4. It is planned to introduce amendments to the CoAV, according to which turnover fine for bid-riggers is to be calculated depending on the initial price of the bids (up to 50% of the initial price of the lot). On the one hand this is more severe deterrence and on the other hand this would simplify calculation of fine by the antimonopoly authority.

Adoption of the “third antimonopoly package of laws” is expected in 2011.
SENEGAL

As a rule, competition law and policy prohibit cartels between companies that have the purpose or effect of restricting or distorting competition within a specific market (Sections 24 et seq. of Senegalese Act No. 94-63 of 22 August 1994 on prices, competition and economic disputes, Article 3 of Regulation No. 02/2002/CM/WAEMU and Article 5 of Additional Act A/SA.1/12/08 of ECOWAS.)

Senegalese legislation has prohibited such anti-competitive cartels “subject to specific legislative or regulatory provisions” (Section 24 of Act 94-63).

Through this clause, Senegalese law opened up a breach in this prohibition in principle. However, it was neither the first nor the only legislation to do so, since it was only following the legislation upon which it was based, including French law, which, like most legislation of regional communities (EU, WAEMU, ECOWAS) or individual countries (Germany, among others), provides for a system to exempt these cartels.

Is this breach aimed at crisis cartels? Can they qualify for it? Or to answer the question more specifically, can crisis cartels be justified?

Historically, and under certain legislation, crisis cartels have been justified even if they have not always produced positive benefits for the economy and consumers (1).

However, the need to take an economic crisis into account cannot – and seems not to – be absent from the concerns of competition authorities, for competition law and policy cannot ignore crisis situations. This being the case, the question that must be asked regarding crisis cartels is: within what framework and under what conditions are they or might they be allowed? (2) This in turn raises another question that we shall address in a concluding section, i.e. if crisis cartels are permissible, might this not ultimately justify the non-enforcement of competition law and policy in low-income countries? (3)

1. The justification for crisis cartels and their impact on the economy

1.1 The justification for crisis cartels

Until recently, many countries believed in the “virtues” of cartels, even during ordinary times. They sometimes pursued this policy out of a desire to combat foreign competition by ensuring that they gained an ever larger market share or, for the same reasons and with a view to expanding their economic and political power, in order to create “national champions”.

As a result, it is easy to understand that these countries, as well as others, may be all too willing to promote or defend the creation of cartels or agreements in a time of crisis.

Even the United States, which is well known for the major, leading role it has played in dismantling cartels, has allowed them at certain times. For example, during the great depression of 1929, more specifically in the Appalachian Coals case, the United States Supreme Court, in response to the crisis in the coal industry, which was facing competition from new industries, deemed it necessary to approve, on the basis of the “rule of reason”, a cartel among producers that had organised a quota system.
Crisis cartels, such as those found in the sugar industry from 1934 to 1974, were encouraged or supported by the US federal government.

Other countries took similar measures – and some of them continue to do so. Specifically, in the same period of the 1929 great depression, in 1931, the French government “considered the widespread use of cartels as one of the most productive means of overcoming the worldwide economic depression”. Today, some countries’ legislation does not prohibit the formation of crisis cartels.

The underlying justification for crisis cartels would seem to be the idea that they can provide a solution to the crisis. A brief review of case law and of certain countries’ legislation shows that cartels have been justified when their aim was, *inter alia*, “to maintain a competitor, preserve employment and salaries and ensure the survival of companies in difficulty”, or in cases of “overcapacity in certain sectors”.

It must be pointed out that case law has changed significantly with regard to most of these points. This could not be otherwise, given that cartels have not always had a positive impact on the economy.

1.2 The impact of crisis cartels on the economy

The concept of “crisis cartels” seems to highlight the idea that such cartels are justified by a crisis and are the only means of combating it. This suggests, then, that crisis cartels have a positive impact on the economy because they can stem the crisis that it is undergoing. This was the view of the French government in 1931, as presented above.

However, the facts of the matter seem to be quite different.

Firstly, as Laurent Benzoni has pointed out, citing a book written by André Piettre in 1936: “the organised allocation of markets among actors to deal with a crisis situation is ultimately an unproductive policy that only has disadvantages, for it fails to reduce excess capacity while maintaining the same actors in place”.

Secondly, as shown by a study conducted on the sugar cartel that lasted from 1934 to 1974, this cartel was characterised by a number of distortions in the economy, such as higher prices, a decline in the quality of the harvest and a reduction in the consumer surplus (in *The Economic Performance of Cartels: Evidence from the New Deal U.S. Sugar Manufacturing Cartel, 1934-1974*, Bridgman, Qi, Schmitz).

Ultimately, the existence of a crisis cartel, like all cartels, cancels out the beneficial effects of healthy competition since it is harmful to the dynamism of companies; in the final analysis, cartels benefit only the companies in them, and above all, they are detrimental to consumers.

From this standpoint, any cartel – in a period of crisis or not – should be prohibited. However, given the serious economic and social problems generated by the crisis, the response cannot be so clear-cut. The crisis and its consequences are a reality that has to be taken into account.

2. How competition legislation and policy take crisis situations into account: the case of crisis cartels

Competition law and policy cannot afford to ignore the crisis situations that hit individual economies or the global economy as a whole, as has happened in the recent international financial crisis, the effects of which have been felt worldwide.

Merger law takes a state of crisis into account through the “failing firm doctrine”, as does the legislation on state aid, which, to cite the example of EU law, allows recourse to “aid…to remedy a serious
disturbance in the economy of a Member State”. What is the situation with respect to crisis cartels? This question might be turned on its head as follows: can the crisis be used to justify cheating, fraud or dissimulation? Of course, the answer to this question is “obviously not”. However, the problem with crisis cartels is that they may have a legal basis that would absolve them of any wrongdoing. Are crisis cartels not always justified? A review of the case law shows that crisis cartels may receive exemptions or benefit from extenuating circumstances with regard to the sanctions imposed on them.

2.1 Exemption of crisis cartels

Before it was repealed, Section 6 of the German GWB (Act against Restraints of Competition) exempted, with respect to crisis cartels, “any agreement between enterprises for the purpose of a co-ordinated and planned adaptation of production capacity to demand”. Block exemptions are permitted under French law and are applicable to “situations of overcapacity in the agricultural sector”.

The gist of this is that national and regional community legislation provide for conditions under which a cartel may be exempted (Article 101, paragraph 3, of the Treaty on the Functioning of the European Union, Article 7 of Regulation No. 02/2002/CM/WAEMU, etc.).

A crisis cartel might be exempted if it met the conditions laid down by these texts. In other words, it is not the crisis itself that would justify the exemption. However, competition law and policy set many conditions for taking a crisis into account. For example, under these requirements, in addition to the conditions laid down in Article 101, paragraph 3, it would have to be shown, according to the Commission’s Report on the Activities of the European Communities in 1982, that following criteria are met: the crisis is structural; there is significant overcapacity and substantial operating losses over a relatively long period; the crisis cartel must be the only possible means of improving the situation; the crisis must be detrimental to consumers; the measures envisaged must be structural and ensure a reduction in production capacities; they must be strictly necessary, limited over time, and must not entail exchanges of information or measures relating to prices.

This European example might certainly inspire other competition authorities whose legislation reproduces, to a great extent, the concepts of European law.

Crisis situations are also taken into account with regard to sanctions.

2.2 How the sanctions imposed on companies in a crisis cartel take crisis situations into account

An example of how a crisis situation may be taken into account with regard to sanctions can be seen in the Judgement of 19 January 2010 by the Paris Court of Appeals ruling on Decision No. 08-D-32 handed down on 16 December 2008 by the French Competition Council in a case regarding practices in the steel trading sector.

In the grounds of its judgement, the Paris Court of Appeals deemed that the Competition Council “addressed too briefly the context of economic crisis, both in general and specifically affecting the metalworking sector, by considering that the turnover used as a basis for the sanctions necessarily included the state of crisis that each company prosecuted may be undergoing, and that the payment moratoria granted by the Treasury also enable these companies to bear the cost of paying a fine; that by doing so, the Council cannot be considered to have taken the crisis situation into account in the sanctions that it imposed”.

The crisis is taken into account in setting the sanction and even afterwards, through the possibility of modifying the schedule of payment of fines for companies in difficulty.
However, all things considered, except in exceptional cases or cases of extreme necessity, there is no good justification for creating or maintaining cartels, which, as we already have stated, most frequently have a detrimental impact on the economy.

However, as we shall show in our conclusion, the crisis cannot be used to justify the protection of domestic or foreign cartels with respect to developing and low-income countries.

3. Conclusion

If it were true that the organisation of crisis cartels was beneficial to the economy and, most importantly, to consumers, then it would be quite natural to promote them in the developing and least advanced countries as a means of enabling them to overcome their ongoing state of crisis. This is of course an erroneous view since these types of cartel, like any cartel, would do more harm than good to these countries and above all to their consumers. In fact, there seems reason to believe that “small countries”, since they do not have strong competition authorities and the human and financial resources to enforce competition law and policy effectively, currently suffer more than any others from international cartels (cement cartel, etc.).

Admittedly, the rising prices of essential commodities may initially have exogenous causes that are not always due to cartels, but they might also be explained by the fact that this is a highly concentrated market, which is fertile ground for cartels at the national and regional level.

The answers, provided in previous paragraphs, primarily concern the Member States of the European Union. However, would they not be equally applicable elsewhere, for example in the West African region?

In any event, the problems that developing countries face are so crucial that policymakers would be willing to use any means to attenuate or control the effects of a crisis, if only in the short term. Some policymakers are responding to the crisis by reverting to the methods of the former managed economy, or to subsidies. Other are creating, for example, marketing companies that include competing importers to maintain the price levels of certain essential commodities at a set level that the poorest members of society can afford.

However, both in Senegalese legislation and that of WAEMU and ECOWAS, no reference is made to crisis cartels.

Admittedly, Senegalese legislation prohibits cartels “subject to specific legislative provisions”. Under Senegalese law, there are no specific provisions in favour of crisis cartels. What Senegal’s legislation does provide for is the possibility of setting prices by legislative or regulatory means (Article 42 of Act 94-63) “when circumstances so require for economic and social reasons” and of taking “temporary measures against excessive price increases caused by a disaster or crisis situation …”. In our opinion, these temporary measures do not seem to be applicable to crisis cartels.

The individual and block exemptions referred to in Article 7 of Regulation No. 02/2002/CM/WAEMU concerning cartels do not include a state of crisis among the qualifying conditions. African case law might follow the example of that of the European Community by highlighting the specific characteristics of their economies.

In this regard, we should point out the curious wording of Article 11 (3) of the Additional Act A/SA-1/12/08 of ECOWAS: “Subject to the conditions to be defined in a further Additional Act, the (Competition) Authority may authorise any person to conclude or execute an agreement or to engage in a commercial practice that may violate the provisions laid down by this Additional Act”. 

192
Fortunately, however, it appears that the power of exemption provided for by this text is not left to the discretion of the Competition Authority and is subject to conditions that will be defined in a further Act.

We are therefore hopeful that the Authority will make judicious choices on the basis of the existing provisions – bearing in mind the idea of Professor Blaise to the effect that “all cartels are bad, but sometimes inevitable” – and that, above all, in making its decisions it will take into account the specific situation of the consumers of the ECOWAS area.
SÉNÉGAL

En règle générale, le droit et la politique de la concurrence prohibent les ententes entre entreprises ayant pour objet ou pour effet de restreindre ou de fausser le jeu de la concurrence à l’intérieur d’un marché déterminé (articles 24 et suivants de la loi sénégalaise n° 94-63 du 22 août 1994 sur les prix, la concurrence et le contentieux économique, 3 du Règlement n°02/2002/CM/UEMOA, 5 de l’Acte Additionnel A/SA.1/12/08 de la CEDEAO.)

La législation sénégalaise prohibait ces ententes anticoncurrentielles « sous réserve des dispositions législatives et réglementaires particulières. » (Article 24 de la loi 94-63).

Le droit sénégalais ouvrait ainsi une brèche à cette interdiction de principe. Mais, il n’était ni le seul ni le premier à s’engager dans cette voie puisqu’il ne faisait que suivre les législations qui l’ont inspiré, notamment celle de la France, elle-même, comme la plupart des législations, communautaires (Union Européenne, UEMOA, CDEAO), ou nationales (Allemagne entre autres), prévoyant un système d’exemption de ces ententes.

Est-ce aux cartels de crise que cette ouverture est faite ? Peuvent-ils en bénéficier ? Ou pour mieux répondre à la question posée, les cartels de crise peuvent-ils être justifiés ?

Au regard de l’histoire et de certaines législations, les cartels de crise ont été justifiés même s’il n’en est pas toujours résulté des avantages bénéfiques à l’économie et aux consommateurs (1.)

Pourtant, la prise en compte de la situation de crise ne peut et ne semble être absente des préoccupations des autorités de la concurrence. Le droit et la politique de la concurrence ne saurait ignorer les situations de crise. Dès lors, la question sera de savoir dans quel cadre ou dans quelles conditions, les cartels de crise sont ou pourraient être admis ? (2.) Cette question suscite une autre que nous pourrons aborder dans une partie conclusive : admettre que les cartels de crise ne pourraient-il pas, en définitive, justifier la non application du droit et de la politique de la concurrence dans les États à faible revenu ? (3.)

1. La justification des cartels de crise et leur impact sur l’économie

1.1 La justification des cartels de crise

Jusqu’à une époque récente, bien des États ont cru aux « vertus » des cartels, même en période normale. Cette politique pouvait résulter d’un désir de faire face à la concurrence étrangère en s’octroyant de plus en plus de parts de marché ou, pour les mêmes raisons et pour des besoins d’expansion tout autant économique que politique, s’inscrire dans la même lignée que celle de création de champions nationaux.

Aussi, est-il aisé de comprendre que ces États ou d’autres soient-ils trop enclins à susciter ou à défendre la création de cartels ou d’ententes en période de crise.

Même les États-Unis, dont on ne saurait ignorer le rôle prépondérant et appréciable dans le démantèlement des cartels, s’y sont essayé. Aussi, durant la grande dépression de 1929, plus exactement avec l’affaire Appalachian Coals, la Cour suprême des États-Unis, face à la crise rencontrée dans
l’industrie du charbon confrontée aux industries nouvelles, se sentit obligée de valider, au nom de la règle de raison, une entente entre producteurs qui avaient organisé un système de quotas.

Des cartels de crise, tels ceux notés dans le secteur de l’industrie du sucre qui dura de 1934 à 1974, furent encouragés ou soutenus par le gouvernement fédéral américain.

Les autres États n’étaient pas en reste. Certains ne le sont pas toujours. Précisément dans la même période de la grande crise de 1929, en 1931, le gouvernement français « considérait la généralisation des ententes comme l’un des moyens les plus féconds de surmonter la dépression économique mondiale ». De nos jours, le recours à des cartels de crise n’est pas écarté par certaines législations.

La justification des cartels de crise serait sous-tendue par l’idée qu’elle constitue un remède à la crise. Un bref examen de la jurisprudence ou de certaines législations révèle qu’ils ont été justifiés lorsqu’ils ont eu pour but, entre autres « de maintenir un concurrent, de préserver l’emploi et les salaires, la survie d’entreprises en difficulté », ou dans des cas de « surcapacité dans certains secteurs ».

Il faut noter que la jurisprudence a bien évolué sur la plupart de ces points. Il ne peut en être autrement puisque les cartels n’ont pas toujours un effet bénéfique sur l’économie.

1.2 L’impact des cartels de crise sur l’économie

L’idée de « cartels de crise » semble colporter l’idée que de telles ententes sont justifiées par la crise et que c’est le seul moyen de la combattre. Les cartels de crise auraient, en conséquence, un effet bénéfique pour l’économie puisqu’ils mettraient fin à la crise qui la secoue. C’était le point de vue du Gouvernement français de 1931 exposé plus haut.

La réalité semble tout autre.

D’une part, pour reprendre Mr. Laurent Benzoni citant un ouvrage de 1936 de André Piettre : « la répartition organisée des marchés entre les acteurs pour faire face à une conjoncture de crise constitue à terme une politique sans issue qui accumule tous les inconvénients : non résorption des capacités de production et maintien en place des acteurs ».


En définitive, l’existence d’un cartel de crise comme tous cartels annule les effets bénéfiques d’une bonne concurrence puisqu’ils portent atteinte au dynamisme des entreprises ; ils ne profitent, en dernière analyse, qu’aux entreprises cartellisées et se font, surtout, au détriment du consommateur.

En ce sens, tout cartel, en période de crise ou en période normale, devrait être banni. Cependant, en raison des graves situations économiques et sociales qu’engendre la crise, il ne peut y avoir une réponse aussi tranchée. La crise et ses conséquences sont une réalité dont il faut tenir compte.
2. **La prise en compte des situations de crise par le droit et la politique de la concurrence : le cas des cartels de crise**

Le droit et la politique de la concurrence ne peuvent pas faire fi des situations de crise qui frappent une économie ou l’économie mondiale comme c’est le cas de la récente crise financière internationale dont les effets sont omniprésents.

L’état de crise est pris en compte dans le droit des concentrations avec la théorie de l’entreprise défaillante et dans celui des aides d’état avec le recours, pour prendre l’exemple européen, « aux aides destinées à remédier à une perturbation grave de l’économie d’un état membre ». Qu’en est-il des cartels de crise ? La question pourrait être « retournée » comme suit : la crise peut-elle justifier la tricherie, la fraude ou le trucage ? Assurément non ! Mais, le problème des cartels de crise est qu’ils peuvent avoir une origine légale qui les absoudrait de toute faute. Des cartels de crise ne sont-ils pas toujours justifiés ? L’examen de la législation et de la jurisprudence révèle que les cartels de crise peuvent faire l’objet d’exemption ou bénéficier de circonstances atténuantes sur les sanctions qu’ils encourrent.

### 2.1 L’exemption des cartels de crise

Avant son abrogation, l’article 6 du GWB allemand exemptait, au titre des cartels de crise, « tout accord entre entreprises ayant pour objet une adaptation coordonnée et planifiée de la capacité de production à la demande ». Des exemptions par catégorie sont prévues en droit français et touchent aux « situations de surcapacité dans le secteur agricole ».

Ce qu’il faut retenir, c’est que les législations tant nationales que communautaires prévoient les conditions dans lesquelles une entente peut être exonérée (article 101 paragraphe 3 de l’Union Européenne, 7 du Règlement n° 02/2002/CM/UEMOA…).

Une entente de crise pourrait être exonérée si elle remplissait les conditions fixées par ces textes. Autrement dit, ce n’est pas la crise elle-même qui justifierait l’exemption. Mais le droit et la politique de la concurrence en tiennent compte avec beaucoup d’exigences. Aussi, au titre des ces exigences, faudrait-il, en plus des conditions de l’article 101 paragraphe 3, prouver, selon le rapport d’activité de 1982 de la Commission européenne que « la crise est structurelle… qu’il y a des surcapacités importantes, des pertes d’exploitation significatives sur une période assez longue, (...) le cartel de crise doit être le seul moyen possible d’améliorer la situation, la crise doit être dommageable aux consommateurs … Les mesures envisagées doivent être structurelles et permettent une réduction des capacités de production. « Elles doivent être strictement nécessaires, limitées dans le temps et ne doivent pas comporter d’échanges d’informations et de mesures qui soient relatives aux prix ».

Cet exemple européen pourrait, certainement, inspirer d’autres autorités de la concurrence dont les législations reproduisent, en grande partie, les concepts du droit européen.

La crise est aussi prise en compte au niveau des sanctions.

### 2.2 La prise en compte de la crise dans les sanctions infligées aux entreprises membres d’un cartel de crise

C’est ce que laisse entrevoir l’arrêt du 19 janvier 2010 de la Cour d’Appel de Paris statuant sur la décision n° 08-D-32 rendue, le 16 décembre 2008, par le Conseil de la concurrence français dans l’affaire relative aux pratiques mises en œuvre dans le secteur du négoce des produits sidérurgiques.

Dans les motifs de son arrêt, la Cour d’Appel de Paris a considéré que le Conseil de la concurrence « a abordé de manière trop brève le contexte de crise économique, générale et particulière à la métallurgie
en estimant que les chiffres d’affaires qui servent de base aux sanctions incluent nécessairement l’état de crise que peut traverser chaque société poursuivie, et que des moratoires du Trésor public permettent en outre à ces entreprises, de supporter le paiement d’une amende ; que ce faisant, le Conseil ne peut être considéré comme ayant tenu compte de la situation de crise dans les sanctions qu’il prononçait.

Il est tenu compte de la crise dans la détermination de la sanction et même, après celle-ci, notamment dans la possibilité d’aménager des délais de paiement à des entreprises en difficulté…

Mais, tout compte fait, la crise, hormis les cas exceptionnels ou ceux d’extrême nécessité, ne peut être une bonne justification pour la création ou l’entretien de cartels qui, nous l’avons déjà dit, ont, le plus souvent, un impact négatif sur l’économie.

Maintenant, ainsi que nous allons l’exprimer dans notre dernière partie, la crise ne saurait justifier la protection des cartels à l’intérieur comme à l’extérieur des pays en voie de développement ou à très faible revenu.

3. Conclusion

S’il était vrai ou établi que l’organisation de cartels de crise profitait à l’économie et, principalement, aux consommateurs, alors rien ne serait plus normal que de les susciter dans les pays en développement ou les moins avancés pour les sortir de leur état de crise permanente. Bien sûr, il ne s’agit là que d’une vision erronée puisque de tels cartels, comme tout cartel, nuiraient davantage à ces pays et surtout à leurs consommateurs. Il semble bien qu’aujourd’hui, faute de disposer de fortes autorités de la concurrence et de moyens tant humains que matériels pour une application efficace de la politique et du droit de la concurrence, les « petits pays » soient plus victimes que tout autre des cartels internationaux (cartel du ciment…).

Certes, la hausse des denrées de première nécessité peut avoir, à son origine, des causes exogènes qui ne sont pas toujours le fait de cartels. Mais leur renchérissement pourrait aussi être expliqué par leur marché très concentré, terreau propice à des ententes au niveau national ou régional.

Les réponses, apportées aux paragraphes précédents, concernent principalement les États membres de l’Union Européenne. Mais ne seraient-elles pas les mêmes ailleurs, notamment dans la région Ouest-africaine ?

De toute façon, les pays en développement sont confrontés à des problèmes tellement cruciaux que les décideurs politiques ne rechigneraient à aucun moyen susceptible d’atténuer ou de juguler, ne serait-ce qu’à court terme, les effets d’une crise. Devant la crise, certains recourent aux méthodes de la vieille économie administrée ou aux subventions. D’autres créent, à titre d’exemple, des sociétés de commercialisation incluant des importateurs concurrents pour maintenir le prix de certaines denrées de première nécessité à un niveau déterminé accessible aux plus démunis.

Cependant, aussi bien dans la législation sénégalaise que dans celle de l’UEMOA et de la CEDEAO, il n’est fait cas de l’admission de cartels de crise.

Certes, la législation sénégalaise interdit les ententes « sous réserve des dispositions législatives et particulières ». Il n’y a pas, en droit sénégalais, de dispositions particulières en faveur des cartels de crise. Ce qui est prévu au Sénégal, c’est la possibilité de fixer les prix par voie législative ou réglementaire (article 42 loi 94-63) « lorsque les circonstances l’exigent pour des raisons économiques et sociales » ou de prendre « des mesures temporaires contre les hausses excessives de prix motivées par une situation de calamité ou de crise… ». Ces mesures temporaires ne nous semblent pas pouvoir porter sur les cartels de crise.
Les exemptions individuelles et par catégorie de l’article 7 du Règlement n° 02/2002/CM/UEMOA, relatives aux ententes, n’incluent pas dans ces conditions, l’état de crise. La jurisprudence africaine pourrait s’inspirer de celle de la communauté européenne en mettant en exergue les spécificités de leurs économies.

Ici, il faut noter la rédaction curieuse de l’article 11 (3) de l’Acte Additionnel A-SA-1/12/08 de la CEDEAO : « Sous réserve des conditions à définir dans un autre Acte Additionnel, l’Autorité (de la concurrence) peut autoriser toute personne à conclure ou exécuter un accord ou à engager une pratique commerciale susceptible de violer les dispositions imposées par le présent Acte Additionnel ». 

Mais, il apparaît heureusement de ce texte que le pouvoir d’exemption qui en découle n’est pas laissé à la discrétion de l’Autorité de la concurrence et est assorti de conditions qui seront définies dans un autre Acte.

Aussi, osons-nous croire que l’Autorité fera des choix judicieux sur la base des conditions fixées avec, en tête, l’idée du professeur Blaise : « toutes les ententes sont mauvaises, mais quelquefois inévitables » et que, surtout, elle se déterminera en tenant compte de la situation particulière des consommateurs de la zone CEDEAO.
SINGAPORE

1. Governmental policies towards cartels during a crisis

Singapore businesses were badly affected by the recent financial crisis. As a small, open economy with heavy dependence on trade (Singapore’s total trade as a percentage of GDP amounts to 282%)\(^1\), the global reduction in trade as a result of the financial crisis resulted in Singapore’s GDP growth rate plummeting from 7.5%\(^2\) in 2007 to -2.1%\(^3\) in 2009.

Singapore’s Competition Act is relatively new and was established in 2005 and is enforced by the Competition Commission of Singapore (CCS). The prohibition against cartels came into force on 1 January 2006. While the Act gives the Minister power to exempt particular anti-competitive agreements or certain type of agreements from the Act on the grounds of “exceptional and compelling reasons of public policy”, this power was never exercised to afford special treatment for crisis cartels during the financial crisis. On the contrary, government policy statements made during the financial crisis clearly indicated that competition is and remains a key tenet of Singapore’s economic growth. The government’s position can be summed up by President S R Nathan’s speech at the Opening of the Singapore Parliament on 18 May 2009 at the peak of the financial crisis where he said:

“Our basic approach to promoting growth has been to stay competitive, upgrade our people, develop new capabilities, and create an outstanding pro-business environment. Then we can rely on free markets, free trade and entrepreneurship to create wealth for individuals and the country. This is how Singapore has consistently developed year after year, and over time totally transformed our economy and our people’s lives.”\(^4\)

As it is not part of Singapore’s policy to allow for the development of crisis cartels, cartel enforcement by the CCS remained robust and in fact increased during the financial crisis. Having said that, CCS recognised that the financial crisis would have an effect on business’ cash flow and ability to pay financial penalties imposed against them as a result of CCS’ finding of infringement. As such, legislative amendments were made in 2010 to allow for the payment of financial penalties by way of instalments in appropriate cases.

Singapore’s commitment to open trade, free markets and robust competition has allowed it to rapidly and successfully emerge from the financial crisis. Indeed, Singapore emerged from the financial crisis with an impressive 15% GDP growth forecasted for 2010\(^5\).

---


\(^4\) [http://www.istana.gov.sg/News/Address+by+President+S+R+Nathan+at+the+Opening+of+Parliament.htm](http://www.istana.gov.sg/News/Address+by+President+S+R+Nathan+at+the+Opening+of+Parliament.htm)

2. Enforcement record on cartels during the recent crisis

In line with government policy, CCS’ enforcement philosophy has consistently been that any agreement or concerted practice which leads to a prevention, restriction or distortion of competition will constitute an infringement of the Competition Act regardless of the prevailing economic climate.

CCS issued its first infringement decision in early 2008 (Pest Operators Case). During the financial crisis CCS’ cartel enforcement gathered pace, with decisions being made in a further two cases, including a price-fixing case (Bus Operators Case) in 2009 which resulted in heavy financial penalties totalling 1.69 million SGD and a bid-rigging case in 2010 which involved a leniency applicant. A number of dawn raids were also conducted in 2009 and 2010 and investigations relating to those raids are ongoing, all signalling to businesses that there would be no let up in CCS’ enforcement stance despite the financial crisis.

3. Trade association activities and competition concerns

Since the 1980s, there has been a broad policy move by the government of Singapore to liberalise all sectors of the economy. While trade associations can serve a useful economic function such as the positive promotion of industry best practices, some trade associations felt that with the removal of government oversight in their sector, the association would then assume the mantle of facilitating and mobilising collective and concerted action among its members, especially in times of economic crisis. Indeed, CCS noted that a number of businesses turned to their trade associations for leadership and assistance during the financial crisis. In some cases, this resulted in the trade association facilitating anti-competitive behaviour including collective action on prices among its members. The Bus Operators Case was a case in point, where the members used their trade association as a front to fix coach ticket prices and fuel surcharges in order to meet the increasing fuel costs which its members faced. One of the association’s stated objectives for the price-fixing arrangements was to allow the economically weaker members to survive, by fixing minimum selling prices for all members’ bus tickets.

In addition to facilitating outright price-fixing agreements by its members, CCS also found that the issuance of price recommendations by trade and professional associations to be a common feature in Singapore. This was probably a legacy from the past when the government had promulgated and encouraged the use of fixed price schedules, and with the abolition of these price schedules, associations felt that it was their role to issue price recommendation to its members to fill that lacuna. For instance, the Law Society of Singapore issued voluntarily fee guidelines for conveyancing transactions after the abolition of the scale fees in 2003, as there was feedback from its members that some form of fee guidelines would be useful in making the transition from the regime of scale fees. The Law Society eventually abolished its fee guidelines in 2009 as it felt that all fees should be freely negotiated between solicitor and client.

CCS’ views on price recommendations by trade associations were set out in a decision issued against the Singapore Medical Association (SMA) in 2010. In this case, CCS found that the anti-competitive effects of the price guidelines (which were in effect price recommendations by the professional association) outweighed any pro-competitive effects that the guidelines were claimed by the association to have. The association had claimed that the price recommendations were good for consumers and dealt with information asymmetry problems which were especially acute in the healthcare industry. In its decision, CCS found that there were better measures in place that were not anti-competitive to improve information asymmetry and information gaps for patients.

CCS followed up on the SMA decision by issuing a policy statement on price recommendations encouraging other trade and professional associations to review their price recommendations and remove

---

them. Business were also encouraged to set their prices independently without recourse to price recommendations issued by their trade or professional associations and not to use price recommendations as a form of justification for charging higher prices to consumers. Instead of immediately investigating trade and professional associations that we were aware had price recommendations in place, CCS took proactive measures to contact these associations and through advocacy convince them to discontinue issuing the recommendations. This is an ongoing process.

4. **Competition advocacy on cartel-related matters**

CCS has extensive and innovative advocacy programmes and these have continued apace during the financial crisis. CCS regularly engages other government agencies as well as to external parties and the messaging is to reiterate the dangers of crisis cartels, for example by referring to historical examples such as the damaging economic effects of legalised cartels during the New Deal era of the Roosevelt Administration.

5. **Conclusion**

In summary therefore, CCS did not have to make any exception in the enforcement against the operations of cartels during the last financial crisis. CCS maintained a consistent stand that cartels are harmful to competition and continued with its enforcement actions. CCS also placed the activities of trade associations under increasing scrutiny to ensure that the trade association does not become a front for cartel activities among its members or allow the trade associations to issue anti-competitive price recommendations to its members.
SOUTH AFRICA

The recent economic crisis has not significantly altered the manner in which the South African Competition Authorities analyse cartel cases. Many of the cartels that exist in the South African economy today have a long history often rooted in regulatory policies from a previous era where following deregulation firms in some sectors, particularly food and agro processing, continued to associate with each other outside of a regulatory framework.

One of the overall economic aims of the South African Competition Act No 89 of 1998 (“the Act”) is the safeguarding of competition whilst maximising social welfare gains. In order to give effect to this, public interest objectives\(^1\) are considered in merger review and exemption applications. These provisions could be emphasised during times of economic recession.

An example of this is section 10 of the Act which allows for the exemption of an agreement or practice or a category of such agreements or practices constituting a prohibited practice in terms of Chapter 2 of the Act\(^2\) provided that the conduct contributes to one or more of the following objectives:

- the maintenance and promotion of exports,
- promoting small businesses or firms controlled or owned by historically disadvantaged people to become competitive,
- change in productive capacity to stop decline in an industry and,
- the economic stability of any industry designated by the Minister.

Therefore it would not be difficult for firms, in times of economic downturn, to justify an exemption from application of the provisions of the Act based on the above grounds. The pertinent provisions in this regard are those relating to change in productive capacity to stop decline in an industry or those dealing with the economic stability of any industry designated by the Minister.

In the past the liquid fuels sector, shipping sector and motor vehicles industry\(^3\) invoked the provision relating to economic stability but these were not pursued. Currently the Commission is considering exemption applications in the milk industry\(^4\), in the healthcare sector and on behalf of maize farmers\(^5\).

The designation of an industry for exemption to ensure economic stability was intended as an avenue for ministerial input for coordination with industrial policy in the national interest. A minister’s designation does not confer exemption by itself. The Commission will factor the Minister’s designation in its determination together with other statutory standards which need to be met. The Commission must specify

\(^1\) Sections 4(1)(a), 10(3), 12A(3).
\(^2\) Relating to vertical and horizontal agreements and abuses of dominance.
\(^3\) South Africa’s Competition Regime: OECD Peer Review, May 2003.
\(^4\) Clover South Africa.
\(^5\) Grain SA.
exactly what behaviour is exempted. As policies and circumstances regarding these sectors may change over time an exemption must be limited to a specific term\(^6\) in order to allow the commission to review the state of that sector.

Change in productive capacity to stop decline was invoked recently in the case of Grain SA.\(^7\) This provision is rarely invoked. The case gripped national interest as it involved the country’s maize farmers who have claimed that they are under threat of exiting the market as a result of the surplus maize produced over the last two years in South Africa resulting in supply exceeding demand and declining producer prices. In addition the maize farmers also invoked the provisions relating to the promotion of exports and designation of an industry by the Minister in an attempt to deal with the crisis. Their intention is to create an export pool to export the surplus maize to overseas markets thereby limiting supply in the domestic market to prevent prices from falling. The rationale provided for the creation of this export cartel was that the current surplus coupled with the international financial crisis threatened the future of maize farmers in the country, which would ultimately impact on food security in the long term as maize is a staple food. The matter is currently still under consideration.

The provisions of the Act, as described above, are sufficiently clear for the Commission to make a fair and objective assessment of the issues - provided that the parties concerned apply for an exemption. There has not been an increase of exemption applications during the recent economic crisis. Although firms may no doubt make use of section 10 during these times.

The process of granting these exemptions\(^8\) requires an in depth investigation into the issues, the issuing of a public notice in the Government Gazette and the consideration of submissions by any interested parties. Granting an exemption is not done arbitrarily and the Commission has to grant the exemption if the conditions are met and must refuse if they are not.\(^9\) The Commission will take into account whether there is a history of collusion in an industry and seeks guidance from international experiences\(^10\) in granting exemptions.

The Commission has also encountered cases where firms in an industry are required to associate with each other as a consequence of government regulation. An example of this is section 17 of the Marketing of Agricultural Products Act 47 of 1996 (“the MAP”) which empowers the Minister of Agriculture to authorise the creation of an export cartel for the purposes of efficiently marketing agricultural products. In cases like these the Commission adopts an advocacy role.

In conclusion, South Africa’s Competition Act enables the Commission to take into consideration the change in capacity and decline as well as the economic stability of an industry when considering exemption applications. However exemptions that have been granted on these criteria are few and far between. Indeed of a total of 43 exemption applications received by the Commission since its inception, only three have invoked the abovementioned provisions thusfar and only one of these\(^11\) exemption applications were brought during the recent recession.

\(^6\) Section 10(4A).
\(^7\) Case no 2010Jul5262.
\(^8\) Section 10(6).
\(^9\) Section 10(2)(b).
\(^10\) Section 1(3): “Any person interpreting or applying this Act may consider appropriate foreign and international law”.
\(^11\) Grain SA.
1. **Government policies and enforcement on cartels**

Article 14 of the Fair Trade Act prohibits enterprises from engaging in concerted actions, save for specific conduct that is listed among exemptions and beneficial to the economy as a whole and in the interests of the public at large. In those cases, the parties may apply to the Commission for approval. The term “concerted action (or cartel),” as defined in Article 7 of the Fair Trade Act, means the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the prices of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby restrict each other’s business activities. This aside, it further qualifies a “concerted action” as being limited to a horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, trade in goods or the supply and demand for services. In addition, the term “any other form of mutual understanding”, as referred to here, means other than by contract or agreement, a meeting of minds whether legally binding or not which would, in effect, lead to joint actions.

There are many different types of concerted actions, and their effects on markets vary. In principle, to have concerted actions is to limit competition, to impede the adjustment of prices and to harm consumer interests. For these very reasons, the Fair Trade Act makes it a point to impose tight scrutiny.

On the other side of the coin, some concerted actions are actually beneficial to the economy as a whole and are in the public interest, too; therefore, in order to be legal, intended actions must be approved by the Commission. Article 14 of the Fair Trade Act provides several exemptions for firms to be able to engage in concerted actions; for these exemptions to apply, a concerted action must satisfy one of the circumstances listed below:

- unifying the specifications or models of goods for the purpose of reducing costs, improving quality, or increasing efficiency (so-called standardization cartels);
- joint research and development on goods or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency (so-called rationalization cartels);
- each developing a separate and specialized area for the purpose of rationalizing operations (so-called specialization cartels);
- entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports (so-called export cartels);
- joint acts in regard to the importation of foreign goods for the purpose of strengthening trade (so-called import cartels);
- joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting the demand orderly, while in an economic downturn, the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulty to maintain their business or encounter a situation of overproduction (so-called recession cartels); or
• joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small and medium-sized enterprises (so-called small and medium-sized enterprise cartels).

The “economic downturn” used in Subparagraph 6 of Article 14 of the Fair Trade Act includes the impact of the overall economic depression on individual industries as well as recessions purely at the sectoral level. When the Commission receives an application for recession cartels, the Commission’s decision to grant approval will take into consideration whether the concerted action is beneficial to the economy as a whole, in addition to the situation of the individual industry in question. In other words, the Commission does not treat particular industries differently either based on applications for recession cartels by enterprises or during economic downturns. To determine whether a concerted action is beneficial to the economy as a whole and in the public interest, the Commission will consider “recession of the general economic environment or an individual industry” as one of the factors of concern. The Commission treats such applications in accordance with the Fair Trade Act and there is no different cartel enforcement during the economic downturn.

When enterprises apply for approval to engage in concerted actions, the Commission shall consider the following factors when deciding whether to grant approval:

• In line with the principles of the Fair Trade Act, when granting approval of these concerted actions, the Commission will take into account the positive contributions to the overall economy and the public interest as well as the adverse impact on the restriction of market competition, if the concerted action is brought into existence. Only when the advantages outweigh the disadvantages can such a concerted action be approved.
• The Commission shall consider the following factors when assessing the aforesaid overall economy and public interest: the extent of the overall technological improvement of the industry in question, predictions regarding the variations in product prices or service prices, upgrades for the convenience of users, as well as public safety, public health, and environmental protection issues.
• The Commission shall consider the following factors when assessing competition restraints resulted from the concerted actions: the extent to which the activities of enterprises not participating in the concerted action are impeded, the extent of the impact on the market competition and the upstream and downstream industries, and whether the participating enterprises are likely to abuse their market position and improperly infringe the interests of general consumers and related enterprises.

According to Articles 13 and 14 of the Enforcement Rules to the Fair Trade Act, with respect to the application for approval to engage in concerted actions, all participating enterprises should prepare relevant material and apply to receive approval prior to execution. Article 15 of the same Enforcement Rules provide that the enterprise should submit the concerted action assessment report which shall specify the following:

• the cost structure before and after the concerted action and analytical data on forecasted changes;
• the impact of the concerted action on enterprises not participating;
• the impact of the concerted action on the structure, supply and demand, and pricing of the relevant market;
• the impact of the concerted action on upstream and downstream enterprises and their markets;
• the concrete benefits and detrimental effects of the concerted action for the overall economy and public interest.
other required information.

In addition, there are different types of concerted action applications for approval, and the items specified in their concerted action assessment report vary. For “recession cartels,” the concerted action assessment report shall specify the following information:

- a monthly comparative breakdown for the preceding three years of the average fixed costs, average variable costs, and the pricing of specified goods for each participating enterprise;
- a monthly breakdown for the preceding three years of production capacity, equipment utilization rate, production and sales value (volume), import/export value (volume) and inventory levels for each participating enterprise;
- changes in the number of businesses in the relevant industry over the preceding three years;
- market prospects for the relevant industry;
- adopted or contemplated self-help methods, other than concerted actions, to turn around the business;
- anticipated results of the concerted action; and
- other related materials that the Commission may request the participating parties to provide.

In its granting approval for these concerted actions, so that market competition can be ensured, the Commission may impose conditions or require undertakings in its granting approval but it must always specify a limited period not exceeding three years. The enterprises involved may, with justification, file a written application for an extension thereof with the Commission within three months prior to the expiration of such period provided, however, that the term of each extension shall not exceed three years.

In the event that after the approval of the concerted action, the basis for such approval no longer exists, the economic condition has changed, or the conduct of the enterprises involved exceeds the scope of the approval, the Commission may revoke the approval, alter the contents of the approval or order the enterprises involved to cease from continuing the conduct, rectify the conduct or take necessary corrective actions. The intention here is to prevent market competition from being harmed through such approved concerted actions.

Meanwhile, the Commission is required to establish a specific registry to record the approvals, conditions, undertakings, time limits, and relevant dispositions. It shall also publish these matters in the government gazette.

2. Case study: Recession cartels in man-made fiber industries

The Commission grants exemptions in a very strict manner. Although the Commission was allowed to grant exemptions to recession cartels under Subparagraph 6 of Article 14, it rejected applications filed by certain man-made fiber industries under such a provision. Detailed information regarding the case is presented in the following.

At the end of 1998, the Taiwan Man-made Fiber Industries Association and Taiwan Synthetic Texturize Industry Association, on behalf of their member companies, respectively applied to the Commission for approval to jointly lower the production volume of polyester filament by more than 20% and that of polyester textured yarn by 10%-15%. It was the first application for recession cartels the Commission had received since its establishment in 1992. After investigation, the Commission found that despite the domestic economic downturn at that time, market demand and sales of the two industries did
not decline but were growing and the inventory on hand was not extraordinarily high. Meanwhile, as of October 1998, the “unintentional inventories” (the balance after subtracting the amount of inventory necessary under normal operating conditions from the total inventory) of polyester filament and polyester textured yarn companies respectively accounted for 1.15% and 1.46% of the total production volumes in that year. The increases in companies’ unintentional inventories were limited and the companies could respond independently and on their own accord with adjustments to their production volumes.

The Commission made a decision that the markets were still able to function and that the inventory on hand was not extraordinarily high. In addition, there was no evidence to prove that this concerted action to lower production volume would meet the requirement of “benefiting the overall economy and public interest”. Therefore, The Commission rejected those applications.

In April 1999, due to improvements in the supply-demand situation in the relevant markets, the fact that companies could respond on their own account by adjusting production volume, and because making a concerted action to lower production volume was deemed unnecessary, the two associations filed another application with the Commission to revoke the prior application. The Commission agreed to the withdrawal of the application.

3. Conclusions

The Commission handles cartel cases in a very strict manner and the policy on cartel enforcement has not changed during the recent global financial crisis. Moreover, during the recent financial crisis, no domestic enterprises applied to the Commission for approval to engage in recession cartels.

Due to the difficulties in obtaining substantive evidence of cartels, the Commission has extensively surveyed the designs and the methods of enforcement of leniency programs in other countries. These findings have served as important reference to the Commission in drafting such a program now that will provide reduction or immunity from fines to cartel members who voluntarily reveal such evidence to the Commission and assist in the investigation regarding the illegal organization of the cartel.

As a result of globalization, more and more anti-competitive activities are subject to scrutiny under two or more competition agencies within different jurisdictions. It is often very difficult for the Commission to collect information to prove the existence of infringements. The Commission has entered into agreements with competition authorities in New Zealand, Australia, France, Canada and Hungary under which there are provisions for cooperation between the enforcement agencies in the respective jurisdictions. However, there has not been an agreement entered into by the Commission with those enforcement agencies of the foreign jurisdictions under which the Commission has been able to obtain useful confidential information to correct illegal activities. The Commission is exploring the possibility of entering into cooperation arrangements with its counterparts in other countries to ensure that enforcement activities can be undertaken in an even more effective manner and to improve the enforcement of competition law to combat cross-border anti-competitive practices and international cartels.
UNITED KINGDOM

1. Summary

Current or other cyclical economic conditions are not and should not be relevant to assessing the compatibility of “crisis cartels” or other agreements (for example, industrial restructuring agreements) with UK competition law.

That said, there has been occasion where the exceptional circumstances that arose owing to the crisis to the Northern Irish cattle industry caused by the outbreak of foot and mouth disease among cattle in 2001 mitigated against the imposition of a financial penalty for a price-fixing agreement that was found to infringe the Competition Act 1998.

This paper summarises UK competition policy on crisis cartels (section II) with observations on the potential incompatibility of industrial restructuring agreements (section III). UK experience in relation to the foot and mouth and financial services crises is discussed in sections IV.

2. UK competition policy on crisis cartels

The Office of Fair Trading (OFT) considers cartel activities to be among the most serious infringements under competition law.¹ Neither the UK Competition Act 1998 (CA98) nor the Treaty on the Functioning of the European Union (TFEU) afford different treatment of cartels during severe economic downturns.

In the UK, current economic conditions or other cyclical economic conditions are not (and should not be) relevant to an assessment of the compatibility of industrial restructuring agreements with competition law.

3. Industrial restructuring agreements

A likely occasion where this may arise is in the context of industrial restructuring agreements. The following paragraphs consider some of the key issues when assessing the compatibility of these agreements with Article 101 TFEU and the equivalent Chapter I prohibition of the CA98.

---

¹ For example, OFT guidance as to the appropriate amount of a penalty (OFT 423, 2004) provides that “The starting point [when calculating the level of financial penalty for infringements of the Competition Act 1998] will depend in particular upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article 81 [now 101 TFEU] and/or the Chapter I prohibition.” [emphasis added]
3.1 **Article 101(1)**

An agreement between producers to reduce capacity, whether sanctioned by government or otherwise, will generally fall within the Article 101(1) prohibition (and the equivalent prohibition in section 2 CA98) by object – as confirmed by the Court of Justice of the European Union in the *Irish Beef* case.\(^2\)

3.2 **Article 101(3)**

It is possible for industrial restructuring agreements to satisfy the legal exception criteria in Article 101(3) TFEU (and the equivalent exemption criteria in section 9 CA98). However it is likely to be difficult to satisfy these criteria in practice.

3.3 **Pro-competitive benefits**

A restructuring agreement whereby less efficient players agree to leave the market may result in pro-competitive benefits through increased capacity utilisation rates by the remaining (more efficient) players with prices driven down as they compete to win market share held by the exiting players.

However, in order to show that these benefits flowed from the agreement, there would have to be evidence that the remaining competitors were unable to increase capacity utilisation, and thereby drive down prices, without the agreed exit of the less efficient players. In a market where the remaining competitors were already more efficient that the exiting player(s), it is not clear why an agreement would be needed to achieve this benefit.

An agreement which removes the least efficient capacity (as opposed to competitor) from the market is most likely to benefit consumers if it reduces producers’ variable costs. However, such an agreement must not contain ‘limitations on output increases’.

In addition to explicit limitations on output, it is likely to be necessary to ensure that sufficient excess capacity remains in the market to allow increases in output in practice, and that this excess capacity is sufficiently distributed between the remaining players to allow competition for switching and increased demand.

3.4 **No more restrictive than necessary**

It is also likely to be difficult in practice to satisfy the third criterion of Article 101(3) (namely that the agreement does not impose restrictions which are not indispensable). In many if not most cases, market forces ought to be sufficient to achieve the pro-competitive outcome.

There may be other less restrictive methods of achieving the same benefits. For example, in some cases it may be feasible for producers to ‘moth-ball’ manufacturing capacity on a unilateral basis.

A merger may be a possible ‘less restrictive’ method of achieving the pro-competitive benefits of a restructuring agreement. A structural change (a merger or structural joint venture) is capable of addressing structural overcapacity. In many cases a merger (assessed under the EU Merger Regulation or national merger control) would be a more appropriate solution to over-capacity. The merger control rules ensure an assessment of whether the pro-competitive efficiencies flowing from a merger would outweigh any anticompetitive impact.

---

\(^2\) Case C-209/07, Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigore) Meats Ltd [2008] ECR I-8637.
However, in many cases a merger could be more restrictive of competition than a restructuring agreement. In those cases where a merger would be 'less restrictive', there would need to be a realistic prospect of a merger taking place before this possibility could be treated as a relevant counterfactual for the purposes of the third criterion of Article 101(3).

3.5 State Aid

State Aid measures are capable of achieving efficiency benefits by removing inefficient capacity from a market. A review under the state aid rules of a proposed government scheme to remove excess capacity would address the potential competition concerns and ensure that the least efficient capacity is removed. The EU has a history of allowing government intervention to restructure industries with structural overcapacity (such as coal and steel, and shipbuilding).

However, state aid schemes may not be readily available in times when government funds are already stretched.

4. UK experience (i): non-imposition of financial penalties – Northern Ireland Livestock and Auctioneers’ Association

While the legality of crisis cartels might not be assessed differently in times of economic downturn, there has been occasion in the UK where liability for financial penalties has been reconsidered in extraordinary times of crisis.

In Northern Ireland Livestock and Auctioneers’ Association\(^3\) the outbreak of BSE (Bovine Spongiform Encephalopathy or “mad cow disease”) and foot and mouth disease among cattle in 2001 caused a crisis in the Northern Irish cattle industry, resulting in increased veterinary health regulation, a reduction in throughput of cattle and the temporary closure of the markets. The NILAA recommended to its members that they introduce a standard buyer’s commission to be payable by purchasers of livestock in Northern Ireland cattle markets. The OFT concluded that the NILAA had infringed the Chapter I prohibition as the recommendation amounted to a decision by an association of undertakings that had as its object the prevention, restriction or distortion of competition in the provision of services by cattle auctioneers at livestock marts in Northern Ireland.

Notwithstanding the finding of infringement and that price fixing practices are among the most serious infringements, the OFT decided not to impose a financial penalty. This was in part due to the overt nature of the practice (the recommendation of the NILAA had been publicised rather than covert) but also due to the exceptional circumstances of the case, in particular the effects of BSE and foot and mouth on the cattle industry in Northern Ireland generally and the burdens identified above (increased regulation, reduced throughput, temporary closure of markets) on the NILAA and its member cattle auctioneers in particular.

UNIVERSAL STATES

This submission responds to the “Questions and points for consideration” relating to Crisis Cartels distributed by the Global Forum by the OECD Secretariat. Put simply, United States antitrust law does not provide for any special treatment of cartels during economic downturns. This is rooted in the United States’ long history of enforcing the antitrust laws and from lessons learned during the Great Depression. This submission explains the general philosophy of the United States towards the prosecution of cartels, provides insight into our recent enforcement record, and concludes with a short discussion of our related competition advocacy efforts.

1. Governmental policies towards cartels during crises: assessment and evolution

Cartels are illegal at any time and are subject to criminal prosecution, regardless of the economic climate. Indeed, there is some literature that suggests cartels are more likely in times of economic trouble when incentives for colluders to defect from price-fixing agreements are weaker. If gains from cheating a cartel are smaller during times of economic crisis (because demand is lower), while the costs of cheating are higher, we are likely to see more collusion during periods of economic decline.

Thus, there are no special provisions related to economic downturns for changes in the legal standard, for exemptions or other derogations from the law, for the creation of cartels, for legal defenses to cartel conduct, for special sector-specific treatment, or for special considerations that the antitrust agencies must take into account in enforcing the antitrust laws. Nor are there special provisions for sanctions and penalties related to economic downturns.

This was not always the case. Eighty years ago, at the time of the Great Depression, U.S. antitrust enforcement policy took a different approach to cartels. As described in 2009 by Assistant Attorney General Christine Varney,1

Significantly, the onset of the Great Depression did not cause the nation to reconsider the damaging effects of cartelization on economic performance. Instead of reinvigorating antitrust enforcement, the Government took the opposite tack. Legislation was passed in the 1930s that effectively foreclosed competition. The National Industrial Recovery Act (“NIRA”), which created the National Recovery Administration (“NRA”), allowed industries to create a set of industrial codes. These “codes of fair competition” set industries’ prices and wages, established production quotas, and imposed restrictions on entry.

At the core of the NIRA was the idea that low profits in the industrial sectors contributed to the economic instability of those times. The purpose of the industrial codes was to create “stability” – i.e., higher profits – by fostering coordinated action in the markets. The codes developed following the passage of the NIRA governed many of America’s

---

major industrial sectors: lumber, steel, oil, mining, and automobiles. Under this legislation, the Government assisted in the enforcement of the codes if firms contributed to a coordinated effort by permitting unionization and engaging in collective bargaining.

What was the result of these industrial codes? Competition was relegated to the sidelines, as the welfare of firms took priority over the welfare of consumers. It is not surprising that the industrial codes resulted in restricted output, higher prices, and reduced consumer purchasing power.

It was not until 1937, during the second Roosevelt Administration, that the country saw a revival of antitrust enforcement. ... The lessons learned from this historical example are twofold. First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government’s response to economic crises to ensure that markets remain competitive.

As AAG Varney concluded, “passive monitoring of market participants is not an option. Antitrust must be among the frontline issues in the Government’s broader response to the distressed economy.”

Importantly, the U.S. Sentencing Guidelines, which apply to criminal sanctions in federal cases, do take into account financial limitations on a defendant’s ability to pay a fine, but these provisions are based on the financial condition of the particular individual or firm, and are not tied in any way to general economic conditions.

Beyond the criminal area, the Antitrust Division of the United States Department of Justice (“Antitrust Division”) and the Federal Trade Commission (“FTC”) have received requests for special treatment in antitrust investigations from parties alleging hardships resulting from the economic downturn. These requests have ranged from completing a merger review more quickly than normal to requests to fashioning merger remedies (e.g., divestitures) in ways that take into account the difficulty of finding buyers for divested assets in difficult economic times. As to the former, if assets would be more quickly deteriorating while waiting for a Division decision, consistent with good analytical decision-making, then the Division may speed the pace of its review. As to the latter, this depends on the facts of each unique investigation. For example, in United States v. Signature Flight Support Corp.,4 the Division had challenged a merger alleging it would create a monopoly in the market for flight support services at Indianapolis International Airport. The defendant agreed in 2008 to a federal court consent decree requiring divestiture of certain flight operations at the airport. In 2009, after the court had approved the decree, the defendant petitioned the court for an extension of the divestiture deadline, arguing that the “global financial crisis” had caused the market for sale of these operations to collapse. The Division opposed the motion and the court denied it, noting that the “final judgment was negotiated in the midst of troubling economic news, and the parties specifically countenanced the possibility that Signature would have difficulty selling the [operations],” and that at least two bidders had in fact made offers to purchase the assets. The FTC has

---


seen an increase in the number of firms seeking special consideration in merger review, especially in the health care sector, due to alleged hardships in these times of economic downturn. The standard of review for mergers remains unchanged, however. See, for example, the matter of Laboratory Corporation of America, where the FTC rejected arguments based on such allegations.  

2. Enforcement record on cartels during the recent economic downturn

The Division continues to vigorously prosecute violations of the antitrust laws. Notably, the Antitrust Division has not observed changes in the types of cartels formed or incentives of cartel participants to seek leniency as a result of the economic downturn. During our most recent Fiscal Year, ending September 30, 2010, the Division filed 60 criminal cases and obtained fines in excess of roughly $550 million. In these cases, 84 corporate and individual defendants were charged. Of the individual defendants sentenced, 76% were sentenced to imprisonment. The average sentence was 30 months and total jail time for all defendants was about 26,000 days. In Fiscal Year 2009, arguably a period of greater economic turmoil, the Division’s statistics were similar. Seventy-two total cases were filed, 87 defendants were charged and served over 25,000 days in prison, and over $1 billion in fines was collected. Indeed, Fiscal Years 2008 and 2009 saw substantial fines imposed against firms and individuals, and the incarceration of individuals reached over 14,000 and 25,000 days, respectively. 

The need to monitor closely the use of federal government funds distributed as part of the Administration’s economic stimulus program, the $787 billion American Recovery and Reinvestment Act of 2009 is also critically important. In May 2009, the Department of Justice launched a Recovery Act initiative designed to help procurement officials prevent collusion and fraud in the award of stimulus projects and to detect and prosecute collusion and fraud if it occurs. As part of the initiative, the Department is training thousands of procurement and grant officials, government contractors, and government auditors and investigators on the signs of collusion and fraud and actively assists other agencies in investigating and prosecuting fraud.

3. International cooperation on cartels

The Antitrust Division continues to work closely with our counterparts around the world and to see the fruits of this close collaboration result in the successful prosecution of global cartels, to the benefit of consumers in all participating jurisdictions. The Division has noted no apparent change in the amount or type of international cooperation related to cartel enforcement as a result of the recent economic downturn.

4. Competition advocacy on cartel-related matters

In contrast to the efforts noted above that occurred during the Great Depression, there has been no support for widespread abandonment of antitrust, even though the U.S. experienced the sharpest downturn in its economy since the 1930s. However, there have been some limited suggestions for specific antitrust exemptions. In Congressional hearings on the newspaper industry in 2009, for example, some industry witnesses, noting the difficult economic conditions facing many newspapers, called for the enactment of an antitrust immunity with regard to all newspaper mergers and joint ventures. The Division opposed these suggestions, explaining in Congressional testimony that U.S. antitrust law is sufficiently flexible to permit

---


a wide range of business practices and creative business models that newspapers might employ as they seek to develop new sources of revenues and to cut costs to survive. The Division also noted that the failing firm defense in merger cases may be applicable in some situations where two competing newspapers seek to merge and have assets that would otherwise exit the industry.

Although related to a public health crisis, rather than an economic one, the Pandemic and All-Hazards Preparedness Act of 2006 created a limited antitrust immunity for private participants in meetings and consultations of private persons engaged in the development of certain pandemic or epidemic products. These meetings, to be chaired by the Department of Health and Human Services, must be notified to and open to the Attorney General and Chairman of the Federal Trade Commission. The Act has a sunset provision and expires in 2012 unless additional legislation is enacted. To date, the antitrust immunity provisions have been potentially applicable in only one study group, and the Division and Federal Trade Commission are carefully monitoring this group for possible antitrust problems.

5. Conclusion

The United States remains committed to vigorous enforcement of the antitrust laws as a means of ensuring a vibrant and well-functioning economy regardless of the broader economic climate. Indeed, the lessons from the Great Depression remind us that the prosecution of illegal cartels and other antitrust violations is just as necessary during times of economic difficulty as during times of economic prosperity.

---

7 It is worth noting that in 1970, Congress passed the Newspaper Preservation Act, which enables joint operating agreements between and among newspapers within close geographic proximity. This exemption extended to areas such as printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution. Importantly, there was to be no merger, combination, or amalgamation of editorial or reportorial staffs, and editorial policies were required to remain independent. 15 U.S.C. §1803.


ZAMBIA

1. Background Note

Zambian competition law regime has existed since 1994 and has been implemented through an independent/autonomous competition authority – previously known as the Zambia Competition Commission and now as the Competition and Consumer Protection Commission. The previous Competition and Fair Trading Act was repealed in August 2010 because of its inherent weaknesses in both content and context in the implementation and/or enforcement of key anti-competitive trade practices and their enforcement, notably on cartels. The Competition and Consumer Protection Act No. 24 of 2010 (herein called the Act) replaced the old law and created the Competition and Consumer Protection Commission, with increased powers of investigations, subpoena of witnesses and documents, search powers and appointment of independent inspectors to assist in cases.

The Government of Zambia has demonstrated greater political will towards competition and consumer protection by drafting and adopting the first ever comprehensive National Competition and Consumer Protection Policy. This was in May 2010. On cartels, the policy states as follows:

Cartels are ... a conspiracy against the public. They subject consumers to high fixed prices, market allocation and bid-rigging, among other anti competitive practices which all prevent effective competition amongst competitors. Such conduct would also result in preventing effective market participation of any enterprise that may not be part of the cartel as cartel members act as a concealed "monopoly ". Government can be susceptible to cartels in state contracts by public tender. Unfortunately, cartels involving bid rigging usually are a huge cost on Government and tax payer ‘s money. The cartel cases are criminal in nature and attract stiff punitive measures.\(^1\)

Arising from the foregoing, the Government has committed to the following:

(i) The competition authority shall undertake periodic research to ascertain the existence of cartels in the economy
(ii) Exposure of cartels to the public (name and shame)
(iii) Establishment of close relationships with competition authorities in other countries and collaborate in investigation and prosecution of cartels
(iv) Collaboration with internal security wings in cartel identification and investigations
(v) Government will establish a mechanism to encourage informers and provide for their protection
(vi) Government will put in place enforcement mechanism such as stiffer penalties that will deter persons from forming cartels.

2. Zambia’s challenges in cartel enforcement

The liberalization of the economy came with its own challenges among them the entrenchment of cartels amongst the private market players after the State sold its commercial/business entities. However,

\(^1\) National Competition and Consumer Protection Policy, Paragraph 2.2.5, page 7.
the repealed Competition and Fair Trading Act did not allow for a leniency program on cartel members who reported on the existence of a cartel. It was therefore difficult to obtain evidence to prove cartel behavior as cartels are ordinarily clandestine in nature. Since 1997, the Commission has successfully uncovered two cartel cases. These were in the poultry sector in 1999 and another in the oil marketing sector in 2001. However, these cases were administratively dealt with after the parties agreed to desist from the conduct and entered into an agreement with the Commission.

**Box 1. Case 1. Cartel in the Poultry Sector involving Hybrid Poultry, Galaunia Farms, Tamba Chicks and Eureka Chickens**

In 1998, the Commission discovered a cartel in the day old chicks and chicken broiler markets. Three out of four cartel members walked into the Commission offices and confessed that they had been “forced” to sign a market allocation agreement – by a dominant firm.

The Commission was relatively young in existence and this was the first time it was dealing with a cartel case. Further, the Commission was understaffed and underfunded

The Commission nullified the reciprocal arrangements and the market allocation agreements that existed between the competitors as well as the largest customers.

**SOURCE:** Zambia Competition Commission, Annual Report 1999

**Box 2. Case 2. Oil Marketing Cartel involving BP, Caltex, Total and others**

The Commission found the oil marketing companies with “smoking-gun” evidence of a price cartel/The Commission engaged with the energy regulator to prosecute the cartel on the understanding that legal fees were to be borne by the regulator – as the Commission had no staff/or money to litigate the case

Along the way, the regulator withdrew from the case as it was found that the alleged “fixed-price” was actually the “price-cap” that was set by the energy regulator/The Commission faced a dilemma as to whether price-cap setting was equivalent to price fixing in the competition law context. While the Commission found that it was price fixing, the Commission issued a cease and desist order after the parties agreed and case was closed.**SOURCE:** Zambia Competition Commission, Annual Report 2002

The maximum fine a cartel member could be fined under the old law was US$2,000, in addition to a jail sentence of not more than 5 years. In criminal cases, the Commission was at the time reckoned to operate under the guidance of the Director of Public Prosecutions (DPP). However, the position was clarified later when the Commission was gazetted as a public prosecutor and could thus move the courts in criminal matters without the guidance of the DPP.

The following challenges have stood out before the 2010 legal reforms.

**2.1 High staff turnover**

For an agency to successfully bust and prosecute a cartel, it should have the necessary capacity in terms of resources and trained staff that have the zeal, credible knowledge and ability to detect, investigate
and prosecute cartels. While resources have increased considerably over the last 3 years, the challenge has been developing and retaining the “zealous cartel-buster” – a dedicated team to the long period of the meticulous and passionate investigation is a gap we have recently began to mould or seal within our system.

The high staff turnover has contributed to cases taking longer as new officers wait to be trained and/or get a grip of the case details, what has been unearthed and what is yet to be unearthed.

In addition, the Commission has realised the need to develop and use a variety of techniques and methods to detect cartel activity, including a mix of both reactive and proactive methods that will increase the opportunities for detecting cartels.

2.2 Leniency program

A useful contemporary tool for cartel busting has been hailed to be a leniency program – of which countries such Brazil and South Africa would be near role-models for Zambia. While generally leniency does exist under the Zambian criminal justice system (through the DPP), a specific leniency to competition cases was found necessary by the Government, which was a recommendation from the National Policy.

The new Competition and Consumer Protection Act has provided for leniency program. Specifically section 79 of the Act has provided thus:

“The Commission may operate a leniency program where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under this Act, and co-operates with the Commission in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act”.

Section 79(2) has further provided that the details of a leniency program under subsection (1) shall be set out in any guidelines of the Commission. Therefore, the Commission has been empowered by the new Act unlike in the Competition and Fair Trading Act to come up with guidelines which it may deem fit and appropriate for the realization of the goal of a leniency program. As the Brazilian and South African experiences show, leniency by competition law authorities can aid fight the most sophisticated hard core cartels. Leniency programs can facilitate the severing of the policy of concealment among cartel plotters. Leniency program may undeniably enhance the Commission's ability to detect and prosecute cartels.

With section 79 of the Act in place, it is very likely that most of these perceived anti-competitive practices in the economy would be uncovered and hopefully successfully prosecuted. In addition, Zambia developed a competition policy in 2010 to really spell out government intention, commitment and strategy in so far as competition is concerned. The policy has thus demonstrated the political will that is there to curb anti-competitive practices including cartels that may prevail in the economy.

2.3 Cooperation with domestic law enforcement agencies and international counterparts

Cooperation with other wings such as the police is critical. The Commission is developing working linkages with the police and other economic crime investigating wings to ensure that where there is a dawn raid, forensic evidence experts can be used to assist the Commission retrieve critical information. There is need for the Commission to develop a good working relationship with domestic law enforcement agencies and international counterparts to have regular contact in order to promote cooperation and the sharing of information as far as permitted by applicable laws, treaties and/or applicable laws. The OECD Global Forum on Competition and the International Competition Network working group system have provided useful learning platforms for the Commission.
2.4 **Education and outreach programmes**

The Commission’s cartel investigations need to be reviewed and repositioned vis-à-vis the public. The Commission will have to focus on education and outreach programmes to raise awareness about cartel behaviour and its harmful effects of cartels on the economy and consumers; to educate people about the operation of the law and the typical signs of cartel conduct, and to generate leads about cartel activity which may be a source for the initiation of a formal investigation. A nation wide radio and television program has been rolled-out since 2010 to educate the public on general anti-competitive trade practices common in our industry, with a particular emphasis on cartels and the likely indicators such as similar prices, terms and conditions, common agents, etc in order for consumers to alert the Commission on possible cartel existence.

2.5 **Investigation techniques**

In today’s world of advancing technologies, more and more information is being generated, stored and distributed by electronic means. This requires the Commission to increase the use of digital evidence gathering techniques as a frequent or standard tool in the fight against cartels. The Commission has not developed in-house expertise but has developed useful links with other specialised agencies to cooperate with.

2.6 **Powers of investigation**

The Commission is now clothed with powers to subpoena witnesses and call for production of documents without going through the Court process – as the situation was before 2011. The Commission had previously found it difficult to obtain information as suspected persons were not obliged to submit or facilitate such information to or for the Commission. Where they refused, the Commission had to take them to the ordinary court system where a whole case would be commenced. This process discouraged the Commission from vigorously pursuing cartels and instead focused on administrative resolution. New legal reforms have, e.g under Section 80 of the new Act, provided that a court of competent jurisdiction shall have jurisdiction over any person for any act committed outside Zambia which, if it had been committed in Zambia, would have been an offence under the Act. Extradition of offenders shall be possible under the *Mutual Legal Assistance in Criminal Matters Act*.

Under Section 83, where an offence is committed by an incorporated or unincorporated body, every director or manager shall be deemed to have committed the offence unless they prove they were not aware or they took “reasonable” steps to prevent the commission of the offence [Section 82 provides a penalty not exceeding 100,000 penalty units (ca. US$ 3,500) or one year jail or to both].

2.7 **Active enforcement**

We have realised that despite all the foregoing, notably a leniency program, successful cartel detection and prosecution would only be possible where the public do not perceive or apprehend that the Commission has no capacity to move a case beyond a certain level. Members of the public need to be convinced that they are dealing with a serious and “no-bluffing” enforcer who will e.g. smoke them out unless they come out. Over the last three years, the Commission has worked itself well into the hearts and minds of the public by taking on a number of multinational entities for various cases ranging from abuse of dominance to consumer protection issues. The notable cases have involved South African Breweries (SAB-Miller), BP and British American Tobacco. The Commission also successfully sought judicial review on the application of competition law to State-owned companies. These results have increased the Commission’s visibility and accorded it the respect that it is not a mere source of threats but will take a step further to find evidence and prosecute accordingly.
2.8 Existing cartel investigations

The public have become increasingly aware of the functions of the Commission and the legal mandate to bust cartels that the law grants the Commission. Members of the public have reported various possible cartels in the fertiliser, maize-meal, wheat-milling and public procurement sectors. The Commission has been investigating these “for years” and the public have become impatient with the slow pace – and lack of arrest or fining of alleged cartel-members. The Commission has painstakingly tried to explain its investigative process and also avoided giving out too much information that could jeopardise the investigation strategies. A recent submission has pointed out at the uniform legal fees charged by lawyers in Zambia – which case has aroused great public interest and high expectations from the Commission.

3. Conclusion

While the public have began to “detect” cartels in various sectors of the economy, the Commission is careful not to excite public expectation of its investigations. Various cartel allegations have been received and it is the Commission’s burden to explain that some of the allegations from the public are not necessarily cartels – and even where they show a semblance of a cartel, the Commission has to investigate the case and find the relevant evidence. With public excitement, there is need to maintain sobriety and professionalism in the investigation process.

Since cartels are typically shrouded in secrecy, their detection and the strategies that should be used by the Commission during the investigatory period are of utmost importance to effective enforcement. The challenges to successful enforcement such as increasing investigative capacity to detect cartels; use of robust investigatory methods; and prioritizing multiple enforcement matters to make the best use of resources are important.

Further, the Commission needs to reach out to all stakeholders and emphasize the dangers of cartels to the economy in order to increase the chances of detection and subsequent prosecution.
Mr. Ian CHRISTMAS

1. Summary

This paper discusses examples of crisis in the steel industry in the last 50 years that have led to temporary changes to competition policy either in the form of government subsidies or use of protectionist trade measures. Since most of the world’s steel is now produced and used in developing countries, the industry has particular interest for competition authorities in these countries.

2. The world steel industry

In 2010 the world produced and used over 1.3 billion tons of steel. Steel is vital to sustainable development and used in every aspect of modern life from construction, power stations, hospitals, schools, cars, ships, railways, machine tools to hypodermic needles for vaccinations.

Steel use in the world has grown over 5% p.a. during the last 10 years and at rates closer to 10% in China, India and other developing countries. China alone accounts for close to 50% of total steel use and production and over 60% world steel is now made and used in developing countries.

As a relatively high-value product, international trade is very important for steel accounting for over 40% of all steel shipments. Unlike many other materials, the concentration of production is very low with even the largest steel company accounting for less than 8% of total world steel production.

3. World Steel Association

The World Steel Association is based in Brussels and Beijing. Its members are over 100 steel companies and 60 national / regional associations which together account for over 85% of total world steel production. Its main role is to provide a strategic forum for the industry’s chief executive officers to address common issues on sustainable development. It is the source of statistics for the industry and its Economics Department is the leading authority on forecasting the future demand for steel.

Other priorities include the promotion of steel in sustainable housing and new passenger cars, the collection of life cycle assessment data, the collection and reporting of CO₂ emissions by steel plants on a common basis worldwide, and a push towards zero accidents in the industry.

4. Competition

Since our members are separate companies operating as competitors in a single market, we are very mindful of our responsibilities to avoid any anti-trust or competition issues. We maintain a strict anti-trust compliance policy which bans any discussion of future pricing, production or investment by our member companies. A legal counsel is present at all our Board and Executive meetings. We strongly believe it is in the best interest of society, our customers and steel companies if individual steel enterprises are completely free to make their own business decisions. Competition between steel companies is in the best interests of the industry.
5. **Anti-competitive behaviour in the steel industry**

However, it would be wrong to suggest that the steel industry has been free from anti-competitive behaviour. Whilst many steel products are very specific in their design and application, others are commodities differing only in terms of price and service.

Over the years, particularly in construction products, there have been cases where competition authorities around the world have taken action against anti-competitive behaviour amongst steel producers and suppliers. In recent years there have been cases against steel companies in South Africa, Korea, Brazil and the European Union.

However, the factors leading to anti-competitive behaviour have sharply changed in the industry and I suspect the level of anti-competitive behaviour at national / regional levels is now insignificant compared with the past. However I have no way of knowing this.

The steel industry has also suffered from anti-competitive behaviour. A few years ago there was the break-up of a cartel operated amongst the suppliers of electric arc electrodes. This cartel was on a major scale and covered most of the world. The companies found guilty were subject to considerable fines.

6. **Crisis in the steel industry**

One company’s crisis is another company’s dynamic competition. For a company or an industry a crisis is manifest where the enterprise(s) are losing money on a significant basis and becoming unsustainable. Whether the crisis deserves favourable consideration by the general public and authorities is another matter. If the crisis of an enterprise is the result of its poor management and operations, then there is not a strong case for any government involvement. However, if the enterprise in question is a significant employer whose collapse would generate severe social problems, or if there is a real possibility that the business can be re-structured to restore its international competitiveness, then there may be a case for public acceptance of some extraordinary measures.

The most common form of public intervention to address a crisis in the steel industry has been either subsidies for continued operation and support for redundant workers, or the introduction of tariffs, quotas and other trade measures to protect the company from international competition over a period of time. There are plenty of past examples, but the consensus in the industry today is that subsidies that distort competition amongst steel companies and the use of protective tariffs are not in the interests of the industry nor its consumers and should be resisted.

The economic argument for the protection of an industry at some stage of its development is often based on the need to give an enterprise time to achieve an economy of scale. In the past the technology associated with the production of steel, particularly by the blast furnace route based on virgin iron ore, did indeed imply significant economies of scale. However today given that the total size of the markets in all countries is larger and the rapid developments in technology, it is true to say that economies of scale are less significant than in the past and that it is quite possible for a new steel company to be established in a developing country which could quickly move to a competitive level of operation. It is also the case for steel that technology is generally available from plant equipment manufacturers worldwide and that access to this technology is open to both existent and new entrants, including in developing countries.
7. Crisis cartels in the public interest

From the above arguments that steel is a high-value product with a very important role in international trade, it follows that the scope for national cartels is becoming more limited. Nevertheless, since most trade is on a regional basis and there is still a very high element of fixed costs in the total cost of producing steel (today labour costs are a very small part of total cost) there is still scope for anti-competitive behaviour at a national / regional level and requirement for vigilance from the competition authorities.

Steel companies can make the case to governments for some form of temporary protection or cartel to give them time to re-structure provided such requests are fully transparent and what is put in place is in the full knowledge of the market and the consumers. Any attempt to establish crisis cartels privately without the involvement or approval of public authorities, is clearly illegal and not in the public interest. However, in some countries certain industries have particular political leverage and therefore even if the measures are accepted by the government and in the public domain, we should not always accept that this is in the public interest.

8. Some examples of crisis in the steel industry

8.1 European Union

The rapid growth of the steel industry and the reconstruction of west European economies came to a halt in the ‘70s following the first oil crisis. Steel companies in Europe started to accumulate considerable losses since it became clear that there was too much capacity and too many small uncompetitive enterprises. The ‘70s can be categorised as a period of increasing levels of state subsidies, significant state ownership and major financial losses. At the time, the Vice President of the European Commission, Etienne Davignon was responsible for the steel industry and he decided to invoke a state of manifest crisis in the industry as allowed under the Treaty of Paris establishing the European coal and steel community. Davignon said he saw a huge risk to the breakdown in the market for steel in Europe given the mounting financial and social problems associated with the industry, which at that time was a major employer in particular regions and towns.

The founding fathers of the European Union had given the European Commission tools to do the job since the European Coal and Steel Community gave the High Authority, subsequently the European Commission, the power to regulate pricing regimes, levels of production etc.

From the late 70’s to the mid ‘80s under the “Davignon Plan”, the European steel industry was highly regulated in an officially sponsored cartel. Production was allocated to individual steel plants and minimum prices were set. Inspectors were stationed at the end of manufacturing lines to ensure that steel plants did not exceed their quota. These draconian measures were introduced against the objections of many steel using industries. These measures merely froze the unsatisfactory state of affairs of the industry but were a prelude to major restructuring of the European steel industry which proceeded over the next 15 to 20 years.

It is interesting to note that some of the restructuring required the re-nationalisation of steel companies as is the case in Sweden and France. When the restructuring process was complete these companies were then privatised. The process of plant closures and restriction of subsidies to only social measures and retraining of redundant workers took a long time. In reality it is only the last ten years that the European steel industry has remerged as fully competitive, much leaner and dynamic business.

8.2 India

Following independence the Indian Government took the view that steel as a “commanding height” of the economy should mainly be in public ownership. As a result, the state owned Steel Authority of India
was given a near monopoly in steel production. No private steel company was allowed more than 2 million tons production and until the end of the ‘90s only SAIL and TATA were the major suppliers. The steel industry was relatively unprofitable, investment levels low and India as a whole lacked investment in infrastructure and steel which was required for its growth.

In the early ‘90s the Indian Government changed its view and disbanded the cartel allowing new private companies to invest in steel with a liberalisation of steel prices and a reduction in import tariffs.

Fifteen years on, the Indian steel industry is dramatically more competitive with a number of new Indian based companies having entered the market such as Jindal and Essar. Both SAIL and TATA have also grown and become more competitive in the ensuing period.

8.3 United States of America

The ‘80s and ‘90s saw rapid growth in the USA of steelmaking based on the re-melting of steel scrap. Companies such as Nucor and Commercial Materials using new technology developed a new business model for steel with much greater flexibility in operations and production costs over the business cycle. Meanwhile the former major steel companies based on integrated steelmaking technologies continued to experience low growth, lack of investment and poor profitability. The US became a major importer of steel.

In 2003 the US steel industry convinced the Bush Administration that some special measures were required to give them breathing space for fundamental restructuring of the industry. Against the protest by major steel using sectors, this was agreed and the government introduced tariffs and quotas to give temporary breathing space to American industry. It also took over responsibility for pension liabilities.

Over the next three to four years the trade unions changed their negotiating stance and US Steel took over National Steel and Stelco in Canada, whilst ArcelorMittal consolidated LTV, Bethlehem, Inland, Weirton, and Dofasco. As a consequence, today the electric arc sector and the integrated sector in North America are more competitive and able to compete equally with others around the world.

9. Issues for developing countries

The issue for governments in industrialised countries in the steel industry is how to manage the problem of overcapacity and maintenance of competitiveness.

In developing countries the issue is how to foster investment in steel which will create a growing and internationally competitive industry. Common incentives used in many countries include state investment in developing infrastructure such as roads, railways and ports; financial support for training new workforce, and tax deductions and credits to reduce investment costs. The use of such incentives runs the risk of objections from competitors in other countries who consider such measures as unfair competition. The use of trade protection which allows higher steel prices in the country may also harm the competitiveness of steel using industries.

In recent years some developing countries have favoured domestic steel enterprises. For example, in China the State refuses to allow foreign steel companies to acquire majority shares in Chinese steel companies. It claims the policy is to enable the Chinese steel enterprises to become “global leaders”. It is difficult to see the justification for this in economic terms. Similarly in India it has been much easier for Indian based steel companies to expand than for foreign owned steel companies.
10. **Lessons from steel**

As for all industries, competitive authorities need to be vigilant of anti-competitive behaviour in a major industry such as steel. Where domestic prices are significantly above international levels and steel products being traded are relatively undifferentiated, these may be warning signs of some inefficiency in the steel markets. However the fierce competitive nature of the steel industry, its low levels of concentration, the importance of trade, and the availability of technology for new market entrants, make the industry much less of a concern today than was the case in the past.

11. **Competition issues for steel**

The steel industry has some concerns on competition policy in two important areas. Firstly where governments in a particular country allow subsidies or other anti-competitive behaviour which creates artificially high profit levels and prices in the home market, this is an indirect subsidy that distorts competition in the industry on a global basis.

Secondly the steel industry faces a very high degree of concentration in the supply of key materials such as seaborne iron ore.

The international iron ore companies have exercised their market position with a dramatic increase in the prices of raw materials for the steel industry and society as a whole. Whether it is in the public interest that so much of the economic rent of the steel production cycle should be captured by these mining companies requires the continued close scrutiny by competition authorities. In this regard, because it is a global business, the national / regional competition authorities need to work together.
M. Ian CHRISTMAS

1. Synthèse

Cette contribution passe en revue certaines des crises qui ont frappé la sidérurgie au cours des cinquante dernières années, et qui ont été à l’origine de modifications temporaires de la politique de la concurrence, que ce soit à travers l’octroi de subventions publiques ou le recours à des mesures protectionnistes. La production et la consommation d’acier au niveau mondial étant aujourd’hui majoritairement concentrées dans les pays en développement, les autorités de la concurrence de ces pays présentent un intérêt particulier pour le secteur.

2. La sidérurgie mondiale

En 2010, la production et la consommation mondiales d’acier ont dépassé 1,3 milliard de tonnes. L’acier est essentiel au développement durable et intervient dans tous les aspects de la vie moderne : du bâtiment aux seringues hypodermiques utilisées pour les vaccinations, en passant par les centrales électriques, les hôpitaux, les établissements scolaires, les voitures, les navires, les chemins de fer et les machines outils.

L’utilisation mondiale d’acier a connu une croissance annuelle de plus de 5 % au cours de la dernière décennie, avec des taux avoisinant les 10 % en Chine, en Inde et dans d’autres pays en développement. La Chine à elle seule représente près de 50 % de la consommation et de la production totales d’acier, et plus de 60 % de l’acier mondial est désormais produit et utilisé dans les pays en développement.

Les échanges internationaux d’acier représentent plus de 40 % des livraisons totales de ce produit à valeur relativement élevée et revêtent ainsi une importance capitale. Contrairement à la production de nombreux autres matériaux, celle de l’acier est très peu concentrée, le premier producteur mondial lui-même ne représentant que moins de 8 % de la production mondiale.

3. La World Steel Association

Les bureaux de la World Steel Association sont situés à Bruxelles et à Beijing. Elle compte pour membres plus de 100 entreprises sidérurgiques et 60 associations nationales/régionales qui représentent ensemble plus de 85 % de la production mondiale d’acier. Sa principale mission consiste à fournir aux décideurs du secteur une plateforme d’échanges leur permettant d’aborder les problèmes auxquels ils sont tous confrontés en matière de développement durable. La WSA diffuse également des statistiques à l’intention des acteurs du secteur, et son Département économique est la référence pour ce qui est des prévisions de la demande d’acier.

Au nombre de ses autres priorités figurent la promotion de l’acier dans les logements durables et les nouvelles voitures particulières, le recueil de données pour l’évaluation du cycle de vie de l’acier, le recueil de données internationalement comparables sur les émissions de CO₂ par les aciéries, et la lutte contre les accidents professionnels dans le secteur.
4. **La concurrence**

Nos membres étant des entreprises distinctes se faisant concurrence sur un marché unique, nous nous faisons scrupuleusement le devoir d’éviter toute question de droit de la concurrence. Nous fonctionnons dans le strict respect de ce droit, ce qui interdit à nos membres toute discussion sur les prix, la production ou l’investissement futurs. Un conseiller juridique assiste à l’ensemble des réunions de notre conseil d’administration et de notre Bureau. Nous sommes fermement persuadés que l’intérêt primordial de la société, de nos clients et des entreprises sidérurgiques veut que chacune de ces entreprises ait toute latitude pour prendre ses propres décisions économiques. L’industrie sidérurgique ne peut que bénéficier d’une concurrence entre les entreprises qui la composent.

5. **Les comportements anticoncurrentiels dans la sidérurgie**

Il serait toutefois inexact d’affirmer que l’industrie sidérurgique est vierge de tout comportement anticoncurrentiel. Si de nombreux produits sidérurgiques ont une conception et des applications extrêmement spécialisées, d’autres sont des produits de base qui ne diffèrent qu’en termes de prix et de service.


Cependant, les facteurs à l’origine de comportements anticoncurrentiels se sont considérablement modifiés dans le secteur, et je pense sincèrement que l’ampleur de ces comportements au niveau national et régional est aujourd’hui négligeable par rapport à ce qu’elle était dans le passé. Je ne peux toutefois pas l’affirmer avec certitude.

On ne peut nier que l’industrie sidérurgique soit touchée par des comportements anticoncurrentiels. Il y a quelques années, une entente illicite conclue entre des fournisseurs d’électrodes pour arcs électriques a été démantelée. Il s’agissait d’une entente de grande ampleur qui s’étendait dans pratiquement le monde entier. Les entreprises coupables se sont vu infliger de lourdes amendes.

6. **La crise dans la sidérurgie**

Ce qui pour une entreprise s’apparente à une crise peut être perçu comme une concurrence stimulante par une autre. Pour une entreprise ou un secteur, la crise devient réelle lorsqu’elle est synonyme de pertes financières massives mettant en péril sa survie. La question de savoir si l’entreprise en crise doit ou non susciter la compassion du public et des autorités relève d’un autre registre. Si la crise résulte de carences de la gestion et du fonctionnement de l’entreprise, il n’y a guère de raisons que les pouvoirs publics interviennent. En revanche, si l’entreprise en question est un employeur important, et si sa faillite devait avoir des répercussions graves sur le plan social, ou bien encore si l’on peut envisager de manière réaliste de restructurer l’entreprise afin de lui permettre de retrouver sa compétitivité à l’échelle internationale, alors une intervention à titre exceptionnel pourrait être acceptée par le public.

La forme d’intervention à laquelle les pouvoirs publics ont le plus couramment recours lors d’une crise dans la sidérurgie est l’octroi de subventions destinées à pérenniser l’activité de l’entreprise et à financer les mesures en faveur des travailleurs licenciés, ou la mise en place de droits de douane, de quotas et d’autres mesures commerciales destinées à protéger l’entreprise de la concurrence internationale pendant une période donnée. Bien que les exemples antérieurs ne manquent pas, on estime généralement dans l’industrie que les subventions qui faussent la concurrence entre les entreprises sidérurgiques et
l’instauration de tarifs douaniers à des fins de protection ne vont pas dans l’intérêt du secteur ni dans celui de ses consommateurs, et qu’il convient de les éviter.

L’argument économique en faveur de la protection d’un secteur à un moment donné de son développement repose souvent sur la nécessité de donner à une entreprise le temps de réaliser des économies d’échelle. Dans le passé, la technologie employée pour la production de l’acier, en particulier celle du haut-fourneau à partir de minerai de fer vierge, s’accompagnait effectivement d’économies d’échelle considérables. Aujourd’hui cependant, compte tenu de l’accroissement de la taille des marchés dans l’ensemble des pays et de l’accélération du progrès technologique, on peut affirmer que les économies d’échelle sont moins importantes qu’auparavant, et qu’il est tout à fait possible pour une entreprise sidérurgique qui démarre son activité dans un pays en développement d’atteindre rapidement un niveau d’exploitation concurrentiel. Dans la sidérurgie, comme dans d’autres secteurs, ce sont généralement les équipementiers du monde entier qui développent les technologies, et ces technologies sont accessibles à la fois aux entreprises établies et aux nouvelles venues, y compris celles situées dans les pays en développement.

7. Les ententes de crise dans l’intérêt public

Comme on l’a vu, l’acier est un produit à valeur élevée qui joue un rôle prépondérant dans les échanges internationaux, de sorte que les possibilités de formation d’ententes nationales se trouvent limitées. Toutefois, étant donné que la majorité des échanges ont une portée régionale et que le pourcentage des coûts fixes dans le coût total de la production de l’acier demeure très élevé (les coûts de main-d’œuvre ne représentent aujourd’hui qu’une part infime du coût total), les comportements anticoncurrentiels peuvent toujours sévir à l’échelon national/régional, et les autorités de la concurrence doivent se montrer vigilantes.

Les entreprises sidérurgiques peuvent justifier auprès de leurs gouvernements de la nécessité de mettre en place une forme quelconque de protection temporaire ou d’entente, afin de leur donner le temps de se restructurer, à condition toutefois que leurs demandes soient entièrement transparentes et que le marché et les consommateurs en soient dûment avertis. Toute tentative visant à constituer des ententes de crise à titre privé, en se passant de la participation ou de l’approbation des autorités publiques, constitue clairement une action illégale et contraire à l’intérêt public. Cela étant, dans certains pays, des secteurs jouissent d’une influence politique particulière et le fait que des mesures soient approuvées par les autorités gouvernementales et relèvent du domaine public ne signifie pas forcément que ces mesures sont prises dans l’intérêt public.

8. Quelques exemples de crises dans la sidérurgie

8.1 L’Union européenne

La première crise pétrolière des années 70 a mis un terme à l’expansion de la sidérurgie et au relèvement des économies d’Europe occidentale. Les entreprises sidérurgiques d’Europe ont commencé à accumuler des pertes massives, alors même qu’il devenait évident que leurs capacités étaient trop élevées et que le secteur était constitué d’une multitude trop importante de petites entreprises non compétitives. Cette décennie peut se caractériser par une hausse du niveau des subventions publiques, des participations publiques importantes et des pertes financières massives. À l’époque, le vice-président de la Commission européenne et chargé du dossier de la sidérurgie, M. Étienne Davignon, a décidé d’invoquer une période de crise manifeste dans le secteur, comme l’en autorise le Traité de Paris, qui institue la Communauté européenne du charbon et de l’acier. M. Davignon a indiqué qu’il craignait fortement un effondrement du marché de l’acier en Europe, compte tenu de l’aggravation, sur les plans économique et social, de la situation du secteur, qui était à l’époque un employeur majeur dans certaines villes et régions.
Les pères fondateurs de l’Union européenne avaient donné à la Commission européenne les moyens d’agir. En effet, il avait été prévu que la Communauté européenne du charbon et de l’acier habilite la Haute autorité, puis par la suite, la Commission européenne, à réglementer les régimes de fixation des prix, les niveaux de production, etc.

De la fin des années 70 au milieu des années 80, aux termes du Plan Davignon, la sidérurgie a été fortement organisée dans le cadre d’une entente officiellement soutenue par les pouvoirs publics. Chaque entreprise sidérurgique s’est vu allouer un quota de production et des prix minimums ont été fixés. Des inspecteurs placés aux extrémités des chaînes de production étaient chargés de veiller à ce que les sidérurgistes ne dépassent pas leurs quotas. Ces mesures draconiennes ont été prises en dépit des objections de nombreux secteurs utilisateurs d’acier. Elles ne sont certes parvenues qu’à maintenir le secteur dans son marasme, mais elles ont été le prélude d’une restructuration majeure de l’industrie sidérurgique européenne qui s’est étendue sur les 15 à 20 ans qui ont suivi.

On notera que cette restructuration a nécessité la renationalisation d’entreprises sidérurgiques, notamment en Suède et en France. A l’issue du processus de restructuration, ces entreprises ont été privatisées. La fermeture des usines et la limitation des subventions aux seules mesures sociales et au reclassement des travailleurs licenciés se sont étalées sur une période relativement longue. Ce n’est en fait qu’au cours des dix dernières années que l’industrie sidérurgique européenne a réussi à refaire surface, à retrouver toute sa compétitivité, et à se présenter comme un secteur allégé et plus dynamique.

8.2 L’Inde

Lorsque l’Inde a acquis son indépendance, les autorités nationales ont estimé que la sidérurgie, en tant que « fer de lance » de l’économie, devait rester principalement sous le contrôle de l’État. L’Autorité sidérurgique indienne, entité dont l’État est propriétaire, s’est par conséquent vu confier le quasi-monopole de la production d’acier. Les entreprises sidérurgiques privées n’étaient pas autorisées à produire plus de 2 millions de tonnes d’acier et jusqu’à la fin des années 90, la SAIL et Tata étaient les seuls grands producteurs. L’industrie sidérurgique était relativement peu rentable, les dépenses d’équipement faibles et à l’échelle du pays, les investissements dans les infrastructures et l’acier étaient insuffisants pour permettre au secteur de croître.

Au début des années 90, le gouvernement indien est revenu sur sa position et a dissous l’entente, permettant ainsi à de nouvelles entreprises sidérurgiques d’investir dans l’acier, parallèlement à la libéralisation des prix de l’acier et à la baisse des tarifs d’importation.

Quinze ans plus tard, l’industrie sidérurgique indienne a amélioré sa compétitivité de façon phénoménale. Plusieurs nouvelles entreprises basées en Inde ont fait leur entrée sur le marché, telles que Jindal et Essar. La SAIL et Tata sont également toutes deux devenues plus compétitives au cours de la même période.

8.3 Les États-Unis

Les années 80 et 90 se sont caractérisées, aux États-Unis par une croissance rapide de l’industrie sidérurgique à partir de la refonte de déchets d’acier. Des entreprises comme Nucor et Commercial Materials ont défini, en ayant recours à des technologies nouvelles, un modèle d’entreprise inédit et plus flexible au niveau du fonctionnement et des coûts de production. Parallèlement, les anciennes grandes entreprises sidérurgiques qui continuaient de miser sur les technologies intégrées s’enflaient dans une croissance médiocre, un manque d’investissement et une faible rentabilité. Les États-Unis sont alors devenus un grand importateur d’acier.
En 2003, l’industrie sidérurgique américaine a convaincu l’Administration Bush de la nécessité de prendre des mesures exceptionnelles afin de lui donner la possibilité de se restructurer en profondeur. Malgré les protestations de certains secteurs parmi les plus gros consommateurs d’acier, les autorités ont pris une décision en ce sens et ont mis en place des tarifs et des quotas afin de soulager momentanément l’industrie sidérurgique nationale. Le gouvernement a par ailleurs assumé les engagements de retraite.

Au cours des trois à quatre années qui ont suivi, les syndicats ont modifié leur stratégie de négociation. US Steel a racheté National Steel et Stelco au Canada, alors qu’ArcelorMittal a fusionné avec LTV, Bethlehem, Inland, Weirton et Dofasco. De fait, le secteur de l’arc électrique et le secteur intégré en Amérique du nord sont aujourd’hui plus compétitifs et plus aptes à concurrencer sur un pied d’égalité d’autres grands acteurs mondiaux.

9. **Les enjeux des pays en développement**

Dans les pays industrialisés, l’enjeu pour les gouvernements consiste à gérer le problème des surcapacités et à soutenir la compétitivité de l’industrie sidérurgique.

Dans les pays en développement, il s’agit davantage de trouver les moyens à mettre en œuvre pour stimuler les investissements dans l’acier et donner ainsi naissance à une industrie croissante et compétitive au niveau international. Au nombre des incitations couramment utilisées dans de nombreux pays figurent le développement des infrastructures – routes, chemins de fer et ports – l’allocation de ressources à la formation de la nouvelle main-d’œuvre, ainsi que l’octroi de déductions et de crédits d’impôt destinés à réduire les coûts d’investissement. Le recours à de telles incitations risque d’être réprouvé par les entreprises concurrentes des autres pays qui y voient une concurrence déloyale. La mise en place de mesures de protection des échanges, qui permet d’augmenter les prix de l’acier dans un pays donné, risque également de porter atteinte à la compétitivité des industries utilisatrices d’acier.

Depuis quelques années, certains pays en développement soutiennent leurs propres entreprises sidérurgiques. Ainsi en Chine, l’État n’autorise pas les entreprises sidérurgiques étrangères à acquérir des parts majoritaires dans les entreprises chinoises, afin de permettre à ces dernières de devenir des « leaders mondiaux ». En termes économiques, un tel argument est difficile à justifier. De même, en Inde, les entreprises sidérurgiques nationales ont pu se développer beaucoup plus facilement que leurs homologues étrangers.

10. **Le bilan de l’expérience de la sidérurgie**

Comme dans toutes les industries, et a fortiori dans une branche d’activité aussi importante que celle de l’acier, les autorités de la concurrence doivent se montrer à l’affût de tout comportement anticoncurrentiel. Lorsque les prix sur le marché national sont considérablement plus élevés qu’au niveau international, et que les échanges portent sur des produits sidérurgiques relativement indifférenciés, on se trouve peut-être en présence d’une certaine inefficience des marchés de l’acier. Toutefois, étant donné la concurrence acharnée qui caractérise ce marché, sa faible concentration, l’importance des échanges et l’accès aux technologies dont disposent les nouveaux entrants, ce secteur suscite beaucoup moins de préoccupations que par le passé.

11. **Sidérurgie et concurrence : les grands enjeux**

En matière de politique de la concurrence, les enjeux auxquels doit faire face la sidérurgie concernent deux domaines majeurs. Premièrement, les cas dans lesquels le gouvernement d’un pays donné autorise les subventions ou tout autre comportement anticoncurrentiel qui dope artificiellement les bénéfices et les prix sur le marché intérieur peuvent s’apparenter indirectement à des subventions qui faussent la concurrence dans l’industrie au niveau mondial.
Deuxièmement, la sidérurgie est confrontée à une concentration très élevée de ses fournisseurs de matériaux essentiels, comme le minerai de fer par voie maritime.

Les producteurs mondiaux de minerai de fer ont usé de leur position sur le marché pour appliquer une hausse spectaculaire des prix des matières premières que subissent la sidérurgie et la société dans son ensemble. Les autorités de la concurrence doivent vérifier en permanence et très minutieusement s’il est dans l’intérêt du public que ces entreprises minières accaparent une proportion aussi élevée de la rente économique du cycle de production de l’acier. À cet égard, et compte tenu de l’envergure internationale de l’industrie sidérurgique, les autorités nationales/régionales de la concurrence doivent coopérer.
Mr. Steve McCORRISTON

1. Introduction

Crisis cartels are typically associated with economic downturns, falling prices and excess capacity. Faced with difficult economic circumstances, firms may have an incentive to coordinate their reductions in capacity or to engage in price-fixing to limit the negative impact of economic and financial crises on profits. This has implications for anti-trust policy and raises the question as to whether competition authorities should take a more lenient view of potential anti-competitive practices in such circumstances as firms adjust or, alternatively, explicitly sanction the use of a cartel. Industry restructuring may also represent a justification for a more lax application of competition policy. These issues generally feature in the discussion over the justification for crisis cartels. Against this, the counterview is that a lax approach to such anti-competitive practices may inhibit (the more competitive) firms’ ability to adjust and hence prolong the economic downturn; in turn, the strict enforcement of competition principles will benefit consumers and the economy in general and aid economic recovery.

Recent events in agricultural and food markets suggest a different set of circumstances against which competition authorities have to gauge the behaviour of firms. Against the background of the global economic downturn and the fall-out from the financial crises, the late-2000s witnessed a surge in world commodity prices which resulted (to varying degrees) in high retail food prices across many countries and, overall, high rates of food price inflation. Specifically, the surge in world agricultural prices in 2007-2008 lead to concerns by governments and international institutions about the impact of food price rises on consumers, particularly the poor who spend a high proportion of their income on food. With the expectation that world agricultural prices will in the future be higher than price levels that have been experienced in the past two decades, food security has emerged as a major issue.

However, while these factors are different from those currently associated with crisis cartels, agricultural and food prices will also likely be more volatile. Related to this is also the exposure to more frequent commodity price spikes. Hence the links between competition issues and agricultural and food prices should centre on the transmission of price shocks to consumers and whether less competitive markets reduce price volatility. Price surges will also affect firms as spikes impact on their costs and may give rise to additional problems as prices fall from their (often short-lived) peaks (particularly if other costs do not reflect the decline in agricultural/food prices). While these issues differ from the usual discussion of competition policy in times of crisis, they have also been ignored in more general discussions on economic policies to deal with price surges and price volatility.

The recent crisis in agricultural and food markets worldwide raises challenges for competition authorities. With specific reference to the issue of “crisis cartels”, the crisis that faces the agricultural and food sector has less to do with falling prices and declining demand but one of higher and more volatile prices. In this context, there are two broad issues that competition authorities have to address. One issue relates to whether the overriding concerns about ameliorating the impact of price spikes and promoting more stable prices, cartels can be justified. The second issue is whether firms take advantage of commodity price spikes and higher variability to coordinate over price fixing or, given the nature of commodity price spikes is that they are often short-lived, that cartels may emerge to prevent the subsequent decline in the prices that consumers would be expected to pay. As noted below, there are a number of cartel investigations in the food sector that are related to the recent behaviour of food prices across several countries.
In this report, we discuss various aspects of the recent crisis in agricultural and food markets, an issue that has again raised concerns over the latter half of 2010 and at the beginning of 2011. Although the issue specifically addressed in this session relates to crisis cartels, there is a broader issue of how the competitive nature of agriculture and food markets impacts on aspects of price behaviour (both in terms of the level and variance of prices) and on the impact of price shocks. The issue of cartels in food markets clearly relates to this issue though competition in food markets covers a wider range of issues (both of a horizontal and vertical nature and distinguishing between domestic and world markets). We refer to these issues as part of the background to the issue of cartels but, in keeping with the focus of the session, we explicitly address the role of cartels in agriculture and food markets. Specifically, we overview briefly emerging competition issues in the food sector and highlight some examples of cartel activity, including some examples of cartels that have emerged over the last few years. We then address the issue that whether, in the context of the recent crisis, there can be any justification for the use of cartels. We start by placing our discussion of crisis cartels in a more general context.

2. Economic crises and crisis cartels

The issue of crises cartels are typically associated with recession and/or financial crises. Fiebig (1999) defines a crisis cartel as “agreements between most or all competitors in a particular market to systematically restrict output and/or reduce capacity in response to a crisis in that particular industry” (Fiebig, p.608). The context against which firms aim to address the crisis they face relates to declining demand such that firms have to deal with industry-wide excess capacity. The implication for competition authorities is that when firms face economic downturns and have to address the issue of “structural” excess capacity, should there be a more lenient approach taken to the coordination among firms or, indeed, that cartels should be explicitly sanctioned?

In an historical context, the issue of the appropriate role for anti-trust policy in the context of economic crises, reference is often made to the US in the 1930s. Crane (2008), for example, documents the political and economic context in the dampening of competition policy principles in the US during the 1930s. Academic research on this issue suggests that lax application of competition law prolonged the recession in the US in the 1930s while research on the economic downturn in Japan suggests that government intervention to restrict competition in structurally-depressed industries prolonged the recession in the 1990s (Porter et al., 2000). More detailed overviews of crisis cartels in an historical context are provided by Evenett (2011).

Research on the timing of the formation of cartels has focussed on the effects of business cycles and has reported that cartels are more likely to be formed during periods of falling prices (Levenstein and Suslow, 2006). Lyons (2009) also notes that crisis cartels are more likely when prices drop and firms are interested in price-fixing to prevent this.

Given the historical experience of crisis cartels and the likelihood that severe economic and financial crises increases the incentive for cartel activity, many commentators advocate the continuation of the strict application of competition policy principles and increased vigilance to the rise of cartels during recessionary periods. See Fingleton (2009) and Vickers (2008) representing these views.

These issues do not seem commensurate with recent developments in agricultural and food markets which have witnessed strong demand growth, supply shortfalls and rising prices. However, with higher expected prices in the future, prices will also be more volatile. Thus, while high price levels may raise concerns by competition authorities about how firms respond in an environment of increasing prices, there is also the issue on the links between competition and price volatility. In this context, it is worth noting that on Evenett’s list of motives for state-sanctioned cartels (Evenett, 2011), he lists “promoting consumer welfare” and “price stabilisation” both of which are issues of concern as governments aim to deal with the
crisis in agricultural and food markets and the longer term issue of food security. One should note that “price stability” has appeared as a motivation for permitting crisis cartels in Korea (Evenett, 2011). Yang (2009) notes that, against the background of the commodity price boom in the early 1970s, cartels could be permitted to ensure price restraint and promote short-term price stabilisation. Kinghorn (1996), in a review of cartels in late 19th century Germany, also highlights the stability-promoting nature of cartels and that the experience in the coal, iron and steel industries was not necessarily associated with the standard output-reducing, high price outcomes typically expected of cartel behaviour.

3. Crisis in commodity markets

3.1 Price surges on world markets

Over the past 30 years or so, reference to “crisis in commodity markets” would, by and large, reflect prolonged periods of low prices against a background of a sustained decline in the commodity terms of trade. For example, Maizel’s (1992) book on world commodity markets entitled “Commodities in Crisis” documents the challenges faced due to persistently low prices and how producers and commodity-exporting countries should address this issue. The challenge on how governments have dealt with price cycles in agricultural markets, promoted reliable supplies, raised prices from relatively low levels and raised incomes for producers has, of course, a much longer-history. Domestically, governments have pursued a range of policies much of which centred around direct intervention in agricultural and food markets; in broad terms, developed countries used price support policies to raise prices and, in turn, farm incomes while, in developing countries, the overall characterisation of policies were aimed at providing prices below world market levels reflecting concerns about the cost of food (particularly staples such as cereals and rice) to consumers. In the case of both developed and developing economies, as well as the direct instruments associated with agricultural and trade policy, market manipulation by directly affecting market structure has also been used. Direct manipulation of international markets has also been a feature of dealing with depressed and volatile prices involving inter-governmental agreements on quotas to raise prices and keep them within specified bands.

One potential solution highlighted by Maizels was direct control of commodity markets in the form of international commodity agreements with the overall aim of increasing prices and the revenues received from commodity exports. Several of the international commodity agreements that were motivated by low prices, excess capacity and high levels of stocks aimed to control commodity markets via the use of export controls and quota arrangements among member countries. The experience of responding to commodity crises via the use of international commodity agreements has not been regarded as wholly successful, at least over a sustained period of time (see Gilbert, 1996) but it was not that long ago that the perception of the main challenge in agricultural markets was that of relatively long-lived periods of low prices. There was also direct manipulation of domestic market structures through the use of state trading enterprises and parastatals that gave monopolistic and monopsonistic control over procurement and distribution (both domestically and with respect to trade).

---

1 The issue of how price developments affect the aims of government policy is long-standing. The Depression of the 1930s and the issues associated with “security of supply” following the Second World War, have framed the environment for much of the agricultural and trade policies that have been applied over the last half-century or so. This is also true of the use of commodity agreements to directly manipulate world market prices.

2 Though international commodity agreements have often been referred to as cartels given the supply control that often characterises them, they are not “cartels” in the conventional sense in that the membership of these commodity agreements typically included both producing and consuming countries. This is in contrast to OPEC which is a producer organisation only.
Recent attention relating to agricultural and food markets has, however, been associated with price spikes. Figure 1 documents the 2007-2008 price spike in the context of world food prices since the early 1990s. Though the commodity price spike of 2007-2008 was, in real terms, not as high as that recorded in the 1972-1974 period, the recent surge in world market prices came against the background of sustained low prices dating back to the late 1980s (see Figure 2).

Figure 2. Figure 1: World Food Price Index (Nominal Prices): 1990-2008

The causes of the 2007-2008 surge in world food markets have been well-documented. Sumner (2009) provides a summary of the main drivers and in essence, these can be categorised into demand, supply and policy factors, with a further distinction arising in what are long-term or trend effects and what are short-term or “spike” effects (Sarris (2008), Trostle (2008)). Long-term effects include demand growth.
in emerging economies, the rising costs of agricultural production, low stocks and the trade policy environment. Short-term or spike effects include exchange rates, speculation, droughts and trade policy measures designed to respond to the high prices.

The FAO predicts that over the medium to long-run, world agricultural prices will be lower than the peaks recorded in 2007-2008 but will remain higher than the average levels of the past two decades. In large part, these expected high prices will be driven by strong demand growth (particularly from emerging economies such as China and India), constrained supply and the delays necessary to build up and coordinate stocks to deal with unexpected shocks. Hence, the background to the crisis in agricultural and food markets is one where prices will be relatively high and where the issues relate to the impact on food security. There are also macroeconomic challenges associated with these effects with the potential consequences of high world commodity prices being reflected in high levels of domestic food price inflation impacting on general inflation which may impede economic recovery in many countries (see below)\(^3\). The crisis faced in agricultural and food markets is therefore different in nature to that the economic and financial crisis impacting on other sectors as the issue is not directly associated with declining demand and excess capacity but rather how to deal with high prices and (possibly recurring) price spikes, on the ability of governments to ameliorate the effects of price spikes on the most vulnerable, to deal with food security issues and for agricultural importing countries to cope with the price spikes that arise on world markets.

Though much attention in agricultural and food markets has been directed at the causes and consequences of the 2007-2008 price spike, in mid- to late 2010/early 2011, rising world agricultural prices have again attracted attention. Though agricultural prices had fallen back from the price spike of 2007-2008, agricultural prices have once again started to surge, raising the issue of food price inflation across many countries (Financial Times, 30\(^{th}\) December, 2010) while the risk of another general agricultural and food crisis has also been highlighted (Financial Times, 5\(^{th}\) January, 2011). Figure 3 documents the recent rise in world agricultural prices.

---

\(^{3}\) Price shocks can impact on inflation which underlies some of the concerns associated with recent events on world and domestic food markets and hence generates a macroeconomic context in which policy makers address the issue of high food prices. There are two aspects to this. First, price increases develop over a period of time such that even a price surge can develop over a period of several months. Second, the duration of the shock in world prices can also take several months to feed through to domestic prices with the cumulative impact of these effects being reflected in the rate of domestic food price inflation. As is noted below, that the macroeconomic consequences of high food prices has been the setting against which some competition authorities have addressed concerns associated with price fixing and coordination between firms.
3.2 World agricultural prices and domestic retail prices

The price surge in world agricultural markets in 2007-2008 and the recent rise in prices over late 2010 serve as background for considering how competition issues in the food sector relate to the recent events on world markets. There are several dimensions to price developments in the agricultural and food sectors that impact on how competition issues should be addressed. First, there is the price of the raw agricultural commodity that countries directly export or import; however, the prices of raw commodities directly affect firms in the downstream food sector so, in considering the impact on firms’ costs and the impact on consumers, it is also important to consider domestic issues. Specifically, since in large part competition issues are national in scope, it is also important to consider how domestic food prices have responded to recent developments in world markets. As detailed below, the data for domestic food markets (particularly at the consumer end) across many developed and developing countries suggests that the experience has varied considerably.

Figure 4 shows an example of how the behaviour of domestic food prices may differ from developments in world markets. The data relates to the UK from 1988 to 2010 and compares world agricultural prices with the prices received by domestic agricultural producers and domestic retail food prices. While domestic producer prices track developments on world markets, domestic retail food prices behave rather differently. In relation to the 2007-2008 spike in world markets, though domestic retail food prices rose, the rise was considerably less than what was observed on world markets.

Figure 4: World and UK Domestic Producer Prices and Retail Food Prices, 1998-2010

The behaviour of domestic consumer prices relative to price developments on world markets has, however, varied across countries. The FAO noted that the transmission of the commodity price spikes varied considerably across many developing countries. For example, the pass-through from world market prices to domestic prices was often less than 50 per cent. Similarly, when differentiating between the changes in domestic producer prices from consumer prices, the latter changed by considerably less than producer prices for a wide range of countries and across many commodity sectors. Similar variation can be found across the EU. Specifically, while the average food price change for the EU as a whole for the period from mid-2007 to late 2008 was around 5-6%, in many EU states, the change in domestic consumer prices for food was 4 to 5 times the EU average (Bukeviciute et al., 2009). In addition, the change in domestic consumer prices for food typically, but not always, was less than the change in domestic producer prices. The EU average for EU producer price changes over the same period was 1.5 times greater the EU average for domestic consumer price changes for food. In some cases, the opposite was observed. For example, in Hungary, against the background where consumer prices rose by more than producer prices, the change in domestic consumer prices was almost three times the EU average (for consumer price changes) while the change in producer prices was only twice the EU average (for producer price changes).
Notwithstanding the different behaviour between world agricultural prices and domestic retail prices, domestic food price inflation has, in many countries, risen faster than general inflation. Figure 5 compares domestic food price inflation non-food price inflation and it is evident that prices in domestic retail food markets have risen faster. The FAO also reports the same phenomena for a number of developing countries (FAO, 2008). For example, in Egypt, the domestic CPI rose by 15.4 per cent between January 2007 and January 2008 while food prices rose by 24.6 per cent. Jones and Kwicinski (2010) also report increases in domestic food price inflation across a number of emerging economies. While the OECD average of the rate of food price increases was 3.9 per cent for the 2006-2008 period (up from 2.1 per cent for the 2003-2006 period), the recorded rate of inflation was much higher across a number of countries: Chile, 9.8 per cent for the 2006-2008 period (up from 1.2 per cent in the earlier period); South Africa, 10.5 per cent (up from 2.5 per cent); China, 12 per cent (compared to around 6 per cent).

Figure 5: Domestic Food and Non-Food Price Inflation: 1988-2010

Understanding how domestic food prices behave relative to developments on world agricultural markets is a challenge for competition authorities especially when there is a concern that (the lack of) competition in the food sector can impact on the level of domestic food prices and the transmission of shocks emanating from world markets. Given that raw agricultural inputs may represent a relatively small share in the costs of supplying a processed food product at the retail level, the retail price of food will be determined by a range of different factors including exchange rates, labour costs, general economic conditions and government policies among other factors4.

The experience of several competition authorities is interesting in this regard. Two examples serve to highlight this. First, the Competition Commission of South Africa, in face of rising food prices, made the domestic food sector a priority sector for investigation. As noted in OECD (2009), the Commission highlighted the importance of disentangling anti-competitive behaviour in the food industry from other determinants of food price increases. Nevertheless, against the background of de-regulation in the post-

---
4 A recent report by UBS (2011) and which was featured in the British media (The Times, 1st March, 2011) suggests that food price increases in the UK exceeded the increase in costs and drew attention to competition issues in the UK food retailing sector.
Apartheid regime, the existence of cartels has been identified across the food sector in South Africa covering bread and milling, milk and fertilisers. Second, and more recently, rising food price inflation has served as the background for cartel investigations in the Baltic States. These examples highlight the sensitivity of domestic food price increases and the attention it subsequently attracts from competition authorities.

3.3 Price Volatility

In addition to higher price levels that are expected to continue in the future, there is also the concern of price volatility. This has been predicted to be a key feature of agriculture and food markets in the future. Gilbert and Morgan (2010), based on commodity price data since 1990, have explored whether volatility has increased since 2007. They show that the estimated increase in price volatility has increased for a large number of agricultural commodities including major grains and vegetable oil products. Figure 6 also highlights concerns associated with increasing price volatility on agricultural markets in a recent brief from the FAO (FAO, 2010); the data shows a sharp increase in implied volatility for several key agricultural commodities.

There are several factors that contribute to rising price volatility and are largely related to the factors that have caused the recent price spikes and relate to increased supply fluctuations (e.g. weather and crop failures) and demand fluctuations (e.g. macroeconomic factors in emerging economies, the financialisation of commodity markets) against the background of relatively low levels of stocks for many commodities. Of course, following on from the discussion above that the distinction should be made between world price shocks and domestic prices for food, the caveat should be added that higher world market price volatility may not necessarily be reflected in similar levels of price variability in domestic retail food markets.

Figure 6: Implied price volatility for selected agricultural commodities (in %)

In sum, the recent crisis which characterises agricultural and food markets is very different from the circumstances that may face other industries. In agricultural and food markets, there is strong demand growth, underinvestment in agricultural production, high prices, increased price volatility marked by occasional price spikes. The impact of this relates to domestic food price inflation and the impact of high prices for the poor and greater exposure to food price fluctuations. In light of this, does the competitive nature of food markets impact on the effect of high and more volatile prices? In terms of Evenett’s list of
factors that may, in principle, lead to arguments in favour of crisis cartels, specifically the reference to “promoting consumer welfare” and “stabilising prices” (Evenett, op. cit.), can crisis cartels be justified?

4. **Competition Issues and Cartels in Agricultural and Food Markets**

Agricultural and food markets represent a complex, vertically-related structure such that the raw agricultural commodity prices serve as an input passing through the vertical food chain such that the retail price of food will be determined by a range of different factors (such as labour costs, marketing services, other inputs) with the consequence that the behaviour of retail food prices can be very different from the behaviour of world agricultural prices, as we have noted above. In this vertically-related structure, competition issues can arise at any horizontal stage (e.g. food processing or food retailing) or vertically, for example through the use of vertical restraints of alternative forms or the terms and conditions of contracts. Note that in this vertically-related system, the impact of competition on procurement not just sales to the subsequent stage is also an issue in determining the overall competitiveness and efficiency of the food sector (McCorriston, 2008).

One of the features of the food sector across many countries has been the increase in concentration at all levels of the food sector in both developed and emerging economies. High and increasing levels of concentration, coupled with the increase in mergers and acquisitions (both domestic and cross-border), competition authorities across many countries have taken an active interest in competition issues in the food sector (McCorriston (2008)). In a domestic context, with increasing concentration throughout the vertically-related food sector, there are a wide range of anti-competitive issues that may arise that have horizontal and vertical dimensions (see McCorriston (2007) for a broad overview). In this context, there is the possibility of cartel behaviour. There are several dimensions to cartel activity in the food sector: one is domestic where downstream food firms are exposed to the price of upstream raw agricultural commodity inputs; the second is an international dimension where there is coordination of activities for those firms to coordinate their activities directly with respect to world markets.

Some examples highlight these issues, some of which pre-date the more recent crisis and others which relate (either directly or coincidently) with recent events. Two examples relating to domestic issues which pre-date the recent surge in prices. First, is the reference already made to cartel activity in the South African food sector: against the background of rising food prices, the Competition Commission of South Africa made the food sector a priority for investigation. Though the Commission made the point of disentangling anti-competitive behaviour from other determinants of food price increases, they nevertheless identified the existence of cartels in the bread and milling, milk and fertiliser industries (OECD, 2009). Another example relates to the Irish meat packing sector and would be more likely be associated with the traditional use of the term “crisis cartels”. In 2002, with a view to reducing capacity in the processing sector, Irish beef processors established the Beef Industry Development Society (BIDS). Against the background of over-capacity, the purpose of BIDS was to coordinate a 25 per cent reduction in capacity where those firms who decommissioned capacity would be compensated by the remaining members of BIDS and where there was a two-year non-compete clause. The case went to the European Court of Justice (following a rejection of the Irish High Court’s rejection of the case made by the Irish Competition Authority). The European Court ruled that the case that the negative effect of a reduction in capacity were insufficient to outweigh any positive effects.

From an international perspective, state-sanctioned cartels have also been identified in the context of the recent crisis. In this context, recent developments in the structure of the world fertiliser market

---

Herger et al. (2008) discuss the issue and determinants of cross-border mergers and acquisitions in the global food sector.
highlight concerns over cartels that are part of the vertically-related food sector. As concerns over agriculture and food prices have emerged in recent years, attention has also turned to developments on fertiliser and oil markets. Figure 7 shows fertiliser prices also surged during the 2007-2008 period (and as of the beginning of January 2011, there were renewed concerns over oil exceeding $100 a barrel).

Figure 7: World Fertiliser Prices, 2006-2010. (Dollar/mt)

Source: World Bank

The role of OPEC in the world oil market is well-known though less attention has been given to the structure of the world fertiliser market. Potash (potassium carbonate) is a key plant and crop nutrient. The world potash market is dominated by a small number of players with the world’s potash reserves being mainly found in Canada and the former Soviet Union. In this context, Canada has sanctioned a potash export cartel, Canpotex Ltd, whose membership comprises of three companies (Potash Corp, Mosaic and Agrium) and controls about 40 per cent of global trade in potash. Recent attention on the role of Canpotex arose when BHP launched a hostile bid for Potash Corp with the expectation that the export cartel would not survive if the BHP bid was successful and that production capacity would be expanded and world potash prices would subsequently fall. The legal status of this cartel has raised issues about the links between cartels and the food crisis, and the obligations of countries to ensure more improved cooperation on competition issues on international markets (Financial Times, 31st August, 2010).

31. Continuing the international theme and the issue of state-sanctioned cartels, against the background of the tripling of world rice prices in 2007-2008, Thailand suggested the possibility of forming an OPEC-style rice cartel and planned to discuss plans with Laos, Burma, Cambodia and Vietnam. The idea that countries who have market power over the export of key agricultural commodities is not new. Following the upheavals in commodity markets in the 1970s, and given the small number of countries that accounted for a large proportion of international trade in grains, there was discussion about the possibility of grain export cartels (see, for example, Schmitz et al., 1981).

The surge in agricultural and food prices in 2007-2008 as has been documented above has also served as background for more recent cartel investigations. The nature of price spikes themselves gives rise to concerns about competition and specifically the possibility/desirability of cartel behaviour. By definition, international cartels involving private firms have also been identified in the food and related sectors. In their review of international cartels identified over the 1990s, Evenett et al. (2001) report several arising in the agriculture and food sector or agriculturally-related sectors covering a range of commodities including sugar, vitamins and lysine.
the obvious characteristic of a price spike is that prices rise sharply but then they subsequently fall (typically after a relatively short interval). But this may result in firms seeking to prolong high prices in the face of the recent spike and prevent the subsequent decline in prices. An alternative interpretation of the impact of a price spike is that, the rise in raw commodity prices impacts on downstream firms’ price-cost margins. So, the face a negative input shock that may not be fully passed on to consumers (see below). As such, firms face difficult times and may seek to remedy the situation by coordinating over prices and market shares. With these possible incentives associated with price spikes in mind, there are some more recent examples of cartel activity in the agricultural and food sector that have emerged:

- In August 2010, the Competition Commission of India ordered an investigation into possible price fixing in the sugar sector. Against the background of a substantial slide in retail sugar prices if around 40 per cent, sugar millers were suspected of price fixing to stem the fall of sugar prices and to stop them falling below the cost of production. More recently (January, 2011), the Competition Commission of India has been asked to probe the possibility of a cartel manipulating the price of onions (a core commodity in India outside basic staples such as rice and wheat).

- The Federal Cartel Office in Germany carried out dawn raids in January 2010 against firms engaged in the sweet, coffee and pet food markets. The specific allegation relates to coordination between manufacturers and retailers regarding retail prices.

- In 2009, Italy’s anti-trust authorities fined 26 pasta manufacturers for collaborating in a cartel operating over the period October 2006 to March 2008 where retail prices had risen by over 50 per cent. Subsequently, in January 2010, five of the main pasta producers in Italy were accused of forming an illegal cartel.

- In autumn 2010, Estonian competition authorities launched an investigation into possible cartel behaviour in the dairy and bread industries following an increase of milk prices by 25 per cent in September and bread producers announcing plans to increase prices by between 10 and 20 per cent.

As noted above, the domestic price of food will be determined by a range of different factors, not just the world price of agricultural commodities and as such competition authorities who have taken an interest in competition in the food sector in the wake of the recent crisis have to discriminate between the wide range of factors that may cause food prices to rise and anti-competitive behaviour. Indeed, in relation to many of the examples listed above, the defence often made was that prices were driven up by other factors rather than coordination over prices by firms. This, of course, is not to justify the emergence or persistence of cartels but the task of addressing anti-competitive behaviour is made more challenging when industries are faced with multiple and coinciding shocks.

5. The Agricultural and Food Crisis and Crisis Cartels

The characterisation of recent events in agricultural and food markets and the likely future developments that have been outlined above are different from the environment usually associated with crisis cartels: demand growth is strong and likely to remain so; there is a need for more investment though supply may be affected by temporary disruptions; agricultural prices will be affected by a range of factors emanating from outside the food and agricultural sector including speculation in commodity derivatives, developments on world oil markets, demand and supply shocks and so on. These variables translate into higher prices than have been recorded over the past two decades, occasional price spikes and more volatile prices for key commodities. For policy makers concerned with inflation and food security issues more generally, what are the potential links between the extent and nature of competition on markets and these characterisations of price developments? If “consumer welfare” and “price stabilisation” fall under the motivation for crisis cartels, can they be justified in light of recent developments in agricultural and food markets?
The links between the extent and nature of competition in markets (and, by extension, the appropriate role for competition policy) and the impact of shocks and price volatility has not been addressed in various surveys on the potential measures that governments can employ to deal with price shocks and food security issues. From a competition perspective, the issues concerning anti-competitive practices typically focus on static effects or on the best way to ensure greater efficiency in an industry (for example, by reducing excess capacity). However, in the context of agricultural and food markets, the issue is the linkage between competition and the transmission of price shocks and whether or not competitive markets promote price stability. In other words, it is not the static effects of anti-competitive practices that are important per se but the impact of market structure on the first and second moments of the distribution of prices.

Consider the transmission of price shocks emanating from world markets and consider first of all the case of a supply shock impacting on agricultural prices. From a static point of view, a competitive market will produce greater output than a less competitive market but, under fairly general conditions, an increase in input prices will lead to a lower commensurate increase in retail prices if markets are less competitive. Moreover, recalling that agricultural and food markets are more appropriately characterised as a series of vertically-related industries, as the number of vertical stages increase and with imperfect competition being a feature of each stage, the impact of upstream price shocks on retail food prices are further dissipated. More directly, as markets become less competitive at any or all stages of the vertical food chain, the impact of shocks to agricultural prices on retail food prices becomes weaker. McCorriston (2002) gives some details on this issue. This observation belies the importance of making a distinction between world agricultural prices for a product that enters the vertical food sector at an upstream stage and the price of food at the retail end of the food sector.

With these effects in mind, it is then perhaps not surprising that the rise in retail food prices around the 2007-2008 period that has been referred to above has been less marked than the price surge on world markets for raw agricultural commodities that have received much of the attention from policymakers and the media. Of course, other factors would also have been important (e.g. responses by governments, the existence of trade barriers that cuts the links between world and domestic prices and so on) but notwithstanding these factors, less competitive markets dampen the impact of supply shocks.

However, the other side to this is that firms’ price-cost margins are reduced. As their input prices rise, if their selling price rises less than proportionately to the increase in costs, the price-cost margin falls. Thus, while price transmission can be less when markets are imperfectly competitive, firms have to take the “hit”.

If less competitive markets dampen the impact of a price shock on retail prices (the first moment), how do less competitive markets impact on price variance (the second moment)? Unsurprisingly, as agricultural prices come back down from the peak of the spike, with less competitive markets the fall in the retail price for food will be less than that arising in competitive markets. As a consequence, taken over a period of time, we should expect retail prices to have less variance than agricultural prices and, more generally, that less competitive markets may be associated with more stable prices. There has been some evidence of this in the economics literature. Carlton (1986), Domberger and Fiebig (1993) and Slade (1991) provide empirical evidence that prices tend to be less volatile in more concentrated industries.

This empirical evidence relates to the links between competition and price volatility but has set aside the issue of stocks. One of the factors contributing to the price spike of 2007-2008 was the low level of stocks for key commodities, as noted above. Thille (2006) has explored the issue linking market structure to the level and use of stocks. He shows that the issue is a complex one and depends on specific conditions: less competitive markets have lower price variance and, while inventories per unit of production are lower in more competitive markets, producers are more willing to use them in response to random events.
6. Conclusion

This paper argues that the crisis in agricultural and food markets is different in nature from the economic downturn and the financial crises that have impacted on other industries. Prices have been rising, demand growth is expected to be strong, and there are a range of demand and supply shocks that can be expected to impact on the agricultural and food sectors in the future. Hence higher prices, occasional price spikes and greater price volatility can be expected to characterise the food sector in both developed and developing countries in the future.

In this context, governments seek a range of policy options to cope with price surges and price volatility. Jones and Kwiecinski (2010) and Thompson and Tallard (2010) provide a summary of different policy options. These include the use of trade policy instruments, fiscal policy, domestic agricultural policies and so on with the aim of lessening the impact of higher food prices on the most vulnerable, to address the problem of inflationary pressures and, over the longer term, to improve food security. With rising and more volatile food prices, what is the appropriate role for competition policy? If policymakers are concerned with “consumer welfare” and “price stabilisation”, can crisis cartels be justified? Should the concerns also relate to “producer welfare”? If the longer term concern of policymakers is to promote food security, how do cartels (and other aspects of anti-competitive practices) impact on the incentives of agricultural producers to invest in new technology and increase production in the agricultural sector? In terms of ameliorating the impact of price shocks and price volatility, to what extent would crisis cartels be a better (or worse) instrument of policy than other instruments? Finally, even if a case for crisis cartels could be made to deal with the crisis in agricultural and food markets, to what extent would they impede the effectiveness of other policy instruments, for example, the promotion and use of risk management instruments?

The observations made above that market structure can impact on the transmission of price shocks and be associated with potentially more stable prices does not in itself justify a more lenient approach to competition policy in general or to advocate cartels as a means to promote price stability. Other policy options may provide a more direct, transparent and flexible means to promote price stability and ensure that the most vulnerable are not adversely affected by high and more volatile food prices. The following list highlights alternative means via which policy can be targeted to the overall aim of promoting food security and ameliorating the impact of volatile prices.

- The use of trade policy instruments: for example, for importing countries, trade barriers can be reduced to encourage cheaper imports; for exporting countries, controls over exports may be a more acceptable alternative to the creation of a state-sanctioned cartel.

- The build-up and coordination of stocks of staple commodities will help reduce the exposure to adverse developments on world markets and reduce the likelihood that price spikes will arise.

- The use of market-based risk management tools will help deal with more volatile world prices and volatile exchange rates that influence the pricing of key commodities (as these are typically priced in US dollars).

- To ameliorate the impact of high and volatile prices in domestic markets, there are a range of options including stock release, consumer safety nets (e.g. cash transfers, public distribution system to direct food to the most vulnerable, suspension of VAT and other taxes).

This list of policy alternatives is not intended to be exhaustive but rather to highlight that governments have a range of policy alternatives that can deal with the impact of price spikes and more volatile prices. The extent of competition on markets can, as discussed above, impact on the extent of price transmission...
and the variance of prices but this does not in itself make the case for cartels to deal with crises that arise in agricultural and food markets. Alternative policy instruments do exist that are likely to be more direct, transparent, flexible and predictable and that avoid diluting the principles and application of competition policy.

While this session has focussed on the issue of cartels and crisis cartels specifically, in the context of recent events on world and domestic agricultural and food markets, there is the broader issue of how competition impacts on the functioning of agricultural and food markets and hence on the behaviour and impact of world and domestic prices. This covers a broader range of issues than the issue of cartels; given the sensitivity of food prices in the consciousness of consumers and policymakers, there are a broader range of issues that competition authorities may have to contend with even if this is limited to an advocacy role.
REFERENCES


Financial Times (2011) “Global Food Prices Hit Record High” 5th January.


Lyons, B. “Competition Policy, Bailouts and the Economic Crisis” Draft Paper, Centre for Competition Policy, University of East Anglia, UK.


M. Steve McCORRISTON

1. Introduction

Les ententes sur les prix sont généralement associées à des périodes de récession, de baisse des prix et de surcapacités. Face à des circonstances économiques difficiles, les entreprises peuvent avoir intérêt à se coordonner pour réduire leurs capacités de production ou à se livrer à des pratiques de fixation des prix en vue de limiter l'impact négatif d'une crise économique et financière sur leurs bénéfices. De telles ententes ont des implications pour la politique de la concurrence et amènent à se demander si les autorités de la concurrence doivent adopter une attitude plus clémente à l'égard d'éventuelles pratiques anticoncurrentielles lors de périodes d'ajustement des entreprises, ou si elles doivent au contraire sanctionner explicitement le recours à ces ententes. La restructuration de secteurs d'activité peut aussi justifier une application plus souple de la politique de la concurrence. Ce sont des questions généralement abordées dans les débats sur la justification des ententes de crise. À l'inverse, on peut considérer qu'une approche laxiste à l'égard de telles pratiques anticoncurrentielles peut inhiber la capacité d'ajustement des entreprises (plus compétitives) et prolonger par là-même la récession et que l'application stricte des principes de concurrence sera bénéfique aux consommateurs et à l'économie en général et favorisera le redressement de l'activité économique.

Avec les événements récents sur les marchés agricoles et alimentaires, on se trouve dans une situation différente dans laquelle les autorités de la concurrence doivent évaluer le comportement des entreprises. Dans le contexte de la récession mondiale et des retombées de la crise financière, la fin des années 2000 aura été marquée par un gonflement des prix mondiaux des produits de base qui a abouti (à des degrés divers) à une hausse des prix alimentaires au détail dans de nombreux pays et, de façon générale, à une forte inflation des prix des produits alimentaires. Plus spécifiquement, la poussée des prix agricoles à l'échelle mondiale durant la période 2007-2008 a amené les autorités nationales et des institutions internationales à s'inquiéter des répercussions de ces hausses des prix alimentaires sur les consommateurs, notamment les pauvres qui consacrent une forte proportion de leurs revenus à l'alimentation. Comme on peut penser que les prix agricoles mondiaux vont à l'avenir être supérieurs à leur niveau de ces vingt dernières années, la question de la sécurité alimentaire est devenue un enjeu majeur.

Toutefois, même si ces conditions diffèrent de celles qui sont couramment associées aux ententes de crise, les prix agricoles et alimentaires vont, selon toute vraisemblance, être également plus volatils. À cela s'ajoute le risque de multiplication de flambées des prix des produits de base premières. En conséquence, la question des liens entre problèmes de la concurrence et prix agricoles et alimentaires doit se concentrer sur la transmission aux consommateurs des chocs de prix et sur la question de savoir si une moindre concurrence sur les marchés est de nature à réduire la volatilité des prix. Les flambées des prix ont également affecté les entreprises car elles ont un impact sur leurs coûts et elle peut poser d'autres problèmes lorsque les prix redescendent de leurs pics, souvent de courte durée (en particulier si d'autres coûts ne reflètent pas le recul des prix agricoles et alimentaires). Non seulement ces questions s'écartent du débat habituel sur la politique de la concurrence en période de crise, mais elles ont également été négligées dans des débats plus généraux sur la politique économique face à des flambées et une instabilité des prix.

La récente crise des marchés agricoles et alimentaires à l'échelle mondiale pose des problèmes aux autorités de la concurrence. En ce qui concerne spécifiquement la question des « ententes de crise », la crise que connaît le secteur agricole et alimentaire est moins liée à une baisse des prix et à un recul de la demande qu'à une hausse et une plus grande instabilité des prix. Dans ce contexte, les autorités de la concurrence doivent résoudre deux grands problèmes. Le premier consiste à savoir si le souci prédominant
d’atténuer les conséquences d’une flambée des prix et de promouvoir une plus grande stabilité des prix peut justifier la formation d’ententes. Le second consiste à déterminer si les entreprises profitent des flambées des prix des produits de base et de leur plus forte variabilité pour fixer leurs prix de façon coordonnée ou si, sachant que les flambées des prix des produits de base sont souvent éphémères, des ententes peuvent se former pour se prémunir contre la baisse ultérieure des prix que devraient normalement ressentir les consommateurs. Comme on le verra, il y a un certain nombre d’enquêtes concernant des ententes dans le secteur de l’alimentation qui se rapportent au comportement récent des prix alimentaires dans plusieurs pays.

Dans cette contribution, nous examinerons divers aspects de la récente crise des marchés agricoles et alimentaires, thématique qui a de nouveau suscité des préoccupations au second semestre de 2010 et au début de 2011. Bien que le thème spécifique de cette session porte sur les ententes de crise, on peut se poser le problème plus général des conséquences de la nature concurrentielle des marchés agricoles et alimentaires sur différents aspects du comportement des prix (aussi bien en termes de niveau que de variation) et des effets des chocs de prix. La question des ententes sur les marchés agricoles et alimentaires concerne manifestement cette question même si la concurrence sur les marchés alimentaires recouvre un éventail plus large de problèmes (de nature aussi bien horizontale que verticale et en distinguant marchés nationaux et mondiaux). Nous évoquerons ces questions dans le cadre de la présentation générale du problème des ententes, mais, tout en restant dans le cadre du thème de cette session, nous procéderons un bref tour d'horizon des problèmes de concurrence qui se dessinent dans le secteur alimentaire et nous apporteront quelques exemples d’entente, notamment d’ententes qui se sont formées ces toutes dernières années. Puis, nous nous demanderons si, dans le contexte de la crise récente, le recours à de telles ententes peut se justifier. Mais auparavant, nous replacerons notre étude des ententes de crise dans un contexte plus général.

2. Crises économiques et ententes de crise

La question des ententes de crise est généralement associée à des périodes de récession et/ou de crise financière. Fiebig (1999) définit la notion de ententes de crise comme « des accords entre la plupart, voir la totalité des concurrents sur un marché donné en vue de restreindre systématiquement la production et/ou de réduire les capacités en réaction à une crise touchant cette branche d'activité particulière » (Fiebig, p.608). Les conditions dans lesquelles les entreprises cherchent à remédier à la crise qui les touche sont liées à une telle baisse de la demande que les entreprises sont en proie à des surcapacités à l’échelle de leur secteur. En conséquence, lorsque les entreprises subissent une récession et doivent régler un problème de surcapacités « structurelles », les autorités de la concurrence sont amenées à se demander si elles doivent adopter une attitude plus clément à l’égard de la coordination entre entreprises ou si, au contraire, elles doivent sanctionner explicitement ces ententes.


Une étude consacrée au moment où se forment les ententes s’est attachée aux effets du cycle conjoncturel et a conclu que la formation des ententes avait tendance à intervenir durant les périodes de baisse des prix (Levenstein et Suslow, 2006). Lyons (2009) relève également que les ententes de crise sont
plus susceptibles de se former lorsque les prix baissent et que les entreprises cherchent des moyens de fixer 
les prix pour endiguer de tels reculs.

Compte tenu de l'expérience historique des ententes de crise et de la probabilité que de graves crises 
économiques et financières soient une incitation à conclure des ententes, de nombreux observateurs plaident 
pour que l'on continue d'appliquer rigoureusement les principes de la politique de la concurrence et que 
l'on fasse preuve d'une plus grande vigilance vis-à-vis du risque de multiplication des ententes en période 

Cette problématique ne semble pas correspondre aux évolutions récentes sur les marchés agricoles et 
alimentaires qui ont connu une forte expansion de la demande, une pénurie de l'offre et une hausse des 
prix. Toutefois, compte tenu de leur augmentation attendue à l'avenir, les prix vont aussi être plus instables. 
En conséquence, même si le niveau élevé des prix peut amener les autorités de concurrence à s'interroger 
sur la façon dont les entreprises réagissent à un tel phénomène, il faut aussi se poser la question des liens 
entre concurrence et volatilité des prix. Dans ce contexte, il convient de noter que dans sa liste de motifs de 
formation d'ententes sanctionnées par l'État, Evenett (2011) mentionne « la promotion du bien-être des 
consommateurs » et « la stabilisation des prix », deux sujets de préoccupation à l'heure où les pouvoirs 
publics s'efforcent de régler la crise des marchés agricoles et alimentaires ainsi que la question de la 
sécurité alimentaire. On relèvera également que « la stabilité des prix » est apparu comme un motif 
d'autorisation d'ententes de crise en Corée (Evenett, 2011). Yang (2009) note que, dans le contexte du 
boum des prix des matières premières du début des années 1970, des ententes ont pu être autorisées pour 
assurer une modération des prix et promouvoir leur stabilisation à court terme. Dans une revue des ententes 
à la fin du XIXᵉ siècle en Allemagne, Kinghorn (1996) met aussi en avant la nature stabilisatrice des 
tentes et le fait que l'expérience des secteurs du charbon ainsi que du fer et de l'acier n'a pas été 
nécessairement associée au phénomène classique de réduction de la production et de niveau élevé des prix 
généralement attendu des pratiques d'entente.

3. Les crises des marchés des produits de base

3.1 Les flambées des prix sur les marchés mondiaux

Depuis une trentaine d'années, lorsque l'on parle de « la crise des marchés des produits de base », on 
fait allusion à des périodes prolongées de faiblesse des prix dans un contexte de détérioration soutenue des 
termes de l'échange dans ce secteur. Par exemple, dans son ouvrage consacré aux marchés mondiaux des 
produits de base et intitulé « Commodities in Crisis », Maizel (1992) étudie les problèmes posés par la 
faiblesse persistante des prix et la façon dont les producteurs et les pays exportateurs de produits de base 
doivent régler ces problèmes. Naturellement, la question de savoir comment les pouvoirs publics ont traité 
les cycles des prix sur les marchés agricoles, favorisé la régularité des approvisionnements, fait progresser 
des prix qui paraient d'un niveau relativement faible et accru les revenus des producteurs, est bien plus 
anancienne. Sur le plan intérieur, les pouvoirs publics ont pris une série de mesures centrées pour la plupart 
sur des interventions directes sur les marchés agricoles et alimentaires ; en général, les pays développés ont 
recouru à des mesures de soutien des prix en vue de faire progresser et de relever par là-même les revenus 
arigoles ; dans les pays en développement enfin, les mesures prises visaient de façon générale à maintenir 
les prix intérieurs en deçà des niveaux observés sur les marchés mondiaux, ce qui reflète des 
préoccupations quant aux coûts des produits alimentaires (en particulier des produits de première nécessité

---

1 La question de la façon dont l'évolution des prix influe sur les objectifs des pouvoirs publics se pose depuis 
longtemps. La Grande Crise des années 1930 et les problèmes liés à la « sécurité des approvisionnements » à 
la suite de la Seconde Guerre mondiale, ont déterminé en grande partie les conditions d'exercice des 
politiques agricole et commerciale en vigueur depuis environ un demi-siècle. Il en va de même de l'utilisation 
des accords sur les produits de base visant à manipuler directement les prix sur les marchés mondiaux.
comme les céréales ou le riz) pour les consommateurs. Dans cette catégorie de pays, ainsi que dans le cas des instruments directs associés à la politique agricole et commerciale, on a également eu recours à des manipulations du marché consistant à agir directement sur sa structure. Des manipulations directes des marchés internationaux ont également été observées dans le cadre d’initiatives visant à remédier à la faiblesse et à l’instabilité des prix, initiatives impliquant des accords intergouvernementaux de contingentement en vue de relever les prix et de les maintenir dans des fourchettes précises.

Une solution mise en avant par Maizels consiste à assurer un contrôle direct des marchés de produits de base à travers des accords internationaux de produit (AIP) dont l’économie générale consiste à accroître les prix et les recettes perçues par les exportateurs de ces produits de base. Plusieurs de ces accords motivés par la faiblesse des prix, des surcapacités et l'accumulation de stocks cherchaient à maîtriser les marchés de matières premières par des mesures de contrôle des exportations et des mécanismes de contingentement entre pays adhérents. L’expérience de la réaction aux crises des produits de base au moyen d’AIP ne semble pas avoir été entièrement couronnée de succès, au moins durant une assez longue période (Gilbert, 1996) ; cela étant, cela ne fait pas très longtemps que le principal problème des marchés agricoles paraît résider dans de relativement longues périodes de faiblesse des prix. On a aussi assisté à des manipulations directes de la structure des marchés nationaux par le biais d'entreprises commerciales et d'organismes parapublics disposant d'un pouvoir de monopole et de monopsone sur l'attribution des marchés et la distribution (aussi bien sur le plan intérieur qu'en matière de commerce international).

Cela étant, la récente attention accordée aux marchés agricoles et alimentaires est née d’une flambée des prix. Le graphique 1 est consacré à la flambée des prix alimentaires de 2007-2008 dans le contexte de l'évolution des prix alimentaires mondiaux depuis le début des années 1990. Même si la flambée de 2007-2008 n'a pas été, en termes réels, aussi forte que celle de 1972-1974, la récente poussée des prix sur les marchés mondiaux est intervenue dans un contexte de faiblesse durable des prix remontant à la fin des années 1980 (graphique 2).

Figure 5. Graphique 1 : Indice des prix alimentaires mondiaux (prix nominaux) : 1990-2008

Bien que les accords internationaux de produit aient souvent été désignés comme des ententes compte tenu du contrôle de l’offre qui les caractérise souvent, il ne s’agit pas « d’ententes » au sens classique car l’adhésion à ces accords associe généralement des pays aussi bien producteurs que consommateurs. Il s’agit d’un cas différent de celui de l’OPEP qui est une organisation uniquement composée de producteurs.
Les causes de la flambée des prix de 2007-2008 sur les marchés alimentaires mondiaux sont connues. Sumner (2009) présente une synthèse des principaux facteurs de cette flambée et on peut essentiellement les catégoriser en facteurs de demande, facteurs d’offre, et facteurs de politique avec une autre distinction entre ce qui relève des effets de long terme ou effets tendanciels et des effets de court terme ou effets de « crête » (Sarris (2008), Trostle (2008)). Parmi les effets de long terme, on retiendra la croissance de la demande dans les économies émergentes, l’augmentation des coûts de la production agricole, la faiblesse des stocks et le contexte général de la politique commerciale. Les effets de court terme ou effets de crête comprennent les cours de change, la spéculation, les périodes de sécheresse et les mesures de politique commerciale destinées à réagir au niveau élevé des prix.

La FAO prévoit qu’à moyen ou long terme, les prix agricoles mondiaux vont être inférieurs aux crêtes des années 2007-2008, tout en restant supérieurs à leur niveau moyen des deux dernières décennies. Pour une large part, cette cherté attendue résultera d’une forte expansion de la demande (en particulier de la part d’économies émergentes comme la Chine et l’Inde), de contraintes pesant sur l’offre et des délais de reconstitution et de coordination des stocks pour faire face à des chocs inattendus. En conséquence, la crise des marchés agricoles et alimentaires s’inscrit dans un contexte où les prix sont relativement élevés et où les enjeux concernent l’impact de ces prix sur la sécurité alimentaire. Il existe par ailleurs des problèmes macroéconomiques associés à ces effets, la cherté des produits de base à l’échelle mondiale pouvant aboutir à une forte hausse des prix alimentaires sur le marché intérieur, hausse se répercutant elle-même sur le niveau général de l’inflation, au risque d’entraver la reprise de l’activité économique dans de nombreux pays (voir plus loin). La crise que connaissent les marchés agricoles et alimentaires diffère donc dans sa nature de la crise économique et financière qui affecte d’autres branches d’activité, car le problème n’est pas

Les chocs de prix peuvent avoir des répercussions sur l’inflation, élément qui explique certaines incertitudes associées aux événements récents sur les marchés alimentaires nationaux et mondiaux et qui détermine donc le contexte macroéconomique dans lequel les pouvoirs publics traitent le problème de la cherté de l’alimentation. Il y a deux aspects dans ce domaine. Premièrement, l’augmentation du niveau des prix s’étend sur une période telle que même une forte poussée des prix peut durer plusieurs mois. Deuxièmement, il peut aussi falloir plusieurs mois pour qu’un choc au niveau des prix mondiaux se répercute sur les prix intérieurs, l’impact cumulé de ces effets se reflétant dans la hausse des prix alimentaires sur le marché intérieur. Comme on le verra, ce sont les conséquences macroéconomiques de la cherté des produits alimentaires qui ont déterminé les conditions dans lesquelles certaines autorités de la concurrence ont réagi aux préoccupations associées aux pratiques de fixation des prix et de coordination entre entreprises.
cette fois pas directement lié à un recul de la demande ou à l'existence de surcapacités mais porte plutôt sur la façon de remédier au niveau élevé des prix et à des flambées (éventuellement récurrentes) de ces prix, sur la capacité des gouvernements d'atténuer les effets de ces flambées sur les plus vulnérables, de régler les problèmes de sécurité alimentaire et, dans le cas des pays importateurs de produits agricoles, de réagir aux flambées des prix qui se produisent sur les marchés mondiaux.


Figure 7. Graphique 3 : Évolution récente des prix sur les marchés agricoles mondiaux

Indice des prix alimentaires de la FAO

3.2 Prix agricoles mondiaux et prix de détail sur le marché intérieur

La hausse des prix sur les marchés agricoles mondiaux en 2007-2008 et leur nouvelle augmentation au second semestre de 2010 serviront de référence pour étudier le lien entre les problèmes de concurrence dans le secteur de l'alimentation et les récents événements intervenus sur les marchés mondiaux. L'évolution des prix agricoles et alimentaires présente plusieurs dimensions qui ont des répercussions sur la façon de régler les problèmes de concurrence. Premièrement, il y a le prix des produits agricoles de base que les pays exportent ou importent directement ; il faut néanmoins savoir que les prix de ces produits de base affectent directement des entreprises dans le secteur aval de l'alimentation. En conséquence, lorsque l'on étudie l'impact de ces évolutions sur les coûts des entreprises et sur les consommateurs, il convient aussi de tenir compte des aspects de la problématique du marché intérieur. Plus précisément, comme une grande partie des problèmes de concurrence sont d'ordre intérieur, il faudra aussi étudier la façon dont les prix alimentaires sur le marché intérieur ont réagi aux évolutions récentes sur les marchés mondiaux. Comme on le verra plus en détail, l'examen des données disponibles sur les marchés alimentaires intérieurs (en particulier au niveau du consommateur) de nombreux pays développés ou en développement fait ressortir une diversité considérable des expériences.
Le graphique 4 donne un exemple des différences de comportement de prix alimentaires intérieurs par rapport aux évolutions des marchés mondiaux. Les données portent sur le Royaume-Uni de 1988 à 2010 et compare les prix agricoles mondiaux avec les prix perçus par les producteurs agricoles nationaux ainsi que les prix alimentaires de détail sur le marché intérieur. Alors que les prix intérieurs à la production suivent l'évolution des cours mondiaux, les prix alimentaires au détail sur le marché intérieur se comportent de façon assez différente. En ce qui concerne la flambée des prix mondiaux de 2007-2008, malgré leur augmentation, les prix alimentaires au détail sur le marché national ont enregistré une progression nettement inférieure à ce que l'on a observé sur les marchés mondiaux.

Graphique 4 : Prix mondiaux à la production et prix alimentaires à la production et au détail au Royaume-Uni, 1998-2010

Le comportement des prix intérieurs à la consommation par rapport aux évolutions observées sur les marchés mondiaux a cependant varié selon les pays. La FAO note que la transmission des flambées des prix des produits de base a été très variable dans de nombreux pays en développement. Par exemple, la variation des prix du marché mondial ne s'est souvent répercutée sur les prix intérieurs qu'à concurrence de moins de 50%. De même, lorsqu'on étudie la différence entre les variations des prix intérieurs à la production et à la consommation, on constate que ces derniers ont beaucoup moins varié que les prix à la production dans un large éventail de pays et de secteurs des produits de base. On peut observer une variation analogue à travers l'UE. Plus précisément, alors que la variation moyenne des prix alimentaires de l'ensemble de l'UE de la mi-2007 à la fin de 2008 a été de l’ordre de 5-6%, la variation des prix intérieurs à la consommation dans le secteur de l’alimentation a représenté dans de nombreux États membres quatre à cinq fois la moyenne de l'UE (Bukeviciute et al., 2009). De plus, toujours dans le secteur de l’alimentation, la variation de ces prix intérieurs à la consommation a généralement, mais pas systématiquement, été inférieure à celle des prix intérieurs à la production. La moyenne à l’échelle de l’UE des variations des prix alimentaires européens au stade de la production durant la même période a représenté une fois et demie celle des variations des prix intérieurs à la consommation. On a parfois observé l'inverse. Par exemple, en Hongrie, dans un contexte où les prix à la consommation ont progressé plus vite que les prix à la production, la variation des prix intérieurs à la consommation a représenté près de trois fois la moyenne de l'UE (variations des prix à la consommation), alors que la variation des prix à la production n'a représenté que deux fois la moyenne de l'UE (variations des prix à la production).

Au-delà des différences de comportement entre les prix agricoles mondiaux et les prix intérieurs au détail, la hausse des prix alimentaires intérieurs a, dans bien des pays, été plus forte que l'inflation générale. Le graphique 5 compare la hausse des prix alimentaires intérieurs et celle des prix intérieurs hors
alimentation et il en ressort que les prix alimentaires de détail ont augmenté plus vite. La FAO fait le même constat dans un certain nombre de pays en développement (FAO, 2008). Par exemple, en Égypte, l'IPC a augmenté de 15.4 % de janvier 2007 à janvier 2008 tandis que les prix alimentaires progressaient de 24.6 %. Cones et Kwencinski (2010) relèvent également des accélérations de la hausse des prix alimentaires intérieurs dans un certain nombre de pays émergents. Alors que la moyenne de l'OCDE des rythmes d'augmentation des prix alimentaires s'est établie à 3.9 % sur la période 2006-2008 (contre 2.1 % sur la période 2003-2006), le rythme de l'inflation observée dans un certain nombre de pays a été nettement supérieur : au Chili, 9.8 % pour la période 2006-2008 (contre 1.2 % durant la période précédente) ; Afrique du Sud, 10.5 % (contre 2.5 %) ; Chine, 12 % (contre 6 % environ).

**Graphique 5: Hausse des prix alimentaires et hors alimentation sur le marché intérieur : 1988-2010**

Il est essentiel pour les autorités de la concurrence de bien comprendre la façon dont les prix alimentaires intérieurs se comportent par rapport à l'évolution des marchés agricoles mondiaux, en particulier lorsque l'on peut craindre que la concurrence (ou l'absence de concurrence) dans le secteur de l'alimentation ait des répercussions sur le niveau des prix alimentaires intérieurs et la diffusion des chocs émanant des marchés mondiaux. Étant donné que les intrants agricoles représentent sans doute une relativement faible part des coûts de fourniture de produits alimentaires transformés au stade de la vente au détail, les prix alimentaires de détail vont être déterminés par toute une série de facteurs, notamment les cours de change, les coûts de main-d'œuvre, la situation économique générale et l'action des pouvoirs publics.4

L'expérience de plusieurs autorités de la concurrence est intéressante à cet égard. Deux exemples illustrent notre propos. Premièrement, la Competition Commission d'Afrique du Sud, confrontée à une hausse des prix alimentaires, a décidé que ses enquêtes porteraient prioritairement sur le secteur national de l'alimentation. Comme l'indique le document OCDE (2009), la Commission a mis en évidence l'importance qu'il y avait à bien distinguer les comportements anticompetitifs dans ce secteur d'autres déterminants de

---

4 Un récent rapport de l'UBS (2011) commenté dans les médias britanniques (*The Times*, 1er mars 2011) indique que les hausses des prix alimentaires au Royaume-Uni ont dépassé celle des coûts et a attiré l'attention sur des problèmes de concurrence dans le secteur britannique de la distribution de produits alimentaires.

3.3 Volatilité des prix

Outre le renchérissement des prix qui devrait se poursuivre à l’avenir, il faut aussi se préoccuper de la volatilité de ces prix. On estime en effet qu’il s’agira de l’une des caractéristiques essentielles des marchés agricoles et alimentaires du futur. Gilbert et Morgan (2010), s’appuyant sur les statistiques des prix des produits de base depuis 1990, ont voulu vérifier si la volatilité s’était accrue depuis 2007. Ils montrent que l’augmentation estimée de la volatilité des prix s’est accentuée dans le cas d’un grand nombre de produits agricoles de base, y compris les céréales et les oléagineux les plus importants. Le graphique 6 rend également compte des préoccupations associées à l’accroissement de la volatilité des prix agricoles telle qu’elle ressort d’une récente note de la FAO (FAO, 2010) ; les données font en effet apparaître une forte augmentation de la volatilité implicite de plusieurs produits de base essentiels.

Plusieurs facteurs contribuent à l’accentuation de la volatilité des prix et sont dans une large mesure liés aux facteurs à l’origine de la récente flambée des prix et concernent plus particulièrement l’accroissement des fluctuations de l’offre (par exemple, les conditions météorologiques défavorables et des mauvaises récoltes) ou de la demande (par exemple des facteurs macroéconomiques dans les économies émergentes, la financiarisation des marchés des produits de base) dans un contexte de relative faiblesse des stocks de nombreux produits de base. Naturellement, comme on l’a vu, il convient d’établir une distinction entre les chocs relatifs aux prix mondiaux et les prix alimentaires sur les marchés intérieurs, tout en précisant que l’accentuation de la volatilité des prix des marchés mondiaux ne se traduit pas nécessairement par une variabilité analogue des prix sur les marchés alimentaires intérieurs au stade de la vente au détail.

Graphique 6: Volatilité implicite des prix de quelques produits agricoles de base (en %)

Source : FAO (2010)
Note : la volatilité implicite correspond à ce que le marché attend quant à l’ampleur des variations futures des prix d’un produit de base.
En somme, la crise récente qui caractérise les marchés agricoles et alimentaires est très différente des circonstances auxquelles peuvent être confrontées d'autres branches d'activité. Les marchés agricoles et alimentaires se caractérisent par une forte croissance de la demande, un sous-investissement dans la production agricole, des prix élevés et une accentuation de la volatilité des prix marquée par des flambées occasionnelles des cours. L'impact de cette configuration se manifeste à travers la hausse des prix alimentaires sur les marchés nationaux, leur niveau élevé pour les pauvres et une plus forte exposition à des fluctuations des prix alimentaires. À la lumière de ce qui précède, on peut se demander si le caractère concurrentiel des marchés des produits alimentaires détermine en partie les effets du niveau élevé des prix et leur plus grande volatilité. Si l'on reprend la liste de facteurs d'Evenett normalement susceptibles de plaider en faveur des ententes de crise, en particulier la référence à « la promotion du bien-être des consommateurs » et à « la stabilisation des prix » (Evenett, op. cit.), peut-on justifier les ententes de crise ?

4. Problèmes de concurrence et ententes sur les marchés agricoles et alimentaires

Les marchés agricoles et alimentaires représentent une structure complexe verticalement intégrée telle que les prix des produits agricoles de base agissent à la manière d’un intrant se répercutant tout au long de la chaîne verticale de l'alimentation, de sorte que le prix alimentaire au détail est déterminé par une série de facteurs (comme les coûts de main-d’œuvre, les services de commercialisation, etc.). Dans ces conditions, le comportement des prix alimentaires au détail peut être très différent du comportement des prix agricoles mondiaux, comme on l’a vu précédemment. Des problèmes de concurrence peuvent se poser à chaque niveau horizontal de cette structure verticalement intégrée (par exemple, la transformation ou la vente au détail de produits alimentaires) mais aussi selon un processus vertical, par exemple, par le recours à diverses formes de restrictions verticales ou les conditions des contrats. On notera que dans ce système verticalement intégré, l'impact de la concurrence sur les approvisionnements et non pas uniquement sur les ventes intervenant au stade suivant pose également un problème de détermination de la compétitivité et de l'efficience globale du secteur de l'alimentation (McCorriston, 2008).

Dans de nombreux pays, l’une des caractéristiques du secteur de l'alimentation réside dans l'accroissement de sa concentration à tous les niveaux du secteur aussi bien dans les pays développés que les économies émergentes. Face à l'ampleur et l'accentuation de cette concentration, ainsi qu’à la multiplication des fusions et acquisitions (aussi bien au niveau national que transnational), les autorités de la concurrence de nombreux pays se sont activement intéressées aux problèmes de concurrence dans le secteur de l'alimentation (McCorriston (2008))5. Sur un plan national, devant l'augmentation de la concentration dans tous les secteurs verticalement intégrés de l'alimentation, on constate des situations anticoncurrentielles des plus diverses qui peuvent présenter des dimensions horizontales et verticales (voir McCorriston (2007) pour un tour d'horizon de la question). Un tel contexte se prête à la formation d'ententes. Les ententes dans le secteur de l'alimentation présentent plusieurs dimensions : l'une est d'ordre national lorsque les entreprises du secteur situé en aval sont exposées aux variations des prix des produits agricoles de base en amont ; l'autre est d'ordre international lorsqu'il y a coordination directe des activités de ces entreprises vis-à-vis des marchés mondiaux.

Quelques exemples permettent d'illustrer ces questions, certains étant antérieurs à la crise récente et d'autres étant liés (de façon directe ou par coïncidence) avec les événements récents. Deux exemples ont trait à des problèmes nationaux antérieurs à la récente poussée des prix. On retrouvera d’abord l'exemple déjà évoqué des ententes dans le secteur de l'alimentation en Afrique du Sud : dans un contexte d'augmentation des prix alimentaires, la Competition Commission d’Afrique du Sud a décidé de faire porter prioritairement ses enquêtes sur ce secteur. Bien que la Commission se soit attachée à distinguer les comportements anticoncurrentiels d'autres déterminants de l'augmentation des prix alimentaires, elle a

5 Herger et al. (2008) étudient la question et les déterminants des fusions-acquisitions transnationales dans le secteur mondial de l’alimentation.
néanmoins pu constater l’existence d’ententes dans la boulangerie et la meunerie, le secteur du lait et celui des engrais (OCDE, 2009). Un autre exemple concerne le secteur irlandais du conditionnement de la viande et semble mieux correspondre à ce que l’on appelle traditionnellement un « entente de crise ». En 2002, soucieux de réduire les capacités de leur branche d’activité, les entreprises irlandaises de transformation de viande bovine ont mis en place la *Beef Industry Development Society (BIDS)*. Dans ce contexte de surcapacités, cet organisme devait coordonner une réduction de 25 % des capacités et, dans ce cadre, les entreprises ayant démantelé des capacités devaient être dédommagées par les autres membres de la BIDS ; le dispositif prévoyait en outre une clause de non-concurrence de 2 ans. L’affaire a été portée devant la Cour de justice des Communautés européennes (après le rejet par la Haute cour irlandaise du dossier soumis par l’Autorité irlandaise de la concurrence). La cour a estimé dans cette affaire que l’effet négatif d’une réduction des capacités n’était pas suffisant pour compenser les éventuels effets positifs.

Sur le plan international, des ententes sanctionnées par l’État ont également été recensées dans le cadre de la crise récente. Dans ce contexte, l’évolution récente de la structure du marché mondial des engrais illustre les préoccupations que peuvent susciter les ententes conclues dans le secteur vertical de l’alimentation. Des préoccupations s’étant exprimées ces dernières années à propos des prix agricoles et alimentaires, l’attention s’est également tournée vers les marchés des engrais et du pétrole. Le graphique 7 montre que les prix des engrais ont également connu une forte poussée durant la période 2007-2008 et à partir du début janvier 2011, la situation sur le marché pétrolier a suscité un regain d’inquiétudes, le prix du baril ayant dépassé la barre de 100 USD.

**Graphique 7 : Prix mondiaux des engrais, 2006-2010. (USD/mt)**

Source : Banque mondiale

Le rôle de l’OPEP sur le marché pétrolier mondial est notoire ; en revanche, on connaît moins bien l’organisation du marché mondial des engrais. Le potassium (et plus particulièrement le carbonate de potassium) est un nutriment essentiel des plantes et récoltes. Le marché mondial du potassium est dominé par un petit nombre d’intervenants, la majeure partie des réserves mondiales se trouvant au Canada et dans

---

l'ex-Union soviétique. Dans ce contexte, le Canada a réprimé une entente sur les exportations de potassium, Canpotex Ltd, réunissant trois sociétés (Potash Corp, Mosaic et Agrium) et contrôlant environ 40 % du commerce mondial de potassium. L'attention s'est récemment portée sur le rôle de Canpotex lorsque BHP a lancé une OPA hostile contre Potash Corp, le marché s'attendant que cette entente à l'exportation ne survie pas à la réussite de cette OPA et que les capacités de production se développent et fassent ensuite baisser les prix du potassium. Le statut juridique de cette entente a aussi suscité des interrogations sur les liens entre de tels cartels et la crise alimentaire ainsi que sur les obligations des pays de mieux coopérer dans des dossiers de concurrence sur les marchés internationaux (Financial Times, 31 août 2010).

Poursuivant sur la thématique internationale et la question des ententes sanctionnées par l'État, le tout dans le contexte du triplement du prix du riz à l'échelle mondiale en 2007-2008, la Thaïlande a évoqué la possibilité de constituer un cartel du riz de style OPEP et a prévu d'examiner des projets en ce sens avec le Laos, la Birmanie, le Cambodge et le Vietnam. L'idée de réunir des pays qui détiennent une puissance commerciale à l'exportation de grands produits agricoles de base n'est pas nouvelle. À la suite du bouleversement des marchés des produits de base dans les années 1970 et compte tenu du fait qu'un petit nombre de pays représentent une grande partie des échanges internationaux de céréales, il y a eu des discussions sur la possibilité de former un cartel d'exportation de céréales (voir par exemple, Schmitz et al., 1981).

La flambée des prix agricoles et alimentaires de 2007-2008 que l'on a décrite précédemment a aussi constitué l'arrière-plan d'enquêtes plus récentes sur des affaires d'entente. La nature de ces flambées des prix elle-même suscite des préoccupations relatives à la concurrence et plus particulièrement sur la possibilité/l'utilité de conclure des ententes. Par définition, la caractéristique évidente d'une flambée des prix est que les prix augmentent d'abord brutalement avant de rebaisser par la suite (généralement dans un intervalle de temps relativement bref). Or cela peut aboutir à des situations où des entreprises cherchent à prolonger la cherté des prix et à les empêcher de baisser par la suite. Autre interprétation de l'impact d'une flambée des prix, le renchérissement des matières premières se répercute sur les marges bénéficiaires des entreprises en aval. En conséquence, on se trouve en présence d'un choc négatif en amont qui ne peut pas être entièrement répercuté sur les consommateurs (voir plus loin). De ce point de vue, les entreprises affrontent des périodes difficiles et peuvent vouloir remédier à cette situation en coordonnant leurs prix et leurs parts de marché. Compte tenu de ces éventuelles incitations associées aux flambées des prix, on peut évoquer quelques exemples assez récents d'ententes dans les secteurs de l'agriculture et de l'alimentation :

- En août 2010, la Competition Commission de l’Inde a ordonné une enquête sur une éventuelle pratique de fixation des prix dans le secteur du sucre. Dans le contexte d'une chute notable des prix du sucre de l'ordre de 40 %, les entreprises de raffinage du sucre ont été soupçonnées de fixer les prix pour les empêcher de baisser et surtout de baisser en dessous du coût de production. Plus récemment (janvier 2011), la Competition Commission a été invitée à vérifier la possibilité qu’une entente manipule le prix des oignons (une denrée essentielle en Inde en dehors de produits de base essentiels comme le riz et le blé).

- En janvier 2010, l'Office fédéral allemand des ententes (Bundeskartellamt) a procédé à des descentes dans les locaux d'entreprise travaillant dans le secteur de la confiserie, du café et des aliments pour animaux de compagnie. Les accusations spécifiques portent sur une coordination des prix de détail entre fabricants et distributeurs.

- En 2009, les autorités italiennes de la concurrence ont infligé des amendes à 26 fabricants de pâtes pour leur collaboration à une entente ayant fonctionné d'octobre 2006 à mars 2008, période au cours de laquelle les prix au détail avaient augmenté de plus de 50 %. Par la suite, en janvier 2010, cinq des principaux fabricants de pâtes d'Italie ont été accusés d'avoir constitué une entente illégale.

- À l’automne 2010, les autorités estoniennes de la concurrence ont lancé une enquête sur une éventuelle entente dans les secteurs du lait et du pain à la suite d'une augmentation de 25 % du prix
du lait en septembre et de l'annonce par les producteurs de pain d'un projet de relèvement des prix de 10 à 20 %.

Comme on l'a vu précédemment, le prix alimentaires intérieurs va être déterminé par une série de facteurs et non pas uniquement par le prix mondial des matières premières agricoles et, en tant que telles, les autorités de la concurrence qui se sont intéressées au secteur de l'alimentation au lendemain de la récente crise doivent faire le tri entre toute cette série de facteurs qui peuvent être à l'origine d'une hausse des prix alimentaires et de pratiques anticoncurrentielles. De fait, si l'on se réfère à nombre des exemples évoqués précédemment, l'argument de défense le plus souvent avancé veut que les prix aient été déterminés par d'autres facteurs que leur coordination par les entreprises. Il ne s'agit naturellement pas de justifier la formation ou la persistance d'ententes, mais s'opposer à des pratiques anticoncurrentielles pose d'autant plus de problèmes lorsque des branches d'activité sont confrontées à des chocs multiples et simultanés.

5. **La crise agricole et alimentaire et les ententes de crise**

Les caractéristiques des événements récents sur les marchés agricoles et alimentaires et leurs probables évolutions futures que l'on a décrites précédemment diffèrent des conditions généralement associées avec les ententes de crise : en l'occurrence, la croissance de la demande est forte et a des chances de le rester ; un accroissement des investissements est nécessaire même si l’offre peut être affectée par des perturbations temporaires ; les prix agricoles vont être touchés par une série de facteurs extérieurs au secteur de l'alimentation et de l'agriculture, notamment la spéculation sur les instruments dérivés sur les marchés mondiaux du pétrole, des chocs concernant la demande et l'offre, etc. Ces variables se traduisent par une augmentation des prix que l'on a pu constater depuis une vingtaine d'années, des flambées occasionnelles des cours et une plus forte volatilité des prix de certains produits de base essentiels. Pour les autorités se préoccupant d'inflation et de sécurité alimentaire de façon plus générale, quelles sont les relations pouvant exister entre l'ampleur et la nature de la concurrence sur les marchés et ces caractéristiques de l'évolution des prix ? Si le « bien-être des consommateurs » et la « stabilisation des prix » sont des motifs de formation d'ententes de crise, ces ententes peuvent-elles être justifiées à la lumière des évolutions récentes sur les marchés agricoles et alimentaires ?

La question des liens entre l'ampleur et la nature de la concurrence sur les marchés (et, partant, le rôle approprié de la politique de la concurrence) d'une part et, d'autre part, l'impact des chocs et la volatilité des prix n'a pas été traitée dans les différentes études consacrées aux mesures que les pouvoirs publics peuvent prendre pour remédier à des chocs de prix ou à des difficultés de sécurité alimentaire. Du point de vue de la concurrence, les problèmes posés par des pratiques anticoncurrentielles sont généralement centrés sur des effets statiques ou sur la meilleure façon d'améliorer l'efficience d'une branche d'activité donnée (par exemple, en réduisant ses surcapacités). En revanche, dans le contexte des marchés agricoles et alimentaires, le problème porte sur le lien entre concurrence et transmission des chocs de prix et sur la question de savoir si l'existence de marché concurrentiel est ou non un facteur de stabilité des prix. En d'autres termes, l'important n'est pas en soi la question des effets statiques des pratiques anticoncurrentielles, mais l'impact de la structure du marché sur les moments des premier et second ordres de la distribution des prix.

On s'intéressera à la transmission des chocs de prix provenant des marchés mondiaux et en premier lieu au cas d'un choc de l'offre ayant des répercussions sur les prix agricoles. Du point de vue statique, un marché concurrentiel va permettre une augmentation de la production plus importante que des marchés moins concurrentiels mais, dans des conditions assez générales, une hausse des prix des intrants va déboucher sur une augmentation proportionnellement moins forte des prix de détail si les marchés sont moins concurrentiels. De plus, sachant que les marchés agricoles et alimentaires peuvent être judicieusement caractérisés comme une série de branches d'activité intégrées verticalement, plus le nombre de strates de cette structure verticale augmente et plus ces différentes strates se caractérisent par une
conclusion imparfaite, plus l'impact des chocs de prix en amont sur les prix de détail des produits alimentaires s'atténue. Plus directement, moins les marchés deviennent concurrentiels à l'un quelconque ou à tous les niveaux de la chaîne verticale du secteur de l'alimentation, plus l'impact des chocs de prix agricoles sur le niveau des prix alimentaires de détail diminue. McCorriston (2002) donne quelques précisions sur la question. Cette observation conforte l'importance qu'il y a à bien distinguer les prix agricoles mondiaux d'un produit qui entre dans la structure verticale du secteur de l'alimentation en amont et le prix des produits alimentaires au stade de la vente au détail.

Lorsque l'on songe à ces effets, il n'est sans doute guère surprenant que l'augmentation des prix alimentaires de détail aux alentours de la période 2007-2008 que l'on a évoquée précédemment ait été moins marquée que la poussée des prix sur les marchés mondiaux des produits agricoles de base qui ont tant retenu l'attention des pouvoirs publics et des médias. Naturellement, d'autres facteurs ont aussi pu entrer en ligne de compte (par exemple, les réactions des pouvoirs publics, l'existence d'obstacles aux échanges qui rompent les liens entre prix sur les marchés mondiaux et sur le marché national, etc.) mais au-delà de ces facteurs, l'existence de marchés moins concurrentiels atténuent l'impact des chocs de l'offre.

Cela étant, l'autre aspect de la problématique est que les marges bénéficiaires des entreprises se trouvent réduites. À mesure que les prix de leurs intrants augmentent et si les prix de vente progressent de façon proportionnellement moins forte que l'augmentation des coûts, les marges bénéficiaires diminuent. En conséquence, même si la transmission des prix peut être atténuée lorsque les marchés connaissent une concurrence imparfaite, ce sont les entreprises qui « en font les frais ».

Si l'existence de marchés moins concurrentiels atténué l'impact d'un choc sur les prix de détail (le moment de premier ordre du processus), comment cette moindre compétitivité des marchés influe-t-elle sur la variance des prix (le moment de second ordre du processus) ? Or, à mesure que les prix agricoles se replient par rapport à leurs crêtes, la baisse des prix de détail des produits alimentaires sur des marchés moins concurrentiels va être moins importante que celle qui se serait produite sur des marchés concurrentiels. En conséquence, sur une période donnée, on peut penser que les prix de détail présenteront une moindre variance que les prix agricoles et, plus généralement, que des marchés moins concurrentiels aillent de pair avec une plus grande stabilité des prix. Les publications économiques font état de certains éléments témoignant de ce phénomène. Carlton (1986), Domberger et Fiebig (1993) et Slade (1991) apportent des éléments économétriques montrant que les prix ont tendance à être moins volatils dans des secteurs d'activité plus concentrés.

Ces éléments économétriques portent sur les liens entre concurrence et volatilité des prix mais mettent de côté la question des stocks. En effet, l'un des facteurs ayant contribué à la flambée des prix de 2007-2008 a été la faiblesse des stocks d'un certain nombre de produits de base essentiels, comme on l'a vu précédemment. Thille (2006) a étudié la question de la relation entre la structure du marché et le niveau et l'utilisation des stocks. Il montre que la question est complexe et dépend de conditions spécifiques : des marchés moins concurrentiels présentent une moindre variance des prix et, même si les stocks par unité de production sont moindres sur des marchés plus concurrentiels, les producteurs ont une plus forte propension à les utiliser face à des événements aléatoires.

6. Conclusion

Cette contribution affirme que la crise des marchés agricoles et alimentaires est de nature différente de la récession économique et des crises financières qui ont touché d'autres branches d'activité. En effet, les prix ont augmenté, la croissance de la demande devrait rester forte et on peut s'attendre à une série de choc de la demande et de l'offre qui se répercuteront à l'avenir sur les secteurs de l'agriculture et de l'alimentation. En conséquence, l'évolution future du secteur de l'alimentation dans les pays développés ou en développement va sans doute se caractériser par un renchérissement des prix, des flambées occasionnelles des cours et une plus grande volatilité des prix.
Dans ce contexte, les pouvoirs publics cherchent à définir une série de solutions permettant de faire face à ces flambées et cette volatilité des prix. Jones et Kwiecinski (2010) ainsi que Thompson et Tallard (2010) présentent une synthèse de ces choix stratégiques. Il s'agit notamment du recours aux instruments de la politique commerciale, de la politique budgétaire, des politiques agricoles nationales, etc. en vue d'atténuer l'impact du renchérissement des prix alimentaires sur les plus vulnérables, de traiter le problème des tensions inflationnistes et, à plus long terme, d'améliorer la sécurité alimentaire. Face à l'augmentation des prix alimentaires et leur plus grande volatilité, quel doit être le rôle de la politique de la concurrence ? Si la préoccupation des pouvoirs publics porte sur le « bien-être des consommateurs » et sur la « stabilisation des prix », la formation d'ententes de crise peut-elle être justifiée ? Les préoccupations des autorités doivent-elles aussi porter sur le « bien-être des producteurs » ? Si l'objectif de long terme des autorités est de favoriser la sécurité alimentaire, comment les ententes de crise (et d'autres types de pratiques anticoncurrentielles) vont-ils influer sur les incitations des agriculteurs à investir dans de nouvelles technologies et à accroître la production de leur secteur ? S'il s'agit d'atténuer l'impact de chocs de prix et de la volatilité des prix, en quoi des ententes de crise peuvent-ils constituer un instrument meilleur (ou au contraire plus mauvais) que d'autres mesures ? Enfin, même si l'on pouvait plaider pour la formation de ententes de crise en vue de remédier à la crise des marchés agricoles et alimentaires, de telles ententes de porterait-elle pas préjudice à l'efficacité d'autres instruments, comme la promotion et l'utilisation d'outils de gestion des risques ?

L'observation précédente selon laquelle la structure du marché peut avoir une influence sur la transmission des chocs de prix et aller de pair avec une plus grande stabilité de ses prix ne justifie pas en soi d'opter pour une application plus clémente de la politique de la concurrence en général ou de plaider pour des ententes à titre de moyens de promouvoir la stabilité des prix. D'autres solutions peuvent apporter un moyen plus direct, plus transparent et plus souple de promouvoir cette stabilité des prix et de faire en sorte que les plus vulnérables ne soient pas affectés par le niveau élevé et la plus grande volatilité des prix alimentaires. On trouvera ci-après une liste énonçant différentes solutions devant permettre aux autorités de promouvoir la sécurité alimentaire et d'atténuer l'impact de la volatilité des prix.

- Le recours aux instruments de la politique commerciale : par exemple, les pays importateurs peuvent réduire les obstacles commerciaux pour encourager l'importation de produits meilleur marché ; les pays exportateurs peuvent prendre des mesures de contrôle des exportations, ce qui constitue une solution plus acceptable que la formation d'une entente sanctionnée par l'État.

- La constitution et la coordination de stocks de denrées de première nécessité contribuera à réduire l'exposition à des évolutions négatives sur les marchés mondiaux et diminuera la probabilité de flambées des prix.

- Le recours à des outils de gestion des risques fondés sur le marché permettra de mieux faire face à une plus forte volatilité des prix mondiaux et à la volatilité des cours de change qui influence la formation des prix des produits de base essentiels (ces prix étant généralement exprimés en dollars des États-Unis).

- Pour atténuer l'impact de la hausse et de la volatilité des prix sur les marchés nationaux, on dispose d'un certain nombre de solutions, notamment la possibilité de puiser dans les stocks, l'organisation de filets de sécurité pour les consommateurs (par exemple, des transferts pécuniaires, la mise en place d'un système public de distribution pour apporter des produits alimentaires aux plus vulnérables, la suspension de l'application de la TVA ou d'autres taxes).

Cette liste ne se veut pas exhaustive, mais vise plutôt à montrer que les pouvoirs publics disposent de tout un éventail de solutions pour remédier à l'impact des flambées des prix et de l'accroissement de leur volatilité. Comme on l'a vu, l'intensité de la concurrence sur les marchés exerce une influence sur l'amplitude de la transmission des prix et leur variance, mais ne justifie pas en soi la formation d'ententes pour remédier à des crises intervenant sur les marchés agricoles et alimentaires. Il existe en effet d'autres
solutions susceptibles de produire des effets plus directs, plus transparent et de façon plus souple et plus prévisible et qui évitent de diluer les principes et l'application de la politique de la concurrence.

Même si cette session s’est surtout attachée à la question des ententes et plus particulièrement des ententes de crise, on est en droit dans le contexte des récents événements intervenus sur les marchés agricoles et alimentaires mondiaux et nationaux, de se poser la question plus générale de la façon dont la concurrence se répercute sur le fonctionnement de ces marchés et donc sur le comportement et l’impact des prix mondiaux et nationaux. Cette problématique est plus large que celle des ententes ; compte tenu du caractère sensible des prix alimentaires dans la conscience des consommateurs et des pouvoirs publics, il existe un éventail plus large de questions que les autorités peuvent devoir aborder même si leur intervention en la matière reste circonscrite à un rôle de plaidoyer.
RÉFÉRENCES


Financial Times (2011) « Global Food Prices Hit Record High » 5 janvier.


DAF/COMP/GF(2011)11


Lyons, B. « Competition Policy, Bailouts and the Economic Crisis » Draft Paper, Centre for Competition Policy, University of East Anglia, Royaume-Uni.


Mr. Andrew SHENG

1. Introduction

The purpose of this paper is to give an overview of the state of thinking on crisis cartels in the financial services sector, illustrated with reference to a number of country experiences, including China. The term “crisis cartels” is relatively new to financial sector supervisors, as there is a fundamental dilemma and tradeoff between concentration/stability and efficiency. Indeed, the network effects of financial markets tend towards concentration, which bank regulators have tolerated on the assumption that bigger meant more stable institutions and by extension, stable markets. This illusion was shattered during the global financial crisis of 2007/2009. There is now awareness of a different set of problems arising from concentration and power, that of Too Big To Fail.

This paper is divided as follows. Section II does a quick review of the concept of crisis cartels, whether they are justified and the relevance of this concept for the financial sector. Section III examines the objectives of financial sector and financial supervision, including a discussion on the tradeoff between stability and efficiency, in order to consider whether crisis cartels could be justified. Section IV reviews the experience in bank/financial concentration in selected financial systems. Section V makes some tentative conclusions and suggestions for further research and policy debates.

2. Crisis cartels – Definition and issues

A Crisis Cartel is defined as “a cartel that was formed during a severe sectoral, national, or global downturn without state permission or encouragement... or... situations where a government has permitted, in other cases fostered, the formation of a cartel among firms during several sectoral, national or global economic downturns”.

Evenett, Levenstein and Suslow classify international cartels into three types. Type 1 are the so called “hard core” cartels made up of private producers from at least two countries who cooperate to control prices or allocate shares in world markets. Type 2 are private export cartels where independent, non-state-related producers from one country take steps to fix prices or engage in market allocation in export markets, but not in their domestic market. Type 3 are state-run, export cartels.

Based fundamentally on the neoclassical view that cartels fix prices, reduce production and worsens allocative efficiency, most competition authorities take a dim view of cartelization. As Evenett in his survey of the issues has pointed out, development economists such as Ha Jun Chang (1999) contend that concentration of firms in emerging markets may achieve economies of scale benefits that may outweigh the social cost of monopoly. Consequently, emerging markets in East Asia have tended to allow concentration of industries prior to introducing competition laws against anti-trust. For example, Hong Kong is reputed to be the freest market economy by most measures, and yet the city economy has yet to adopt a competition law.

---

Although Evenett contends that no East Asian policy maker has made statements to support Ha’s view that East Asian growth model tolerate monopolistic firms at the expense of optimal pricing, most anecdotal evidence is that Ha’s judgment is basically correct.

Levenstein and Suslow (2006) find that many cartels do survive, with the average duration around five years, but many break up very quickly (under a year), whereas some last for decades. There is limited evidence that cartels are able to increase prices and profits, to varying degrees. Cartels can also affect other non-price variables, such as advertising, innovation, investment, barriers to entry and industry concentration.

Cartels may form during recessionary conditions whereby demand is lower than capacity, so that key players face insolvency and market exit. At the same time, since governments are concerned about rising employment, they may tolerate cartel activities and have laxity in their antitrust enforcement. Levenstein and Suslow (2006) suggest that antitrust laxity during recessions may reduce producers’ incentives to expand sales and hire – the very measures needed to get economy back on track. Because cartels are freed from competitive constraints and raise their prices, they reduce output and cut employment and costs, thus deepening economic contraction. Suspending antitrust law was exactly wrong during the Depression because it limited producers’ incentives to expand output and increase employment.

Cartels, however, collapse due to market forces beyond their control. This may occur due to cartel members cheating on sales or production with lack of effective monitoring. Cartels also face the challenges of new entrants who are not willing to play by cartel rules or the failure to agree to adjust the collusive agreement in response to changing economic conditions. Price wars erupt because members cannot agree or arrive at mutually compatible bargaining positions. Sophisticated cartel organizations are those that are able to develop multipronged strategies to monitor one another to deter cheating and adapt a variety of interventions to increase barriers to entry.

A key question is whether crisis cartels can be justified? Evenett’s comprehensive survey of the literature concludes: “the empirical assessments of crisis cartels are incomplete. Little is known, for example, of the magnitude of the harm done to buyers from crisis cartels. Still, crisis cartels tended to reduce output and raise prices, although this was contested in some cases. In the light of these findings it would be difficult to argue that crisis cartels had no effect”.

On the balance of evidence so far, Evenett argues that: “there is no basis to revise the general presumption in existing international norms that so-called hard core cartels should be discouraged. Nor does the recent global economic downturn provide a reason to reverse the two decade-long trend towards stronger enforcement against hard core cartels.”

This paper argues that even though financial markets are the closest to the ideal of efficient markets, there is a trade-off between development as a learning experience for institutional growth and competitive efficiency. Historically, mercantilist economies have used protectionist policies or allowed “leading enterprises” (with monopolistic tendencies) to pioneer growth so that they can reach economies of scale in international competition. In an era of globalization, lowering tariff barriers and WTO agreements for free trade, emerging market enterprises and financial institutions are finding greater competition from foreign players. There is general consensus that greater competition has been beneficial to stimulate innovation and efficiency. However, in the financial sector, total liberalization of foreign entry into national markets is still incomplete, since there is no WTO agreement in the area of financial services. In the light of the recent contagion from the global financial crisis, the mood is greater caution in opening up the capital.


account and admitting foreign financial institutions in the fear of not being able to manage systemic and other financial risks.

3. **Financial sector objectives and role of financial regulation**

   The financial system provides seven key functions, including:

   - Efficient Resource Allocation between savers and users of funds;
   - Price Discovery and liquidity provision mechanism;
   - Enabling users to improve their risk management;
   - Enforcing governance and credit discipline through transparency and contractual obligations
   - Providing an efficient payments mechanism for the economy
   - Protection of property rights of users of the stakeholders because of the fiduciary function of intermediation
   - Distributive justice and fairness to all stakeholders.

   The last item needs some elaboration, as financial systems do not endogenously generate distributive justice. On the contrary, the inherent network concentration effects actually create risks of monopolistic financial institutions undertaking predatory behaviour at the expense of the weaker retail customers. One of the objectives of financial regulation and supervision is to ensure that financial institutions do not engage in such action.

   The goal of financial regulation is to influence the behaviour of financial market participants so that the policy objectives are achieved. Although different countries may have different policy goals, the common goals are efficiency of the financial system, its robustness in terms of capital adequacy, liquidity and resilience to shocks and adequate consumer protection.

   Conventionally, financial regulation and supervision comprises four types of regulatory policy – prudential regulation; conduct regulation; competition policy and serious fraud or criminal regulation. Regulatory approaches in the past have been institution-based, with regulatory agencies overseeing different classes of financial intermediation, such as banking, securities, insurance and long-term fund management. With the rise of universal banking, in which financial conglomerates provide the whole range of financial services either through financial holding companies of functional subsidiaries or through universal banks, the regulatory approach has shifted towards super-regulators or the so-called Twin Peaks approach, with one regulator looking after prudential supervision and another conduct regulation. The former oversees sound and well-capitalized financial operations, centred mostly on banks; whereas conduct regulation comprises conventionally securities regulation, covering transparency and disclosure, insider trading, market manipulation and consumer protection issues.

   The locus of competition policy can either reside with the functional financial regulator or sometimes hived off to a separate competition authority.

   The 2007/2009 global financial crises have sparked off a fundamental re-examination of financial regulation and the perimeter of financial policy. There is general awareness that narrow institution-based micro-prudential regulation is inadequate and should be supplemented with macro-prudential supervision.

---

4 See, for example, Stevens, G. (2010). *The Role of Finance*. The Shann Memorial Lecture, University of Western Australia, pp. 3.
At the same time, greater attention should be paid to systemic risk and systemically important financial institutions (SIFIs) and the Too Big To Fail (TBTF) problem, whereby SIFIs become so large and so powerful that the state is forced to underwrite these institutions in order to prevent systemic failure. Attention should also be paid to “shadow banking”, in order to ensure that “if the institution quacks like a duck, it should be regulated like a duck”.

3.1 The financial crisis inquiry commission report

The current global financial crisis has elicited several excellent studies and reviews at the regulatory and policy level\(^5\). The latest official document is the Financial Crisis Inquiry Commission (FCIC) Report published on 27 January 2011\(^6\), a 633 page document with more appendices to be published soon. The Report is relevant to this paper on crisis cartels because of the apparent omission of consideration of the role of excessive competition as one possible cause of the crisis. The majority view of the Report listed the usual suspects: that the crisis was avoidable, due to human faults; widespread failures in financial regulation and supervision; failures of corporate governance and risk management at SIFIs; excessive borrowing, risky investments, lack of transparency put system at risk; government was ill-prepared to manage crisis; systemic breakdown in accountability and ethics; trigger was bad mortgage-lending standards and securitization; and contributors were OTC derivatives and rating agency failures.

The three dissenting Republican members of the FCIC\(^7\) considered the Report as too broad and rejected as too simplistic a view that too little regulation caused the crisis. On the contrary, they took the view that too much regulation may have been a cause. They pointed out that the report ignored the global nature of the current financial crisis and argued that the causes should look beyond the housing to other bubbles. They focused on 10 key causes: credit bubble, housing bubble, non-traditional mortgages, credit ratings and securitization, financial institutions concentrated correlated risks, leverage and liquidity risk, contagion risks, common shock, financial shock and panic and financial crisis causes economic crisis.

Another lone dissenter, Peter Wallison of the American Enterprise Institute\(^8\), identified US government housing policies were the major contributor to the financial crisis. He alone identified that competition between the Government-sponsored enterprises (GSEs) and the Federal Housing Agency reduced underwriting standards that created the fragility of the trigger for the crisis. The trigger was failure of the 55 million non-traditional mortgages worth US$4.5 trillion that caused substantial losses to the system as a whole.

In our view, the complexity of the current financial crisis and its causes will give rise to more debates in the years to come. The majority view of the Report was correct in identifying that one major cause of the crisis was behavioural, due to greed and human faults, particularly regulatory and policy responses. However, the dissenters were also correct in identifying that the majority view was partial, by not putting the crisis in its global context. A system-wide crisis needs a system-wide view that is not only inch-deep and mile-wide, but also mile-deep and inch-wide.

For example, one of the glaring omissions of the Report was the lack of consideration of the role that competition and concentration in the financial sector played in the crisis, even though the Report identified earlier that “By 2005, the 10 largest U.S. commercial banks held 55% of the industry’s assets, more than

\(^{5}\) See Brunnermeier and others (2009); Commission of Experts (2009); De Larosiere (2009); Group of Thirty (2009); Turner (2009).

\(^{6}\) Available at www.fcic.gov.

\(^{7}\) Keith Hennessey, Douglas Holtz-Eakin and Bill Thomas, pg. 413-438.

\(^{8}\) FCIC Report (2011) pg. 441-538.
double the level held in 1990. On the eve of the crisis in 2006, financial sector profits constituted 27% of all corporate profits in the United States, up from 15% in 1980. Understanding this transformation has been critical to the Commission’s analysis.9”

Indeed, one omission of the Report was not to point out that mainstream economic theory failed to provide a holistic and systemic-wide view of the financial system and its vulnerability to crisis, instead inculcating policy-makers and regulators to focus on partial analysis and silo-based views that inevitably missed the big picture and the relevant details10. The economics profession is finally beginning to address its own deficiencies and also its own ethics in recent conferences11.

The major failures of the theory and practice of financial regulation in the crises economies were essentially four: failure to understand that the industry had morphed into the larger and under-regulated shadow banking industry; failure to appreciate the systemic risks of contagion and moral hazards; failure to appreciate that the financial sector had become larger than the real sector, too powerful to fail and almost too power to change; and finally failure to take courageous stands against the build up of risks.

The second omission was to discuss whether regulatory capture was one reason why the policy makers and financial regulators failed to act forcefully to stop or avert the crisis. Although the financial community denies this vehemently, we cannot ignore the perception, articulated by Johnson and Kwak12 and others, that economic capture by the financial community played some part in the current global crisis13.

If financial markets are inherently fragile and pro-cyclical, how much regulation is necessary to lessen the costs of financial crisis? The mainstream argument is that regulation and supervision should now be counter-cyclical, removing the pro-cyclical bias in current accounting and regulatory standards and “increasing sand in the wheels” when the risks increase.

From a cost-benefit point of view, it may be useful to consider financial regulation is seen as an insurance policy, in which, annual costs of regulation, opportunity costs on efficiency, and protection should on a discounted cash flow basis be less than the one-time event risk costs of massive financial crisis. Deregulation ignored the risk that it exacerbates the scale of the event risk of massive systemic failure. Over-regulation may increase costs of obstructing financial innovation and the unintended consequences of concentrating risks further, as moral hazard risks increase.

### 3.2 Finance and financial crisis: an alternative network analysis

In other words, it is important to think out of the box in examining how excessive competition and concentration may create crisis and the role of human behaviour and incentives play in financial systems and their regulation. Recognizing that finance is part of the whole economic and social system would highlight the fact that crisis is a systemic issue with many roots. Recognizing that it is human interaction with each other through individuals and institutions that create unpredictable outcomes should have moved

---

10 See work of Posner (2008) etc.
us out of static and linear neo-classical analysis into more complex dynamic adaptive behavioural science with Knightian uncertainty. By taking very partial analysis based on vested interests of bureaucracies legally and artificially broken down into silos, when financial markets are not just national but global and universal in functions, was a disaster waiting to happen.

As Kindleberger, Minsky and others have pointed out, crises, panics and manias are hardwired into financial systems. Financial systems are inherently fragile and pro-cyclical due to the herding behaviour, information asymmetry and highly complex, adaptive incentives, some of which is predatory in nature.

Hence, Goodhart’s insight that financial regulation policy is to change financial market participant behaviour for public policy objectives is crucial to understanding that the financial system is an interactive game between market regulates and regulators, in which both adapt to each other’s action and non-action. The complex interaction between the two could either be a negative feedback mechanism (whereby shocks settle back to equilibrium) or a positive feedback mechanism in which procyclical behaviour becomes larger and larger until the system crashes (the Soros thesis).

Given the fact that financial regulators are only human, with limited resources and limited information and powers limited by law, it is only understandable that political and market capture forces can actually limit their effectiveness and ability to change bad behaviour. Harvard Professor Malcolm Sparrow’s dictum on the regulatory craft to “Pick Important Problems, Fix Them and Tell Everyone”, is an experience-based, pragmatic advice not to treat all problems as important and fine-tune, but to prioritize and focus scarce resources (including political capital) on the most relevant issues.

This paper therefore takes a pragmatic approach in considering the Cartel Competition issue, particularly with respect to trade-offs between the Efficiency and Stability. Note that the objectives of public policy are very different depending on the stage of development of the different countries in question, and that the outcomes of different policies and different national conditions do not add up to an “inevitable” global stability. Indeed, it is argued that “one-size fit all” policies and solutions bring their own unintended consequences of fragility and instability.

In other words, at the global level, we can have global “principles of good public policy objectives”, but at the national level, with different levels of development and financial sophistication and local conditions, priorities and implementation of these “universal principles” can be very different. It is the diversity of policies and conditions that create conditions of systemic stability.

Using this perspective, it can be seen that what is seen as “efficient” from a mature, developed economy, may be coloured in a developing country perspective, because there is a development versus “pure efficiency” trade-off, since most developing economies prefer to nurture domestic institutions to global scale in order to compete effectively for nationalistic, employment or even knowledge-seeking objectives. This national versus global interest conflict is also prevalent in global trade and regulatory negotiations, with national interest more often than not placed before global interests.

There are lots of unknown unknowns (Knightian uncertainty) in calculating the size of the crisis loss. Hence, the policy maker’s real dilemma is to assess whether the rent is worthwhile price to pay. What could be a higher price is the loss to society from the lack of innovation. However, given the rapid spread of technology, most domestic economies could adopt foreign technology quite quickly.

The approach taken in this paper therefore is to view the financial system as part of the ecology of human institutions, in which finance is an interactive derivative of the real sector. The approach uses network theory as a framework to identify the systemic implications, which starts from the premise that
financial systems are interactive, adaptive games between market participants, including financial regulators.

In a seminal work, The Rise of the Network Society, Manuel Castells characterizes society in the information age as a set of global “networks of capital, management, and information, whose access to technological know-how is at the roots of productivity and competitiveness” (Castells 1996: 471). The widespread use of communication and computer technology in the last 30 years gave rise to increasing awareness that networks play a major role in the growth of financial markets. For example, Metcalfe’s law was a widely believed hypothesis that the value of networks was proportional to the square of the number of connected users of the system (Shapiro and Varian 1999)\textsuperscript{14}. The “law” gave competitors in the financial system a profit-and growth-driven rationale to integrate hitherto segmented markets and products, such as banking, insurance, fund management, and capital markets. This trend accelerated in the 1990s, as the philosophy of free markets imbued financial deregulation to permit previously legally segregated banks, insurance companies, securities houses, and funds to merge or form holding companies in a drive to offer one-stop financial services to the consumer and investor.

By the time of the 1997-98 Asian financial crisis, there was increasing awareness of the high degree of contagion among not just banks, but also whole financial systems and the complex interlinkages at the trade and financial levels (Sheng 2009a).

The collapse of Lehman Brothers on September 15, 2008, signified that the nature of modern financial crisis is unprecedented in its complexity, depth, speed of contagion and transmission, and scale of loss. Recent papers have been written on the network nature of the crisis (see Sheng 2005, 2009c; Haldane 2009).

3.3 Characteristics of networks

Firstly, a network is a set of interconnected nodes that have architecture. In particular, network architecture is essentially a tradeoff between efficiency and robustness or stability. There are three basic network topologies: the star or centralized network, the decentralized network, and the distributed network, with the star system being most efficient, as there is only one hub, but the most vulnerable in the event that the central hub fails. The widely distributed network, such as the Internet, is much more resilient to viruses and hacker attacks because of multiple hubs, where links can be shut down, bypassed, and repaired without damaging the whole system, even if a collection of important hubs is destroyed.

The transaction costs are lowered in the star network because linkage is through one central hub, with the hub enforcing standards and protecting property rights for links. Despite its efficiency, the star topology is fragile in the event that the single hubs for links or users actually results in different types of architecture as well as different benefits and costs to users.

Secondly, nodes do not connect with each other at random.

Thirdly, hubs and clusters are efficient, because of shortest route between two distant nodes may be through a hub.

Fourthly, preferential attachment between links and hubs and network externalities taken together explain why a “winner take all” situation is common to networks. In other words, networks demonstrate power law behaviour, in which a few hubs have much more links than most hubs. This is the

\textsuperscript{14} Scale free means that connectivity of nodes is not random, but exhibits power law characteristics. The term was coined by Barabasi (2003).
“concentration effect” in which very rapidly, a few key hubs (in financial market terms, clearing centres or large complex systemically important financial institutions (SIFIs)).

Fifthly, networks are scale free and not static, because each hub continually seeks to increase its links through its own competition or cooperation strategy.

Sixthly, since markets are by their nature competitive, they adapt and evolve around their environment.

The above insights have powerful implications for the way we look at financial markets and institutions (Sheng, 2005). In other words, domestic markets are networks of different networks, and property rights are cleared in hubs called exchanges and clearinghouses and protected through courts and regulatory agencies. The global market is a network of local networks, in which the weakest link is possibly the weakest node, link, cluster, hub, or local network. We do not know why or where the system is weak, until it is subject to stress. Hence, we need to look at global financial stability holistically or throughout the whole network to identify the weakest links.

To illustrate, the concentration of financial services is demonstrated in various subsectors (Table 1).

<table>
<thead>
<tr>
<th>Financial Services</th>
<th>Number of top players</th>
<th>Combined global share of business (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asset Custodian</td>
<td>Top 4 firms</td>
<td>60</td>
</tr>
<tr>
<td>Insurance brokerage</td>
<td>Top 3 firms</td>
<td>64</td>
</tr>
<tr>
<td>Foreign Exchange trading</td>
<td>Top 10 firms</td>
<td>64</td>
</tr>
<tr>
<td>Accounting Services</td>
<td>Top 4 firms</td>
<td>53</td>
</tr>
<tr>
<td>Equity underwriting</td>
<td>Top 10 firms</td>
<td>70</td>
</tr>
<tr>
<td>Debt underwriting</td>
<td>Top 10 firms</td>
<td>62</td>
</tr>
</tbody>
</table>

Source: Nolan and Liu (2007)

3.4 Network characteristics of the current global financial crisis

Viewing the global financial market as a network of national networks highlights several significant network features of the present crisis:

- The network architecture played a role in determining its fragility or vulnerability to crises. Network concentrations created a number of large SIFIs that dominate global trading and are larger than national economies. However, they are regulated by an obsolete regulatory structure that is fragmented into national segments and further compartmentalized into department silos, none of which has a system wide view of the network that allows the identification of system wide risks.

- Increasing complexity of networks is related to their fragility. Complexity is also positively correlated with the externalities of network behavior, and few regulators understood or were able to measure these externalities.

- The high degree of interconnectivity drove the value as well as the risks of hubs or financial institutions. The failure of one hub, such as Lehman Brothers, revealed interconnections that were not apparent to regulators, such as the impact on American International Group (AIG) that guaranteed through various financial derivatives the solvency of banks and investments.
• Networks have negative and positive feedback mechanisms due to the interactivity between players and between hubs and nodes as they compete. • There was no lack of information or transparency, but too much information that was not understandable.

• Regulators ignored the distorted incentive structures that promoted risk taking, and regulators failed to minimize moral hazard, even though there were clear lessons from earlier financial crises.

• The roles and responsibilities for network governance were not allocated clearly. In the absence of a single global financial regulator, effective enforcement of regulation across a global network requires complex cooperation between different regulators. There was a global “tragedy of the commons, whereby collective inaction led to huge regulatory arbitrage and a “race to the bottom”.

3.5 Financial policy trade off between stability and efficiency

The trade-offs between efficiency and stability, as well as competition and concentration, is well understood in financial sector policy. Although the majority of financial regulators subscribe to the benefits of greater competition, the natural conglomeration or concentration of financial institutions and anecdotal experience that larger financial institutions tend to survive financial shocks better than smaller ones have resulted in an ambivalent tolerance of greater concentration.

As summarized by the Competition Committee of the OECD Banking and Advisory Committee BIAC (2010), “on the one hand, there is a belief that more competition in banking results in greater instability and more market failures, other things being equal. This belief suggests that banks operating in a concentrated market (or in a market that restricts entry) will earn profits that can serve as a buffer against fragility, and as an incentive against excessive risk taking. Excessive competition could put more pressure on profits and may create higher incentives for banks to take greater (potentially excessive) risks, resulting in greater instability. This theory predicts that deregulation, resulting in more entry and competition, would ultimately lead to more fragility. It also holds that a more concentrated banking system might reduce the supervisory burden of regulators, thus enhancing overall stability.

The opposing view is that a more concentrated banking structure in fact results in more bank fragility. Such an environment is believed to enhance fragility by, for instance, allowing banks to boost the interest rates they charge to firms which may induce firms to assume greater risk, resulting in a higher probability of non-performing loans. A higher concentration of larger firms is also thought to increase contagion risk. In concentrated markets, it is presumed that banks will tend to receive larger subsidies via Too-Big To Fail policies, thereby intensifying risk-taking incentives and increasing banking system fragility. This perspective argues more greater need for supervision in a highly concentrated market with

15 The Competition Committee of the Business and Industry Advisory Committee (BIAC)’s submission to OECD’s 2010 Competition, Concentration and Stability in the Banking Sector, Roundtable Discussion.


17 Ibid.

18 Ibid.
the idea that concentrated banking systems tend to have larger banks, which offer an array of services, making them more complicated to monitor.\footnote{Ibid.}

3.6 Is there a trade-off?

In a literature survey on behalf of the Bank of Canada, Northcott (2004) examined the traditional perception that a competitive banking system is more efficient and therefore important to growth, but market power is necessary for stability in the banking system. There is no consensus in the theoretical literature as to whether perfect competition or market power best promotes allocative efficiency. In the traditional approach, perfect competition maximizes the quantity of credit available at the lowest price, and market power (the ability to profitably price above marginal cost) leads to a decrease in the quantity supplied and higher prices.

However, where there is asymmetric information, market power can increase a bank’s incentive to engage in relationship lending, which benefits opaque borrowers such as young firms that have no credit history or little collateral. By directing credit to higher-quality projects first, screening can improve allocative efficiency. The incentive to screen falls as the number of banks rises.

He concluded that it might be optimal to facilitate an environment that promotes competitive behaviour (contestability), thereby minimizing the potential costs of market power while realizing benefits from any residual that remains.

He found it very difficult to assess the contestability of a banking market. Recent work suggests that the number of banks and the degree of concentration are not, in themselves, sufficient indicators of contestability. Other factors play a strong role, including regulatory policies that promote competition, a well-developed financial system, the effects of branch networks, and the effect and uptake of technological advancements.

There is also no consensus in the literature as to which competitive structure optimizes both efficiency and stability. Competition is important for efficiency, but market power may also provide some benefits. Market power provides incentives for banks to behave prudently, but regulation can help ensure that banks behave prudently even in a competitive market. Neither competitive extreme (perfect competition nor monopoly) is likely ideal or even possible.

Therefore, Northcott concluded that it might not be possible to completely eliminate market power in banking. As a result, the goal may not be to eliminate market power, but to facilitate an environment that promotes competitive behaviour. In this way, the potential costs of market power are mitigated while perhaps realizing some benefits from residual market power.

There is no consensus in the literature as to which competitive structure optimizes both efficiency and stability. There are benefits to both, and neither extreme is likely ideal. Therefore, the goal may be not to eliminate market power but to facilitate an environment that promotes competitive behaviour (contestability). In this way, the potential costs of market power are mitigated while perhaps realizing benefits from any residual market power.

What does a contestable banking sector look like? There is a growing consensus in the literature that the traditional approach of equating few banks or concentration with market power is not enough. Concentration is not in itself a sufficient indicator of competitive behaviour. Other important factors are involved, such as less-severe entry restrictions, the presence of foreign banks, few restrictions on the
activities that banks can perform, well-developed financial systems, the effect of branch networks, and the effect and use of technological advancements. Because it requires an understanding of these various factors, an assessment of contestability in the banking sector can be very difficult and is likely to be specific to a particular country at a particular time. It is more complicated than it first appears to be.

3.7 Is there relationship between concentration and stability?

World Bank researchers Beck, T. et al (2005) studied the impact of national bank concentration, bank regulations, and national institutions on the likelihood of a country suffering a systemic banking crisis. Using data on 69 countries from 1980 to 1997, they found that crises are less likely in economies with more concentrated banking systems even after controlling for differences in commercial bank regulatory policies, national institutions affecting competition, macroeconomic conditions, and shocks to the economy. Furthermore, the data indicate that regulatory policies and institutions that thwart competition are associated with greater banking system fragility.

Some theoretical arguments and country comparisons suggest that a less concentrated banking sector with many banks is more prone to financial crises than a concentrated banking sector with a few banks (Allen and Gale, 2000, 2004). This is because concentrated banking systems may enhance market power and boost bank profits, that provide a “buffer” against adverse shocks and increase the charter or franchise value of the bank, reducing incentives for bank owners and managers to take excessive risk and thus reducing the probability of systemic banking distress (Hellmann, Murdoch, and Stiglitz, 2000; Besanko and Thakor, 1993; Boot and Greenbaum, 1993, Matutes and Vives, 2000). Furthermore, some hold that it is easier to monitor a few banks in a concentrated banking system than it is to monitor lots of banks in a diffuse banking system. For example, Allen and Gale (2000) argue that the U.S., with its large number of banks, has had a history of much greater financial instability than the U.K or Canada, where the banking sector is dominated by fewer larger banks.

The opposite view is that a more concentrated banking structure enhances bank fragility. Boyd and De Nicoló (2005) argue that the standard argument that market power in banking boosts profits and hence bank stability ignores the potential impact of banks’ market power on firm behavior. Similarly, Caminal and Matutes (2002) show that less competition can lead to less credit rationing, larger loans and higher probability of failure if loans are subject to multiplicative uncertainty. Second, advocates of the “concentration-fragility” view argue that (i) relative to diffuse banking systems, concentrated banking systems generally have fewer banks and (ii) policymakers are more concerned about bank failures when there are only a few banks. (pp.2)

An opposing view is that a more concentrated banking structure enhances bank fragility. First, Boyd and De Nicoló (2005) argue that the standard argument that market power in banking boosts profits and hence bank stability ignores the potential impact of banks’ market power on firm behavior. They confirm that concentrated banking systems enhance market power, which allows banks to boost the interest rate they charge to firms. As discovered in the current Global Crisis, in a concentrated banking system, the contagion risk of a single large bank failure with many interconnections could be more severe, resulting in

---


21 Smith (1984) argues that less competition can lead to more stability if information about the probability distribution of depositors’ liquidity needs is private. Matutes and Vives (1996), however, highlight the complexity of the linkages running from market structure, to competition, to bank stability and show that bank fragility can arise in any market structure.

22 The other argument is that banks in concentrated systems will be larger and better diversified than smaller banks. However, other empirical studies indicate that bank consolidation tends to increase the riskiness of bank portfolios.
a positive link between concentration and systemic fragility. Caminal and Matutes (2002) show that less competition can lead to less credit rationing, larger loans and higher probability of failure if loans are subject to multiplicative uncertainty.

The second set of arguments is that the fewer number of banks in a concentrated system will tend to receive larger subsidies through implicit “too important to fail” policies that intensify risk-taking incentives and hence increase banking system fragility (e.g., Mishkin, 1999). Beck et al.’s work indicates that crises are less likely in more concentrated banking systems, which supports the concentration-stability view. The negative relationship between concentration and crises held when conditioning on macroeconomic, financial, regulatory, institutional, and cultural characteristics and is robust to an array of sensitivity checks. However, their results also suggested that concentration might be an insufficient measure of the competitiveness of the banking system.

Unfortunately, the current financial crisis may very well challenge Beck’s work and suggest that beyond some degree of size or concentration, increased fragility may arise.

In a recent review of the Too Big To Fail issue (TBTF), Morris Goldstein and Nicholas Veron focused on the Transatlantic debate. They set out the TBTF policy issue as (a) exacerbating systemic risk (b) distorting competition and (c) lowers public trust due to privatization of gains and socialization of losses. The real issue that the TBTF problem extremely difficult to handle is that when the financial sector is on average five times larger (in asset size) than the real sector as measured by GDP and before the inclusion of shadow banking and derivative measures (US$673 trillion in notional terms), the question is whether the failure of the financial sector imposes too high costs on the real sector when it fails. The FCIC Report notes not only were the GSEs and investment banks too leveraged (75 to 1 and 40 to 1 respectively), they were major contributors to the lobbying and campaign funds. The GSEs provided US$162 million in lobbying costs and From 1999 to 2007, the financial sector expended $2.7 billion in reported federal lobbying expenses; individuals and political action committees in the sector made more than US$1 billion in campaign contributions. Both the Icelandic bank crises and the Ireland bank crises, where bank assets clearly exceeded national GDP are ample illustration that these large banks hold the nation to ransom when they threaten to fail.

Consequently, the real issue of TBTF is whether the financial sector could be allowed to grow infinitely due to leverage, make profits that generate bonuses for the management, while transferring massive failure costs to the public purse?

23 According to the literature that examines deposit insurance and its effect on bank decisions (e.g. Merton (1977), Sharpe (1978), Flannery (1989), Kane (1989), Keeley (1990), Chan, Greenbaum and Thakor (1992), Matutes and Vives (2000) and Cordella and Yeyati (2002)) – mis-priced deposit insurance produces an incentive for banks to take risk.

24 Highly concentrated banking systems may have high complexity and therefore may be tougher to monitor than a less concentrated banking system with many banks.

25 See also Claessens and Laeven (2004) who do not find any evidence for a negative relationship between bank concentration and a measure of bank competitiveness calculated from marginal bank behavior.

A fundamental question therefore is whether the profits of the financial sector are illusory or real? Haldane and others have begun to question whether the finance industry contributes substantially to social value or not, especially if the public sector bails out financial failures. A study at the Centre for Research on Socio-Cultural Change at the University of Manchester, claimed that while the banking sector paid £203 billion in tax in the five years up to 2006/07, this was more than offset by the cost of the £289 billion banking bail-out. Indeed, even the Chairman of the UK Financial Services Authority has claimed that some financial sector activities are “socially useless.”

In a prescient analysis of internal market forces that led to the current financial crisis, Hyman Minsky argued that “a bank that increases leverage without adversely affecting profits per dollar of assets increases its profitability. The combination of retained earnings and profitability of increased leverage can make the supply of financing grow so fast that the prices of capital assets, the prices of investment output, and finally, the prices of consumption output all rise.”

In other words, Minsky rightly saw that banking is an endogenous destabilizer of the capitalist market economy, because “the entrepreneurs of the banking community have much more at stake than the bureaucrats of the central bank.” “In a world with capitalist finance it is simply not true that the pursuit by each unit of its own self-interest will lead an economy to equilibrium.”

4. **Country experiences – Australia, Canada and China**

The crucial analytical debate of crisis cartels is whether the rent from cartels that the consumer pays will be higher than the total loss to society from a collapse of the key cartel hubs in a network environment or vice versa. Financial crises impose a stock loss as well as a flow loss. Hence, the difficult question to answer is whether the discounted cash flow value of the flow “rent loss” from cartels is less than the “stock loss” from financial crises.

Because size of financial crisis loss is ex ante unknown, there is an implicit willingness to tolerate bank concentration as insurance against crises, noting that concentration does not automatically mean cartels. Depends on context and path dependency (history). In resource rich/high commodity cycle economies such as Canada, Australia, Chile, Malaysia, the degree of banking supervision and tolerance for cartels are higher, with stronger emphasis on supervision oversight but financial repression on mild basis (i.e. open to foreign competition, but limited penetration.

According to OECD (2010), “the resiliency of Canada and Australia to the recent financial crisis seems to suggest that more concentrated financial systems are more resilient to financial distress.”

4.1 **The case of Australia**

The Australian banking market is characterized as high levels of concentration. The four major banks have: (1) 70% of household savings; (2) 70% of household loans; (3) 71% of personal lending; and (4) 68% of business lending.

---

28 Minsky, op.cit. pg. 279 and 280.
29 The Competition Committee of the Business and Industry Advisory Committee (BIAC)’s submission to OECD’s 2010 Competition, Concentration and Stability in the Banking Sector, Roundtable discussion.
30 The Competition Committee of the Business and Industry Advisory Committee (BIAC)’s submission to OECD’s 2010 Competition, Concentration and Stability in the Banking Sector, Roundtable discussion.
In particular, in mid 2008, Australian Competition and Consumer Commission (ACCC) approved acquisition of the 5th largest bank by one of the big 4. The four major banks – Commonwealth Bank of Australia (CBA), Westpac Banking Corporation (Westpac), National Australia Bank (NAB) and Australia and New Zealand Banking Corporation (ANZ) – are large relative to their competitors, and make up a substantial proportion of the market in business and household lending and deposit-taking. They also facilitate financial markets by performing functions, such as securities underwriting, alongside global investment banks. In addition to banking activities, each of the major banks provides a range of other financial services such as insurance and wealth management.

Australia’s four largest banks have historically accounted for the majority of market share for deposits, credit cards, personal lending and mortgages (table 4.1).

<table>
<thead>
<tr>
<th>Year</th>
<th>Share of Assets 4 largest banks</th>
<th>HH index (a)</th>
<th>Share of Deposits 4 largest banks</th>
<th>HH index (b)</th>
<th>Share of Home Loans 4 largest banks</th>
<th>HH index (b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1890</td>
<td>0.34</td>
<td>0.06</td>
<td>0.38</td>
<td>0.10</td>
<td>0.34</td>
<td>0.18</td>
</tr>
<tr>
<td>1913</td>
<td>0.63</td>
<td>0.14</td>
<td>0.64</td>
<td>0.15</td>
<td>0.63</td>
<td>0.21</td>
</tr>
<tr>
<td>1950</td>
<td>0.68</td>
<td>0.16</td>
<td>0.68</td>
<td>0.16</td>
<td>0.68</td>
<td>0.21</td>
</tr>
<tr>
<td>1990</td>
<td>0.66</td>
<td>0.12</td>
<td>0.65</td>
<td>0.12</td>
<td>0.66</td>
<td>0.15</td>
</tr>
<tr>
<td>Oct 2008</td>
<td>0.65</td>
<td>0.11</td>
<td>0.65</td>
<td>0.12</td>
<td>0.65</td>
<td>0.15</td>
</tr>
<tr>
<td>July 2009</td>
<td>0.74</td>
<td>0.15</td>
<td>0.78</td>
<td>0.16</td>
<td>0.74</td>
<td>0.27</td>
</tr>
</tbody>
</table>

(a) Data refers only to activities of banks (a subset of ADIs). Data excludes all activities of credit unions, building societies, and non-ADI lenders. Consequently, the actual concentration and HH index values are lower than stated.

(b) The Herfindahl-Hirschman concentration index (which can vary from 0 representing perfect competition to 1 representing monopoly; a market with X equally-sized competitors will have an index of 1/X).

(c) Assuming all owner-occupier housing loans were made by savings banks and accounted for all their loans.

Source: Report on Bank Mergers, Australian Senate Economics Committee, September 2000

The increase in concentration in the banking sector reflects consolidation over time, as well as the more recent effects of the global financial crisis. Despite the new entries, the total number of participants has fallen since the late 1990s, with mergers and acquisitions outweighing the new entrants. There was a significant merger of smaller institutions, with credit unions declining from 213 in 2001 to 143 in 2008.

Despite this increase in concentration, the Herfindahl-Hirschman index (HHI), calculated only for banks suggests that with respect to both assets and deposits, the Australian market remains relatively competitive, below the USA’s threshold of 0.18 for considering an industry to have high concentration.

The Australian banking sector became more concentrated during the global financial crisis, reflecting consolidation through mergers. Foreign banks also scaled back operations due to funding constraints, even as securitization markets closed. The larger banks embarked on acquisitions of the smaller banks.

So far, the mergers and acquisitions involving the banking sector have been carefully assessed by the independent ACCC, which did not prevent the on-going consolidation.

32 United States Department of Justice, Horizontal Merger Guidelines, subsection 1.51.
It would be useful to note that in December 2010, the Governor of the Reserve Bank of Australia, in his submission to the Australian Senate review of competition in the Australian banking system, was basically satisfied with the state of competition in the Australian financial sector, arguing that “the market remains more competitive than it was in the mid-nineties and borrowers have access to a larger range of products than they once did. The overall availability of finance to purchase housing, in particular, seems to be adequate”.

4.2 The case of Canada

Historically, from 1920 to 1980, Canada consistently had 11 banks (Bordo 1995). In Prior to 1980, the financial services industry had been segmented by legislation along traditional product lines, such as commercial banking, trust business, insurance underwriting and brokerage, and securities underwriting and dealing. There were also limits on the entry of foreign banks into the Canadian market. In 1987, the Office of the Supervisor of Financial Institutions was created by legislation, as it was recognized that financial markets were cutting across traditional lines and needed to be supervised differently. Since then, there was greater entry of foreign financial institutions and by the end of 2006, there were 22 domestic banks and 50 foreign banks operating in Canada, of which 26 were foreign bank subsidiaries and 24 foreign bank branches.

Canada has a highly concentrated banking market; for example, the largest six banks account for more than 90 per cent of the assets in the banking system. Canada’s Herfindahl-Hirschman Index as measure of bank concentration suggests a medium to high degree of market concentration. However, concentration indices neglect the competition (especially in retail and small-business banking) provided by over 1,000 credit unions and caisses populaires in Canada.

In an authoritative study of efficiency and concentration of Canadian banking by the Bank of Canada, Allen and Engert conclude that overall, despite the concentration, Canadian banks appear to be relatively efficient producers of financial services, including relative to their US neighbours. More important, the research suggested that Canadian banks do not exercise monopoly or collusive-oligopoly power, and that banking can be considered to be a monopolistically competitive industry.

One can observe that both Canadian and Australian policy makers and legislatures were keenly aware of the trade-off between concentration, stability and efficiency. Both countries have had regular policy reviews, such as the Australian Campbell and Wallis reports on their financial sectors, to reassure the policy makers and legislatures that the legacy concentrated financial structure was not at the expense of market efficiency and social equity. Consequently, both economies’ past legislative and regulatory changes have pushed for efficiency in domestic financial services, through improving contestability, particularly from foreign entrants. At the same time, the regulatory philosophy in both economies erred on the conservative side, not allowing undue financial innovation and excess competition to push risk frontiers to breaking point.

For example, in the 2002 review of Canadian banking efficiency and consolidation, the Canadian Senate Standing Committee felt that “bank mergers are a valid business strategy, and that they would contribute to Canadian growth and prosperity. We also believe that the Public Interest Impact Assessment, as well as the reviews by the Office of the Superintendent of Financial Institutions and, more particularly, the Competition Bureau – along with any needed undertakings and commitments – will ensure the

---

33 Australia Senate (2010).
34 Allen and Engert (2007).
35 Canada Senate Standing Committee (2002).
competition in the financial services sector that is needed to protect the public interest. Canadian banks are strong now. They could be stronger in the North American marketplace and in world markets, provided that they are allowed to pursue appropriate business strategies while safeguarding the public interest.”

4.3 The case of China

China is a classic case of banking being viewed as a service to the real economy. From 1949 to 1979, when the banks were nationalized, the country adopted a Soviet-style mono-banking system, with the People’s Bank of China being the central bank as well as provider of the payments mechanism, and banks were legally part of the central bank. After 1979, the banking system was gradually devolved into large commercial banks and policy banks. Large-scale reforms in the banking system occurred in the 1990s, when it was decided to commercialize and eventually publicly list the largest banks. With the coming into force of the WTO membership in 2001, China has opened up doors to foreign competition in the banking and financial services in 2007.

In 2003, the decision was taken to create an institutional based financial regulatory structure, with the hiving off of the bank regulatory function from the central bank. The current financial regulatory structure comprises the central bank in charge of monetary policy and systemic financial stability, the China Banking Regulatory Commission (CBRC) overseeing the banking sector, the China Securities Regulatory Commission (CSRC) in charge of securities and capital market area and the China Insurance Regulatory Commission in charge of insurance. Overall a Financial Stability Committee chaired by a Vice Premier, comprising not only the central bank and the three financial regulators, but also the ministry of finance and the national development reform council, undertakes coordination of financial stability.

As of end-2009, China’s banking sector comprised 2 policy banks and China Development Bank (CDB), 5 large commercial banks, 12 joint-stock commercial banks, 143 city commercial banks, 43 rural commercial banks, 196 rural cooperative banks, 11 urban credit cooperatives (UCCs), 3,056 rural credit cooperatives (RCCs), one postal savings bank, 4 banking asset management companies, 37 locally incorporated foreign banking institutions, 58 trust companies, 91 finance companies of enterprise groups, 12 financial leasing companies, 3 money brokerage firms, 10 auto financing companies, 12 financial leasing companies, 3 money brokerage firms, 10 auto financing companies, 148 village and township banks, 8 lending companies and 16 rural mutual cooperatives. The total number of banking institutions registered at 3,857, which had approximately 193,000 outlets and 2.845 million employees.

As of end-2009, the total assets of China’s banking institutions increased by 26.3% to RMB78.8 trillion (US$11.5 trillion), with total equity growing by 17% to RMB4.4 trillion (US$644 billion). As of the end of 2009, the weighted average CAR of China’s banking industry stood at 11.4% of risk assets. All 239 commercial banks satisfied the minimum CAR requirement. As of end-2009, the NPLs of commercial banks measured by the five-category loan classification criteria amounted to RMB497.3 billion, with the NPL ratio at 1.58 percent of total loans.

Large commercial banks, joint stock commercial banks and rural cooperative institutions were the largest three types of banking institutions by asset size, accounting for 50.9%, 15.0% and 11% percent of the total banking assets respectively in 2009. Foreign banks accounted for roughly 2% of total bank assets, even though their branch network is rising rapidly.

In other words, China’s banking system demonstrated a phase of devolution and then re-concentration. Even though the largest banks retained the largest share of the banking business, the small urban and rural cooperatives, as well as the postal banking system provided the bulk of the branch

networks. However, problems in their governance and operations led to a phase of both consolidation and new entrants.

In 2009, urban credit cooperatives (UCCs) and city commercial banks also made breakthroughs in resolving their historical structures. By the end of 2009, the number of UCCs was reduced from 37 to 11, and some city commercial banks completed their NPLs disposal and corporate restructuring.

Since its establishment in 2003, the CBRC has embarked on a comprehensive reform of the structure of the financial system, concentrating on strengthening the largest financial institutions, and consolidating and reforming the smallest rural and urban financial institutions. There were not only mergers, but also new entrants. The basic policy was to improve financial services in the rural areas, particularly in the under-served Western and Central regions of China. In 2009, a total of 43 rural commercial banks and 196 rural cooperative banks were incorporated. Among them, 6 banks located in Wuhan, Ma’anshan, Chengdu, Guangzhou, Dongguan and Jiangnan were approved to commence business.

Given the priority to reform the banking industry as a matter of priority, competition issues were left to market forces, as the industry began to shed their historical legacy non-performing loans and improve their corporate governance. The WTO accession agreement in 2001 to allow foreign entry in 2007 was a deliberate policy move to increase competition to the domestic banks and to raise the quality of financial services.

The competition law is new in China and not yet fully applicable in banking. As competition intensifies in China as domestic and foreign banks continue to compete in terms of products and services, the CBRC is beginning to deepen its research into competition issues, not just within the banking industry, but also competition in financial services in general.

4.4 Competition law in China 38

The China’s Anti-Monopoly Law (AML) was enacted on 30 August 2007 and came into effect on 1 August 2008. It is modeled on EU competition law and includes provisions governing anti-competitive or so-called ‘monopoly’ agreements (e.g. cartels), abuse of dominance and merger control.

The AML applies to ‘monopolistic conduct within China’ but also to ‘monopolistic conduct’ outside China that ‘eliminates or had a restrictive effect’ on competition in the Chinese domestic market. For the purposes of the AML, ‘China’ covers mainland China only, and notably therefore excludes Hong Kong (which has recently published its own comprehensive competitive Bills).

The AML contains broad principles that will guide antitrust enforcement in China. Many of the details of how the AML will be enforced in practice are yet to be specified in the implementing regulations and guidance, much of which is still in draft form.

Nearly two years after the AML took effect, many uncertainties still exist and a number of questions remain open, some of which arise out of the unique features of the Chinese political and economic environment.

38 Freshfields Bruckhaus Deringer LLP (2010).
4.4.1 The enforcement agencies

From an organizational point of view, a complex institutional structure exists at two levels of administration and enforcement:

- On the upper level, the Anti-Monopoly Commission (AMC), which reports directly to the State Council, is responsible for policy formulation and co-ordination; and

- On the lower level, no less than three anti-monopoly enforcement agencies (AMEAs) have been designated to be responsible for day-to-day enforcement of the AML:
  - the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) has exclusive responsibility for merger control review.
  - the National Development and Reform Commission (NDRC), being the country’s price regulator, is responsible for the enforcement of those aspect of the AML relating to monopoly agreements and abuse of dominance that are price-related; and
  - the State Administration for Industry and Commerce (SAIC) has responsibility for the enforcement of those aspects of the AML relating to monopoly agreements and abuse of dominance that are not price-related.

The policy issues with respect to banking are still being debated internally and the international best practice and experience is being studied and evaluated.

5. Conclusion

This brief survey of the literature and experience in crisis cartels in banking suggest that there is a “natural” tendency for finance as a network industry to concentrate. Although larger financial institutions with larger network footprints can gain economies of scale and therefore profitability, the current financial crisis suggests that beyond a certain size there are systemic fragilities and political economy questions that have not been understood and debated sufficiently to date.

The first policy consideration is whether financial institutions that are very large relative to their competitors would engage in “monopolistic” behaviour that have large conflicts of interest and also engage in “predatory behaviour” at the expense of their customers and also competitors. So far, it is not possible to generalize this from the evidence to date, but such behaviour does exist in practice. It is a problem that may be solved through better enforcement.

The second policy consideration that has been highlighted by the financial crisis, but has not been solved satisfactorily, is the policy economy question when the finance industry becomes so large to the real sector, that they become TBTF and Too Powerful to Fail. Even though the current regulatory reforms have begun to put in counter-cyclical capital requirements and attempts to put in overall leverage ratios, the lobby power of the industry has been able to dilute the Volcker rule and also delay implementation of these constraints, subjecting them to further study and possible exemptions.

Because theoretically, no one has yet satisfactorily determined the limits of finance generating social value through growth and leverage, there is as yet no satisfactory answer to the question of limits on bank or financial institution size. The incentives of bank management to increase leverage to generate higher bonuses for themselves at the expense of systemic stability have not been completely solved. The Asian financial systems do not cause political economy issues in the sense that the largest of them are essentially
government owned or subject to government policy controls. On the other hand, it can be seen that in the Australian and Canadian case, where legislatures are aware of the excessive concentration powers of the banking industry, there are periodic reviews of their efficiency, stability and regulatory efficacy, they were able to avoid the consequences of crisis failure so far.

In congruence with the findings of Evenett and others, there’s no “one policy fits all” choice, given the differences in stages of development and institutional and political economy legacy considerations.

This paper argues that it is more important for national policy makers to understand the “best fit” of global “best principles and practices” to their own domestic conditions. The role of the international financial institutional community is to check whether national policies conflict with the “best principles and practices” and to point out where these inconsistencies, gaps and overlaps may lead to systemic issues or costs at the global level. Through FSAPs and regional surveillance, it would be possible to assess whether national and regional policies and practices have global implications.

The logic for this line of thinking is both pragmatic and realistic. Given the difficulties in measuring ex ante the costs of alternative policy options and regulatory action at the national and global level, it seems unrealistic to impose “one size fits all” crisis cartel rules or laws globally. There is no question that the local policy maker understands domestic conditions better and has the sovereign legitimacy to choose the right balance in order to achieve Efficiency and Stability as well as promote innovation. The role of the international community is to advise and provide technical expertise (and best international experience) for the national policy maker to make the balance between national interests and global interests.

In conclusion, the debate over crisis cartels in finance is still a work-in-progress. Much needs to be done to consider the complex issues at hand.
REFERENCES


Jason Allen and Walter Engert, Efficiency and Competition in Canadian Banking


Canada, Standing Senate Committee on Banking, Trade and Commerce, “COMPETITION IN THE PUBLIC INTEREST: LARGE BANK MERGERS IN CANADA” The Sixth Report, December 2002


Economist, Dismal ethics, Economics Focus, The Economist, 8 January 2011, p.74.

Simon J. Evenett, Crisis Cartels”, OECD, University of St. Gallen, January 2011.

Freshfields Bruckhaus Deringer LLP (2010) Overview of Chinese Competition Law


OECD Competition Committee of the Business and Industry Advisory Committee (BIAC)’s submission to OECD’s 2010 Competition, Concentration and Stability in the Banking Sector, Roundtable discussion.


UN Commission of Experts of the President of the General Assembly. 2009.

“Recommendations on Reforms of the International Monetary and Financial System.” United Nations, New York (March 19). Available at

M. Andrew SHENG

1. Introduction

Le présent document se propose de dresser un état des lieux des réflexions menées sur les ententes de crise dans le secteur des services financiers en se fondant sur l’expérience d’un certain nombre de pays, et notamment de la Chine. L’expression « entente de crise » est relativement nouvelle pour les autorités de surveillance financière, du fait que les notions de concentration/stabilité et d’efficience sont par nature difficilement conciliables, voire contradictoires. En effet, les effets de réseau des marchés financiers vont dans le sens d’une plus grande concentration, une tendance que les instances de réglementation bancaire ont tolérée en partant du principe que plus une institution est grande, plus elle est stable, et plus les marchés sont stables. Cette illusion a été balayée par la crise financière mondiale de 2007/2009 au profit d’une prise de conscience de problèmes d’une autre nature, ceux inhérents à la concentration et au pouvoir, que posent les entreprises dites trop grandes pour qu’on les laisse faire faillite.

Ce document s’articule de la façon suivante. La section II donne une présentation succincte du concept d’entente de crise et pose la question du bien-fondé de ce comportement et de sa pertinence dans le secteur financier. La section III analyse les objectifs du secteur financier et de la surveillance financière et se propose de déterminer si les ententes de crise sont légitimes en mettant en balance les avantages et les inconvénients de la stabilité et de l’efficience. La section IV passe en revue l’expérience d’un certain nombre de systèmes financiers en matière de concentration bancaire/financière. Enfin, la section V tente de tirer certaines conclusions et suggère divers axes de recherche et de débats de politique publique.

2. Ententes de crise – Définition et enjeux

Par entente de crise, on entend « toute entente constituée pendant une crise économique grave de portée sectorielle, nationale ou mondiale sans l’accord ni l’encouragement des autorités de l’État… ou… toute situation dans laquelle les pouvoirs publics ont autorisé, et dans certains cas encouragé, toute entente entre plusieurs entreprises pendant diverses crises économiques de portée sectorielle, nationale ou mondiale ».

Evenett, Levenstein et Suslow distinguent trois catégories d’ententes internationales. La première catégorie rassemble les ententes dites « injustifiables » entre producteurs privés d’au moins deux pays, qui coopèrent pour contrôler les prix ou se répartir des parts de marché dans le monde entier. La deuxième catégorie regroupe les ententes à l’exportation entre acteurs privés, dans lesquelles des producteurs d’un pays, indépendants, et ne présentant aucun lien avec l’État, prennent des mesures visant à fixer des prix ou à se répartir des parts de marché sur des marchés à l’exportation uniquement, à l’exclusion du marché national. Pour ce qui est de la troisième catégorie d’ententes, il s’agit d’ententes à l’exportation mises en place à l’initiative de l’État.

Dans la droite ligne de la théorie néoclassique, selon laquelle les ententes servent à fixer les prix et à diminuer la production tout en entravant la répartition efficace des marchés, la plupart des autorités de la concurrence voient d’un mauvais œil la formation d’ententes. Comme l’ont montré les travaux réalisés en

---

la matière par Evenett (1999), des économistes tels que Ha Jun Chang (1999) soutiennent que la concentration d’entreprises dans les marchés émergents peut se traduire par des économies d’échelle susceptibles de compenser le coût social d’un monopole. Ainsi les marchés émergents de l’Asie de l’Est ont-ils eu tendance à permettre la concentration de certains secteurs avant d’introduire des règles de concurrence visant à lutter contre les ententes. Par exemple, au regard de la plupart des règles dont elle s’est dotée, Hong-Kong passe pour être la plus libérale des économies de marché, mais n’a en revanche pas encore adopté de droit de la concurrence.

D’après Evenett, aucun décideur politique de l’Asie de l’Est n’aurait fait de déclaration étayant le point de vue de Ha, selon lequel le modèle de croissance est-asiatique tolère les entreprises monopolistiques au détriment d’une fixation optimale des prix. Néanmoins, la plupart des données relevées sur le terrain abondent dans le sens de Ha.

Levenstein et Suslow (2006) constatent que de nombreuses ententes résistent à l’épreuve du temps, leur durée de vie moyenne s’établissant à environ cinq ans, tout en sachant que bon nombre d’entre elles prennent fin très rapidement (dans un délai inférieur à un an), tandis que certaines perdurent plusieurs décennies. Peu d’éléments attestent que les ententes ont la capacité d’augmenter le prix et les bénéfices à des degrés divers. Les ententes peuvent aussi affecter d’autres paramètres que les prix, et notamment la publicité, l’innovation, l’investissement, les barrières à l’entrée et la concentration du secteur.

Les ententes peuvent se former dans des périodes de récession où la demande est inférieure à la capacité de production, pour éviter aux acteurs majeurs de se retrouver en situation d’insolvabilité et de devoir quitter le marché. Parallèlement, étant donné qu’ils sont soucieux de favoriser l’emploi, les pouvoirs publics peuvent tolérer la constitution d’ententes et appliquer avec laxisme le droit de la concurrence. Levenstein et Suslow (2006) suggèrent que le laxisme en matière de lutte contre les ententes pendant les périodes de récession économique peut réduire l’effet des incitations faites aux producteurs pour développer leurs ventes et employer du personnel – ces mesures étant précisément celles nécessaires pour remettre une économie sur les rails. Alors dépourvues de toute contrainte concurrentielle, les ententes augmentent leurs prix, diminuent leur production et réduisent leurs effectifs et leurs coûts, aggravant d’autant la contraction de l’économie. La suspension du droit de la concurrence pendant la Dépression était justement la voie à ne pas suivre puisqu’elle a limité l’effet des incitations faites aux producteurs pour accroître la production et développer l’emploi.

Cela étant, les ententes échouent en raison de forces du marché qu’elles ne peuvent contrôler. Tel peut être le cas lorsque des membres d’une entente trichent concernant leurs ventes ou leur production et qu’il n’existe pas de contrôle efficace2. Les ententes doivent aussi savoir faire face aux défis posés par l’arrivée de nouveaux entrants qui ne souhaitent pas partager les règles de l’entente en place, ou encore trouver des solutions si elles échouent à se mettre d’accord sur la façon d’ajuster la collusion au vu de la conjoncture économique. Une guerre des prix éclate lorsque les membres ne parviennent pas à trouver ou à atteindre des positions mutuellement compatibles. Les ententes les plus élaborées sont celles dont les membres sont capables de mettre au point des stratégies multiformes pour se surpasser les uns les autres afin de dissuader toute velléité de tricherie, et d’imaginer toute sorte d’intervention visant à renforcer les barrières à l’entrée.

L’une des questions centrales est celle de savoir si les ententes de crise peuvent être justifiées. Dans son analyse approfondie des textes publiés en la matière, Evenett conclut ce qui suit : « les évaluations empiriques des ententes de crise sont incomplètes. On sait très peu de choses, par exemple, sur la portée du préjudice fait aux clients d’une entente de crise. Cela dit, on sait que les ententes de crise ont eu tendance à réduire la production et à augmenter les prix, bien que cela ait été contesté dans certains cas. À la lumière de ces informations, il serait difficile de soutenir que les ententes de crise n’ont eu aucun effet ».

Au vu de l’ensemble des éléments dont on dispose à ce jour, Evenett maintient que : « rien ne justifie une révision de l’hypothèse retenue dans les normes internationales, selon laquelle les ententes dites injustifiables devraient être découragées. La récente crise économique mondiale ne constitue pas, elle non plus, un motif suffisant pour inverser la tendance qui, depuis vingt ans, vise à intensifier la répression des ententes injustifiables3 ».

Le présent document soutient que, même si les marchés financiers sont ceux qui se rapprochent le plus de l’idéal de marché efficient, le développement (en tant que processus permettant de tirer des enseignements sur la croissance institutionnelle) s’oppose à l’efficience concurrentielle. Historiquement, les économies mercantilistes ont recouru à des politiques protectionnistes ou permis l’existence de « champions » (présentant des caractéristiques monopolistiques) pour stimuler la croissance afin de réaliser des économies d’échelle pour affronter la concurrence internationale. Dans une ère de mondialisation caractérisée par l’abaissement des barrières tarifaires et par les accords de libre-échange de l’OMC, les entreprises et les institutions financières des marchés émergents sont confrontées à une concurrence accrue des acteurs étrangers. Tous s’accordent à dire que l’intensification de la concurrence a été bénéfique en ce qu’elle a stimulé l’innovation et l’efficience. Cela étant, dans le secteur financier, les barrières à l’entrée des acteurs étrangers sur les marchés nationaux n’ont pas encore été toutes levées, car il n’existe aucun accord de l’OMC dans le domaine des services financiers. Vu la récente contagion de la crise financière mondiale, la précaution est de mise parmi les autorités lorsqu’il s’agit de toucher au compte-capital et de laisser s’installer sur leur sol des institutions financières étrangères, de peur de ne pas être en mesure de faire face aux risques systémiques et à d’autres risques financiers.

3. **Objectifs du secteur financier et rôle de la réglementation financière**

Le système financier remplit les sept fonctions clés suivantes4 :

- Répartition efficace des ressources entre épargnants et usagers de fonds ;
- Mécanisme de détermination des prix et de fourniture de liquidités ;
- Permettre aux usagers d’améliorer leur gestion du risque ;
- Faire respecter les principes de gouvernance et de discipline du crédit grâce à la transparence et au respect des obligations contractuelles ;
- Constituer pour l’économie un mécanisme de paiement efficace ;
- Protéger les droits de propriété des utilisateurs des parties prenantes au titre de la fonction fiduciaire de l’intermédiation ;
- Justice distributive et équité pour toutes les parties prenantes.

Le dernier point de cette liste appelle à certains éclaircissements, car les systèmes financiers ne génèrent pas d’eux-mêmes la justice distributive. En revanche, la concentration des réseaux pose effectivement le risque de voir les institutions financières à caractère monopolistique engager des comportements prédateurs au détriment des clients de détail, par essence plus faibles. L’un des objectifs de la réglementation et de la surveillance financière est de veiller à ce que les institutions financières ne se livrent pas à de telles activités.

---

4 Voir, par exemple, Stevens, G., *The Role of Finance*, 2010, The Shann Memorial Lecture, University of Western Australia, p. 3.
La réglementation financière vise à influencer le comportement des participants du marché financier de sorte que les objectifs de politique publique soient atteints. Ces objectifs peuvent, certes, varier d’un pays à l’autre, mais certains sont communs à toutes les juridictions : efficience du système financier, robustesse de ce dernier en termes d’adéquation des fonds propres, de liquidité et de résistance aux chocs, et enfin protection adéquate du consommateur.

Traditionnellement, la réglementation et la surveillance financières englobent quatre types de politiques réglementaires – la réglementation prudentielle, la réglementation comportementale, la politique de la concurrence et la réglementation pénale ou applicable aux fraudes graves. Dans le passé, les approches réglementaires ont été orientées sur les institutions, les instances de réglementation ayant pour rôle de surveiller différents types d’intermédiation financière, comme les activités bancaires, les valeurs mobilières, l’assurance ou encore la gestion de fonds à long terme. Avec l’essor de la banque universelle, qui a vu l’avènement de conglomérats financiers proposant tous les types de services financiers soit par l’intermédiaire de sociétés financières holding détenant des filiales fonctionnelles, soit par l’intermédiaire de banques universelles, l’approche réglementaire a évolué vers le recours à des super régulateurs. Également appelée approche Twin Peaks, cette alternative repose sur une instance de réglementation chargée de la surveillance prudentielle et sur une autre instance, chargée quant à elle de la réglementation comportementale. La première veille à ce que les opérations financières soient saines et bien financées et s’intéresse principalement aux banques, tandis que la réglementation comportementale concerne habituellement la réglementation des valeurs mobilières, et couvre les questions de transparence et de communication d’informations, les délits d’initiés, les manipulations de marché et la protection du consommateur.

La politique de la concurrence peut être confiée à l’instance de réglementation financière fonctionnelle ou être parfois transférées à une autorité de la concurrence distincte.

Les crises financières mondiales de 2007/2009 ont suscité un réexamen profond de la réglementation financière et du périmètre de la politique financière. De manière générale, on sait que la réglementation micro-prudentielle fondée sur les institutions n’est pas adaptée en raison de son caractère trop restrictif, et qu’elle devrait être complétée par une surveillance macro-prudentielle. Parallèlement, une plus grande attention devrait être accordée au risque systémique et aux institutions financières systématiquement importantes (systemically important financial institutions - SIFI), ainsi qu’au problème des entreprises trop grandes pour qu’on les laisse faire faillite. En effet, les SIFI deviennent tellement grandes et si puissantes que l’État est contraint de les garantir afin d’éviter tout effondrement du système. Il convient également de s’intéresser au secteur bancaire « caché », afin de s’assurer que « chaque institution reçoive bien le traitement qui lui correspond ».

3.1 Le rapport de la commission d’enquête sur la crise financière

Face à la crise financière mondiale actuelle, diverses études et analyses ont été réalisées sur les politiques publiques menées et sur la réglementation en vigueur. Le dernier document officiel publié à cet égard est le rapport de la Commission d’enquête sur la crise financière (Financial Crisis Inquiry Commission - FCIC), paru le 27 janvier 2011, un document de 633 pages, dont certaines annexes sont encore à paraître. Ce document présente un intérêt pour le présent rapport sur les ententes de crise en ce qu’il semble omettre de prendre en compte l’excès de concurrence comme l’une des causes possibles de la crise. Le point de vue prédominant développé dans ce rapport énumère les habituels constats, à savoir que la crise était évitable, qu’elle trouve son origine dans des erreurs humaines, des manquements généralisés


en matière de réglementation et de surveillance financière, des manquements en matière de gouvernance d'entreprise et de gestion des risques au sein des SIFI, un recours excessif à l'emprunt, des investissements risqués et un manque de transparence qui a mis en danger le système. Selon ce même point de vue, les pouvoirs publics étaient mal préparés à gérer la crise, laquelle a mis en exergue une défaillance systémique de l’obligation de rendre des comptes et du respect de l’éthique. Enfin, les mauvaises pratiques en matière d’octroi de prêts immobiliers et de titrisation ont été l’élément déclencheur de la crise, à laquelle ont contribué les produits dérivés négociés de gré à gré (OTC) ainsi que les carences des agences de notation.

Les trois membres républicains de la FCIC ayant exprimé une opinion divergente ont quant à eux estimé que le rapport était d’une portée trop générale et ont rejeté l’idée que la crise avait été provoquée par un manque de réglementation, jugeant ce point de vue trop simpliste. Ils ont au contraire argumenté qu’un excès de réglementation pouvait figurer parmi les causes de la crise. Ces trois membres ont souligné que le rapport ne tenait pas compte de la dimension mondiale de l’actuelle crise financière et ont affirmé que ses causes devraient être cherchées au-delà de la bulle immobilière et des autres bulles. Ils ont concentré leurs efforts sur 10 causes principales : la bulle du crédit, la bulle immobilière, les hypothèques non traditionnelles, les agences de notation et la titrisation, les risques corrélés concentrés des institutions financières, le risque de levier de l’endettement et le risque de liquidité, les risques de contagion, le choc général, ainsi que le choc et la panique financiers, étant entendu que la crise financière a provoqué à son tour la crise économique.

Une autre voix dissonante, celle de Peter Wallison de l’American Enterprise Institute, a fait valoir que les politiques menées par les autorités américaines en matière de logement avaient été une cause essentielle de la crise financière. Lui seul a soutenu que la concurrence entre les entreprises cautionnées par le gouvernement (GSE) et l’Agence fédérale pour le logement avait tiré vers le bas les normes de souscription, d’où l’apparition d’une fragilité, laquelle a déclenché la crise. Cet élément déclencheur a été la défaillance des 55 milliards d’hypothèques non traditionnelles, dont la valeur atteignait 4 500 milliards USD, qui a causé des pertes substantielles pour l’ensemble du système.

De notre point de vue, la complexité de la crise financière actuelle et de ses causes donnera lieu à d’autres débats dans les années à venir. L’opinion majoritaire du rapport avait raison d’identifier comme principales causes de la crise une faute comportementale, c’est-à-dire l’avidité, ainsi que des fautes humaines, en particulier les réponses apportées par les pouvoirs publics par leurs réglementations et leurs politiques. Cela étant, les opinions minoritaires avaient également raison de souligner le caractère biaisé de l’opinion majoritaire, qui omettait de prendre en considération la nature mondiale de la crise. Une crise d’ampleur systémique appelle à une analyse systémique qui embrasse le problème dans toutes ses dimensions.

Par exemple, l’une des omissions les plus flagrantes du rapport était l’absence de prise en compte du rôle joué dans la crise par la concurrence et la concentration dans le secteur financier, même si le même rapport précise ultérieurement qu’« en 2005, les 10 plus grandes banques commerciales américaines détenaient 55 % des actifs du secteur, soit plus du double qu’en 1990. À la veille de la crise, en 2006, les bénéfices du secteur financier constituaient 27 % de l’ensemble des bénéfices générés par les entreprises de tous les États-Unis, contre 15 % en 1980. La compréhension de cette évolution a été essentielle dans l’analyse de la commission ».

7 Keith Hennessey, Douglas Holtz-Eakin et Bill Thomas, p. 413-438.
L’une des lacunes du rapport était, en effet, de ne pas avoir mentionné que les principaux économistes avaient échoué à développer une vision holistique et systémique du système financier et de ne pas avoir décelé sa vulnérabilité à la crise, invitant au lieu de cela décideurs et instances de réglementation à se concentrer sur une analyse partielle et sur des visions compartimentées qui occultaient inévitablement une partie du tableau ainsi que des détails pertinents\textsuperscript{10}. Dans les récentes conférences, les économistes commencent enfin à se pencher sur leurs propres déficiences et sur leur propre éthique\textsuperscript{11}.

On peut reprocher quatre principaux écarts à la théorie et à la pratique de la réglementation financière dans les économies en crise : ne pas avoir compris que le secteur s’était transformé en un secteur bancaire « caché » de plus grande ampleur et sous-réglementé ; ne pas avoir évalué les risques systémiques de contagion et le risque moral ; ne pas s’être rendu compte que le secteur financier avait supplanté en taille le secteur réel de l’économie, et qu’il était devenu trop puissant pour qu’on le laisse faire faillite et presque trop puissant pour changer ; et, enfin, s’être abstenu de prendre des positions courageuses pour minimiser les risques.

La deuxième omission portait sur la question de savoir si le contournement des dispositions réglementaires expliquait en partie pourquoi les décideurs politiques et les instances de réglementation financière n’avaient pas réussi à réagir de manière vigoureuse pour stopper ou éviter la crise. Bien que la sphère financière s’en défende avec véhémence, il est difficile d’ignorer l’idée avancée entre autres par Johnson et Kwak\textsuperscript{12}, selon laquelle la mainmise du secteur financier sur l’économie avait joué un certain rôle dans la crise mondiale que nous connaissons aujourd’hui\textsuperscript{13}.

Si, par essence, les marchés financiers sont fragiles et pro-cycliques, quelle dose de réglementation est alors nécessaire pour diminuer les coûts d’une crise financière ? L’argument généralement invoqué est que la réglementation et la surveillance devraient désormais être contre-cycliques. Il s’agirait de corriger l’orientation pro-cyclique des normes comptables et réglementaires actuelles et de ‘ralentir la machine’ lorsque le risque augmente.

Dans une perspective coûts - avantages, il pourrait être utile de considérer la réglementation financière comme une police d’assurance grâce à laquelle les coûts annuels de la réglementation, les coûts d’opportunité par rapport à l’efficience et la protection devraient, d’après un calcul basé sur les flux de trésorerie actualisés, être inférieurs au coût ponctuel d’une crise financière majeure. La déréglementation s’est faite sans que l’on tienne compte du fait qu’elle aggravait le risque d’une faillite systémique massive. Une réglementation excessive peut augmenter les coûts en entravant l’innovation financière et avoir pour conséquence inattendue de concentrer encore davantage les risques, étant donné qu’elle accroît le risque moral.

3.2 Finance et crise financière : une autre analyse du réseau

En d’autres termes, il est important de penser différemment pour, d’une part, évaluer dans quelle mesure une concurrence et une concentration excessives peuvent engendrer une crise et, d’autre part, cerner le rôle que jouent le comportement humain et les incitations dans les systèmes financiers et leur  

\textsuperscript{10} Voir les travaux de Posner (2008), etc.
\textsuperscript{11} Ordres du jour de l’American Economic Association Annual Conference, 2008-2010.
réglementation. Si l’on admettait que la finance fait partie intégrante du système social et économique, il apparaîtrait plus évident que la crise est un problème de portée systémique dont les racines sont nombreuses. En reconnaissant que ce sont les interactions humaines entre individus et institutions qui engendrent des situations imprévisibles, nous aurions dû abandonner la vision lineaire et statique néoclassique au profit d’une science comportementale, dynamique, adaptable et plus complexe qui prenne en compte l’incertitude de Knight. En développant une analyse très morcelée, fondée sur les intérêts personnels des bureaucraties, eux-mêmes légalement et artificiellement séparés en compartiments, alors que les marchés financiers ne sont pas nationaux mais mondiaux et qu’ils assurent des fonctions universelles, le désastre était inévitable.

Comme l’ont affirmé entre autres Kindleberger et Minsky, les crises, les paniques et les passions sont indissociables des systèmes financiers. Les systèmes financiers sont par définition fragiles et procycliques en raison des comportements grégaires, de l’asymétrie des informations et du caractère évolutif et extrêmement complexe des incitations, dont certaines sont de nature prédatrice.

Par conséquent, le point de vue de Goodhart – selon lequel la politique de réglementation financière doit changer le comportement des participants des marchés financiers pour répondre aux objectifs de politique publique – est crucial pour comprendre que le système financier est un jeu interactif entre les entités réglementées du marché et les instances de réglementation, un jeu dans lequel les uns et les autres s’adaptent aux actions et à l’absence d’actions de chacun. L’interaction complexe entre les deux parties pourrait avoir soit un écho négatif (les chocs inverses menant à un équilibre final) ou un écho positif, le comportement procyclique prenant alors de l’ampleur jusqu’à ce que le système s’effondre (thèse de Soros).

Étant donné que les instances de réglementation ne sont composées que d’êtres humains, que leurs moyens et leurs informations sont restreintes et que leurs pouvoirs sont limités par la loi, on peut évidemment comprendre que les forces politiques et économiques soient en mesure de limiter leur efficacité et d’entraver leur capacité à faire évoluer les mauvais comportements. La maxime de Malcolm Sparrow, professeur à Harvard, dit de l’outil réglementaire qu’il sert à « sélectionner des problèmes importants, à les résoudre et l’annoncer haut et fort ». Il s’agit d’un conseil pragmatique fondé sur l’expérience, selon lequel il convient de ne pas traiter tous les problèmes sur un pied d’égalité, mais de définir des priorités et de concentrer les rares ressources (y compris le capital politique) sur les questions les plus urgentes.

Ce document se penche donc sur la question de la concurrence et des ententes en suivant une approche pragmatique, notamment pour ce qui est de l’équilibre à trouver entre efficience et stabilité. Il convient de noter que les objectifs de politique publique varient en fonction du niveau de développement du pays concerné, et que la somme des diverses politiques et des diverses situations nationales ne donne pas une stabilité mondiale « inévitable ». En effet, il est prouvé que les politiques et les solutions appliquées uniformément à tous ont, elles aussi, leur lot d’effets indésirables en termes de fragilité et d’instabilité.

En d’autres termes, à l’échelon mondial, nous pouvons partager des « objectifs communs de bonne politique publique », mais à l’échelon national, étant donné que chaque pays présente un niveau de développement et de sophistication financière qui lui est propre, ainsi que des conditions locales spécifiques, les priorités et la mise en œuvre de ces « principes universels » peuvent varier considérablement. C’est la diversité des politiques et des situations qui crée les conditions d’une stabilité systémique.

Fort de ce point de vue, on peut donc comprendre que ce qui peut être jugé « efficient » de la part d’une économie mature et développée peut ne pas l’être dans un pays en développement. Le développement s’oppose en effet à l’« efficience pure », étant donné que la plupart des économies en développement préfèrent favoriser le développement d’institutions nationales à l’échelon mondial afin d’exercer une concurrence efficace pour servir des objectifs nationalistes, liés à l’emploi ou même à
l’acquisition de savoirs. Ce conflit d’intérêts entre les enjeux mondiaux et nationaux prévaut également dans le commerce international et les négociations de réglementations, l’intérêt national prenant souvent le pas sur les intérêts mondiaux.

De nombreux paramètres imprévisibles (incertitude de Knight) interviennent dans le calcul de l’ampleur des pertes engendrées par une crise. Le dilemme du décideur politique consiste donc à évaluer si le prix à payer (tribut) pour éviter une telle crise est adapté. Le prix maximal pourrait être pour la société l’absence d’innovation. Cela dit, étant donné l’avancée rapide de la technologie, la plupart des économies nationales pourraient adopter la technologie étrangère assez rapidement.

L’approche suivie dans ce rapport consiste donc à considérer le système financier comme un maillon de l’écosystème des institutions humaines, dans lequel la finance apparaît comme un produit dérivé interactif de l’économie réelle. Cette approche applique la théorie de réseau comme un cadre servant à identifier les implications systémiques, et part du principe que les systèmes financiers sont des jeux interactifs et évolutifs entre les participants du marché, y compris les instances de réglementation financière.

Dans son ouvrage fondamental, The Rise of the Network Society, Manuel Castells qualifie la société à l’ère de l’information comme un ensemble mondial de « réseaux fait de capital, de gestion et d’information, dont l’accès au savoir-faire technologique conditionne la productivité et la compétitivité » (Castells 1996: 471). Ces 30 dernières années, le recours massif à la technologie des communications et de l’informatique a de plus en plus fait prendre conscience que les réseaux jouent un rôle majeur dans la croissance des marchés financiers. Par exemple, la loi de Metcalfe a posé une hypothèse largement acceptée selon laquelle l’utilité d’un réseau était égale au carré du nombre de ses utilisateurs (Shapiro et Varian 1999). Cette « loi » a incité les concurrents du système financier – en quête de bénéfices et de croissance – à explorer des marchés et des produits jusqu’ici segmentés, tels que la banque, l’assurance, la gestion de fonds et les marchés de capitaux. Cette tendance s’est accélérée dans les années 1990, à une époque où la philosophie des marchés libres guidait la déréglementation financière dans le but de permettre aux banques, compagnies d’assurance, maisons de titres et fonds, auparavant séparés par la loi, de fusionner ou de former des sociétés holding afin de proposer à un guichet unique toutes sortes de services financiers au consommateur et à l’investisseur.

Lors de la crise financière asiatique de 1997-98, on était de plus en plus conscient (1) de la forte contagion qui existait non seulement entre les banques, mais aussi entre tous les systèmes financiers, et (2) des liens d’interdépendance qui caractérisaient le commerce et la finance (Sheng 2009a).

La faillite de Lehman Brothers, le 15 septembre 2008, a annoncé une crise financière moderne sans précédent en termes de complexité, de profondeur, de rapidité de contagion et de transmission, ainsi qu’en termes de pertes. De récents rapports ont été rédigés sur la nature de réseau de la crise (voir Sheng 2005, 2009c ; Haldane 2009).

3.3 Caractéristiques des réseaux

Premièrement, un réseau est un ensemble de nœuds interconnectés selon une architecture. Plus précisément, une architecture de réseau est essentiellement un équilibre entre efficience et robustesse ou stabilité. Il existe trois topologies de réseau de base : le réseau centralisé ou en étoile, le réseau décentralisé et le réseau distribué, le système en étoile étant plus efficient car il comporte un seul centre nodal, mais aussi le plus vulnérable en cas de défaillance de ce dernier. Un réseau distribué à grande échelle, comme

Une échelle libre signifie que la connectivité des nœuds n’est pas aléatoire, mais qu’elle présente les caractéristiques d’une loi de puissance. Cette expression a été inventée par Barabasi (2003).
Internet, est beaucoup plus résistant face aux attaques de virus et de hackers car il est composé de multiples centres nodaux, et parce que les liens peuvent être coupés, contournés et réparés sans endommager l’ensemble du système, même si une série de centres nodaux importants est détruite.

Les coûts de transaction sont réduits dans le réseau en étoile, car le maillage des liens passe par un nœud central, ce nœud étant chargé de faire appliquer les normes et de protéger les droits de propriété des liens. Malgré son efficacité, la topologie en étoile s’avère fragile si le centre nodal unique qui relie les liens ou les utilisateurs relaie différents types d’architectures, avec à la clé divers avantages et coûts pour les utilisateurs.

Deuxièmement, les nœuds ne s’interconnectent pas de manière aléatoire.

Troisièmement, les centres nodaux et les grappes sont efficaces car le trajet le plus court entre deux nœuds distants peut se faire via un centre nodal.

Quatrièmement, les préférences qui s’établissent entre les liens, les centres nodaux et les externalités du réseau font que les réseaux se retrouvent souvent dans une situation où ‘le vainqueur rafle tout’ . En d’autres termes, les réseaux développent un comportement dit de loi de puissance, où un nombre réduit de centres nodaux créent beaucoup plus de liens que tout le reste des centres. Il s’agit de l’‘effet de concentration’ par lequel, très rapidement, quelques centres nodaux clés (sur les marchés financiers, il s’agit des centres de compensation ou de grandes et complexes institutions financières d’envergure systémique (SIFI)) prennent de l’importance sur les autres.

Cinquièmement, les réseaux présentent d’infinies possibilités et ne sont pas statiques, car chaque centre nodal cherche constamment à accroître ses liens grâce à sa propre stratégie de concurrence ou de coopération.

Sixièmement, étant donné que les marchés sont par nature concurrentiels, ils s’adaptent et évoluent en fonction de leur environnement.

Les informations ci-dessus ont de sérieuses implications sur le regard que l’on porte sur les institutions et les marchés financiers (Sheng, 2005). En d’autres termes, les marchés nationaux sont des réseaux de différents réseaux, et les droits de propriété sont compensés dans les centres nodaux et les chambres de compensation, et protégés par les tribunaux et les instances de réglementation. Le marché mondial est un réseau de réseaux locaux, dans lequel le maillon le plus faible est probablement le nœud, le lien, la grappe, le centre nodal ou le réseau local le plus faible. Jusqu’à ce qu’il soit soumis à un stress, nous ne savons ni pourquoi ni où le système présente une faiblesse. Il convient par conséquent de considérer la stabilité financière mondiale d’un point de vue holistique ou d’examiner l’intégralité du réseau pour en identifier les maillons les plus faibles.
Pour illustrer cette idée, le tableau ci-dessous présente la concentration des services financiers dans divers sous-secteurs (Tableau 1).

<table>
<thead>
<tr>
<th>Services financiers</th>
<th>Nombre d'acteurs de premier rang</th>
<th>Part d'activité mondiale combinée (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conservation d'actifs</td>
<td>4 premières entreprises</td>
<td>60</td>
</tr>
<tr>
<td>Courtage en assurance</td>
<td>3 premières entreprises</td>
<td>64</td>
</tr>
<tr>
<td>Commerce des devises</td>
<td>10 premières entreprises</td>
<td>64</td>
</tr>
<tr>
<td>Services comptables</td>
<td>4 premières entreprises</td>
<td>53</td>
</tr>
<tr>
<td>Souscription d'actions</td>
<td>10 premières entreprises</td>
<td>70</td>
</tr>
<tr>
<td>Souscription de titres de créance</td>
<td>10 premières entreprises</td>
<td>62</td>
</tr>
</tbody>
</table>

Source : Nolan et Liu (2007)

3.4 Caractéristiques de réseau de l'actuelle crise financière mondiale

Le fait de considérer le marché financier mondial comme un réseau de réseaux nationaux met en exergue plusieurs caractéristiques de réseau significatives de la crise actuelle :

- L’architecture en réseau a participé à mettre en lumière la fragilité ou la vulnérabilité du marché financier mondial face aux crises. La concentration des réseaux a engendré un certain nombre de grandes SIFI qui dominent le commerce international et dont la taille dépasse celle des économies nationales. Néanmoins, ces entreprises sont soumises à une réglementation obsolète fragmentée en segments nationaux, eux-mêmes compartimentés, d’où l’impossibilité de développer une vision systémique du réseau de nature à permettre l’identification des risques d’ampleur systémique.

- La complexité croissante des réseaux est liée à leur fragilité. La complexité est également corrélée de manière positive avec les paramètres externes au comportement de réseau, et peu de régulateurs ont compris ou ont été en mesure d’évaluer ces externalités.

- Le degré élevé d’interconnectivité a fait augmenter la valeur et les risques liés aux centres nodaux ou institutions financières. La défaillance d’un centre nodal, tel que Lehman Brothers, a révélé des interconnexions qui n’étaient pas visibles pour les instances de réglementation. Cette même défaillance a, par exemple, affecté American International Group (AIG), qui garantissait la solvabilité de banques et d’investissements par l’intermédiaire de divers produits financiers dérivés.

- Les réseaux se répondent les uns aux autres de manière positive ou négative en raison de l’interactivité qui existe entre les acteurs et entre les nœuds et les centres nodaux qui se font concurrence.

- Il n’y a pas eu défaut d’information ou de transparence, mais trop d’informations se sont avérées incompréhensibles.

- Les instances de réglementation ont fermé les yeux sur les mécanismes d’incitation qui faussaient le jeu en encourageant la prise de risque, et ont échoué à réduire au minimum le risque moral, malgré les leçons évidentes tirées de précédentes crises financières.
Les rôles et responsabilités des instances gouvernantes des réseaux n’ont pas été clairement établis. En l’absence d’un régulateur financier unique pour le monde entier, l’application efficace de la réglementation dans un réseau mondial requiert une coopération complexe entre différentes instances de réglementation. Il s’est produit une « tragédie des biens publics », où l’inaction collective a abouti à un gigantesque arbitrage réglementaire et à un « nivellement par le bas ».

3.5 **Entre stabilité et efficience, les compromis de la politique financière**

Les oppositions entre efficience et stabilité et entre concurrence et concentration sont des notions bien comprises en matière de politique publique dans le secteur financier. Bien que la majorité des régulateurs financiers reconnaîse les avantages d’une plus grande concurrence, la conglomération ou la concentration naturelle des institutions financières ainsi que l’expérience empirique montrent que plus les institutions financières sont grandes, plus elles ont tendance à mieux résister aux chocs financiers, d’où une tolérance ambivalente vis-à-vis de la concentration.

Comme l’a résumé le Comité de la concurrence du Comité consultatif économique et industriel (BIAC) auprès de l’OCDE (2010)\(^{15}\), « d’un côté, on estime qu’une plus grande concurrence dans le secteur bancaire engendre une plus grande instabilité et davantage de défaillances du marché, tandis que les autres paramètres demeurent inchangés »\(^{16}\). Ce point de vue suggère que des banques opérant au sein d’un marché concurrencé (ou sur un marché doté de barrières à l’entrée) engendreront des bénéfices qui les protégeront de toute fragilité et les dissuaderont de prendre des risques excessifs. Une concurrence excessive pourrait, en effet, intensifier la course aux bénéfices et inciter davantage les banques à prendre des risques accrus (potentiellement excessifs), d’où une plus grande instabilité. Selon cette théorie, la déréglementation, qui entraînerait une augmentation des entrées et une intensification de la concurrence, se traduirait au bout du compte par une plus grande fragilité. Cette même théorie prétend qu’un système bancaire plus concentré peut alléger le travail de surveillance des régulateurs, et favoriser ainsi la stabilité globale\(^{17}\).

Le point de vue opposé consiste à dire qu’un système bancaire plus concentré induit en fait davantage de fragilité\(^{18}\). Un tel environnement favoriserait, en effet, la fragilité, par exemple en permettant aux banques de gonfler les taux d’intérêts qu’elles font payer aux entreprises, ce qui peut pousser ces dernières à prendre davantage de risques, d’où une plus forte probabilité de prêts non performants. Une plus grande concentration de grandes entreprises accroîtrait également le risque de contagion. Il est présumé que sur les marchés concentrés, les banques auront tendance à recevoir des subventions plus importantes dans le cadre de politiques visant les entreprises trop grandes pour qu’on les laisse faire faillite, ce qui intensifie les incitations à la prise de risque et fragilise le système bancaire. D’après ce point de vue, un marché hautement concentré appelle à davantage de surveillance, car les systèmes bancaires concentrés ont

\(^{15}\) Soumission du Comité de la concurrence du Comité consultatif économique et industriel auprès de l’OCDE (BIAC) à la Table ronde de 2010 sur la concurrence, la concentration et la stabilité dans le secteur bancaire.


\(^{18}\) Ibid.
tendance à être constitués de banques plus grandes, qui proposent un large éventail de services, ce qui rend leur contrôle plus compliqué

3.6 Existe-t-il un compromis ?

Dans l’examen de la littérature qu’il a réalisé pour le compte de la Banque du Canada, Northcott (2004) s’est penché sur la perception traditionnelle qui veut que si un système bancaire concurrentiel est certes plus efficient et donc meilleur pour la croissance, il n’en reste pas moins vrai que le pouvoir de marché reste nécessaire pour la stabilité du système bancaire. Il n’existe dans les écrits théoriques aucun consensus quant à la question de savoir lequel de la concurrence parfaite ou du pouvoir de marché favorise le mieux la bonne répartition des ressources. Selon l’approche traditionnelle, la concurrence parfaite maximise la quantité de crédit disponible au meilleur prix, tandis que le pouvoir de marché (la capacité de fixer des prix rentables au-dessus du coût marginal) entraîne une baisse de la quantité offerte, ainsi qu’une hausse des prix.

Cela étant, en cas d’asymétrie de l’information, le pouvoir de marché peut inciter une banque à accorder un prêt, ce qui bénéficie aux emprunteurs opaques tels que les jeunes entreprises qui ne disposent d’aucun historique de crédit et de peu de garanties. En affectant les crédits en premier lieu aux projets de meilleure qualité, la sélection des bénéficiaires peut améliorer la répartition des ressources. Plus il y a de banques, plus cette incitation à la sélection diminue.

Northcott concluait en expliquant que l’idéal était peut-être de faciliter la création d’un environnement capable de promouvoir la concurrence (contestabilité), ce qui permet de réduire au minimum les coûts potentiels du pouvoir de marché, tout en récoltant les bénéfices de tout vestige de pouvoir de marché encore présent.

Il a par ailleurs jugé très difficile d’évaluer la contestabilité d’un marché bancaire. Les travaux effectués récemment en la matière suggèrent que le nombre de banques présentes et le degré de concentration d’un marché ne constituent pas en tant que tels des indicateurs suffisants de contestabilité.

D’autres facteurs jouent un rôle plus important, notamment les politiques réglementaires en faveur de la concurrence, le niveau de développement du système financier, les effets des réseaux de succursales, ainsi que l’effet et l’adoption des avancées technologiques.

Par ailleurs, il ne se dégage des textes aucun consensus quant à la question de savoir quelle structure de concurrence optimise à la fois l’efficience et la stabilité. La concurrence est importante pour l’efficience, mais le pouvoir de marché peut également présenter certains avantages. Le pouvoir de marché fournit aux banques des incitations à la prudence, mais la réglementation peut aider à faire en sorte que les banques se montrent prudentes, et ce même dans un marché concurrentiel. En matière de concurrence, aucun extrême (concurrence parfaite ou monopole) n’est idéal ou possible.

En conséquence, Northcott conclut qu’il n’est peut-être pas possible d’éliminer totalement le pouvoir de marché dans le secteur bancaire. L’objectif à poursuivre n’est peut-être donc pas de supprimer ce pouvoir de marché, mais de faciliter la mise en place d’un environnement favorable à la concurrence. Cette voie permet d’atténuer les coûts potentiels du pouvoir de marché tout en bénéficiant peut-être de certains avantages de tout pouvoir de marché résiduel.

La littérature n’établit aucun consensus quant à la question de savoir quelle structure de concurrence optimise à la fois l’efficience et la stabilité. Il existe certains avantages pour l’une et pour l’autre, et aucun extrême n’est idéal. Par conséquent, l’objectif peut être de ne pas éliminer le pouvoir de marché, et de

19 Ibid.
faciliter la création d’un environnement capable de promouvoir la concurrence (contestabilité). De cette façon, les coûts potentiels du pouvoir de marché sont atténués tout en maintenant peut-être les avantages d’éventuels vestiges de pouvoir de marché.

À quoi ressemble un secteur bancaire contestable ? Il se dégage des écrits un consensus de plus en plus marqué, selon lequel l’approche traditionnelle – qui assimile la présence d’un nombre réduit de banques ou une concentration du marché à un pouvoir de marché – n’est plus suffisante. La concentration ne constitue pas en soi un indicateur suffisant de comportement concurrentiel. D’autres facteurs importants entrent en jeu, tels que l’existence de restrictions à l’entrée moins sévères, la présence de banques étrangères, de peu de restrictions sur l’éventail d’activités autorisées aux banques, de systèmes financiers bien développés, l’effet des réseaux de succursales, ainsi que l’effet et l’adoption des avancées technologiques. Parce qu’elle requiert une compréhension de ces divers facteurs, l’évaluation de la contestabilité dans le secteur bancaire peut s’avérer très difficile et reste spécifique à un pays donné, à un moment donné. Cet exercice est plus compliqué qu’il ne semble l’être au premier abord.

3.7 Y a-t-il un lien entre concentration et stabilité ?

Chercheurs à la Banque mondiale, Beck, T. et. Al (2005) ont étudié dans quelle mesure la concentration du secteur bancaire national, les réglementations bancaires et les institutions nationales impactaient la probabilité qu’un pays subisse une crise bancaire systémique. À partir des données de 69 pays récoltées de 1980 à 1997, ils ont établi que les crises étaient moins probables dans les économies dotées de systèmes bancaires plus concentrés, même en tenant compte des différences entre les politiques réglementaires des banques commerciales, des institutions nationales qui influent sur la concurrence, des conditions macroéconomiques et des chocs reçus par l’économie. Qui plus est, les données montrent que les institutions et les politiques réglementaires qui ont pour effet de freiner la concurrence sont associées à une plus grande fragilité du système bancaire²⁰.

Certains arguments théoriques et certaines comparaisons entre pays suggèrent qu’un secteur bancaire moins concentré, qui compte de nombreuses banques, est plus exposé aux crises financières qu’un secteur bancaire concentré composé d’un nombre restreint de banques (Allen et Gale, 2000, 2004). Cela s’explique par le fait que les systèmes bancaires concentrés sont à même de faciliter le pouvoir de marché et de stimuler les bénéfices des banques, ce qui constitue pour elles un « matelas de protection » en cas de choc et accroît la valeur de la charte ou de la franchise de la banque, réduisant ainsi les incitations qui poussent les propriétaires et dirigeants de banques à prendre des risques excessifs, d’où une probabilité moins forte de difficultés bancaires systémiques (Hellmann, Murdoch, et Stiglitz, 2000 ; Besanko et Thakor, 1993 ; Boot et Greenbaum, 1993, Matutes et Vives, 2000)²¹. En outre, certains affirment qu’il est plus facile de surveiller quelques banques dans un système bancaire concentré, que de surveiller un grand nombre de banques dans un système bancaire dispersé. Par exemple, Allen et Gale (2000) soutiennent que les États-Unis, qui comptent de nombreuses banques, ont connu par le passé beaucoup plus d’instabilité financière que le Royaume-Uni ou le Canada, dont le secteur bancaire est dominé des banques plus grandes et moins nombreuses²².


²² L’autre argument consiste à dire que les banques de systèmes concentrés seront plus grandes et davantage diversifiées que ne peuvent l’être des banques plus petites. Quoi qu’il en soit, des études empiriques montrent que la consolidation des banques a tendance à accroître le risque des portefeuilles des banques.
Selon le point de vue opposé, plus une structure bancaire est concentrée, plus les banques sont fragiles. Boyd et De Nicolo (2005) expliquent que l’argument traditionnel selon lequel le pouvoir de marché dans le secteur bancaire stimule les bénéfices et, par conséquent, la stabilité bancaire ne tient pas compte de l’impact potentiel du pouvoir de marché des banques sur le comportement des entreprises. De la même façon, Caminal et Matutes (2002) montrent que moins de concurrence peut se traduire par un rationnement moins sévère du crédit, des prêts plus importants et une plus grande probabilité de défaillance si les prêts sont soumis à une incertitude multiplicative. Deuxièmement, les défenseurs de la thèse selon laquelle la concentration favorise la fragilité font valoir que (i) par rapport aux systèmes bancaires dispersés, les systèmes bancaires concentrés comptent généralement moins de banques et (ii) que les décideurs politiques sont plus attentifs aux faillites bancaires lorsque l’on compte seulement un petit nombre de banques (p.2).

Selon un point de vue opposé, une structure bancaire plus concentrée favorise la fragilité des banques. Tout d’abord, Boyd et De Nicolo (2005) affirment que l’argument classique selon lequel le pouvoir de marché dans le secteur bancaire stimule les bénéfices et confère par conséquent de la stabilité aux banques, ne tient pas compte de l’impact potentiel du pouvoir de marché des banques sur le comportement des entreprises. Ils confirment que les systèmes bancaires concentrés favorisent le pouvoir de marché, ce qui permet aux banques d’augmenter les taux d’intérêt qu’elles font payer aux entreprises. Comme on l’a découvert lors de l’actuelle crise mondiale, dans un système bancaire concentré, le risque de contagion consécutif à la faillite d’une seule grande banque présentant de nombreuses interconnections peut s’avérer plus grave, d’où une corrélation positive entre concentration et fragilité systémique. Caminal et Matutes (2002) montrent que moins de concurrence peut aboutir à moins de rationnement du crédit, à des prêts plus importants et à une probabilité de défaillance plus forte si les prêts sont soumis à une incertitude multiplicative.

La deuxième série d’arguments consiste à dire que les banques, qui sont moins nombreuses dans un système concentré, auront tendance à recevoir des subventions plus importantes dans le cadre de politiques implicites adressées aux entreprises ‘trop grandes pour qu’on les laisse faire faillite’, ce qui renforce les incitations à la prise de risques et accroît de ce fait la fragilité du système bancaire (par exemple, Mishkin, 1999). Les travaux de Beck et de ses collaborateurs indiquent que les crises sont moins susceptibles d’éclater dans les systèmes bancaires plus concentrés, ce qui étaye la thèse selon laquelle concentration et stabilité vont de pair. Pour eux, la corrélation négative entre concentration et crise est valable lorsqu’elle tient à des caractéristiques macroéconomiques, financières, réglementaires, institutionnelles et culturelles, et lorsqu’elle résiste à toute une suite de tests de sensibilité. Cela étant, leurs résultats ont aussi suggéré que la concentration ne suffisait pas forcément à mesurer la compétitivité du système bancaire. Malheureusement, la crise financière actuelle pourrait bien remettre en question les conclusions des travaux de Beck et suggérer qu’au-delà d’une certaine taille ou d’un certain degré de concentration, la fragilité peut être accrue.


24 Les systèmes bancaires très concentrés peuvent s’avérer très complexes et être par conséquent plus difficiles à contrôler qu’un système bancaire moins concentré, où l’on recense de nombreuses banques.

25 Voir également Claessens et Laeven (2004), qui ne voient aucune preuve d’une quelconque corrélation négative entre la concentration bancaire et une mesure de la compétitivité des banques calculée à partir du comportement d’une banque marginale.
Dans une analyse récente de la question des entreprises trop grandes pour qu’on les laisse faire faillite, Morris Goldstein et Nicholas Veron se sont penchés plus particulièrement sur le débat mené de l’autre côté de l’Atlantique. Ils ont établi que la politique publique menée vis-à-vis de ces entreprises (a) amplifiait le risque systémique, (b) faussait la concurrence et (c) entachait la confiance du public en raison de la privatisation des gains et de la socialisation des pertes.

Le problème de ces entreprises trop grandes pour qu’on les laisse faire faillite est extrêmement difficile à résoudre. En effet, attendu que le secteur financier est en moyenne cinq fois plus développé (en termes de taille des actifs) que le secteur réel de l’économie, mesuré d’après le PIB (hors secteur bancaire « caché » et produits dérivées (673 000 milliards USD en termes notionnels)), la question est de savoir si la faillite du secteur financier imposerait ou non des coûts trop élevés au secteur réel de l’économie. Le rapport de la FCIC souligne que non seulement les entreprises cautionnées par le gouvernement (GSE) et les banques d’investissement se sont trop endettées (dans un rapport de 75 pour un et de 40 pour un, respectivement), mais qu’elles ont aussi été les principales contributrices des activités de lobbying et du financement de la campagne électorale. Les GSE ont consacré 162 millions USD à des activités de lobbying, et de 1999 à 2007, le secteur financier a dépensé 2 700 milliards USD dans des frais de lobbying auprès des autorités fédérales, tandis que les particuliers et les comités d’action politique dans le secteur ont apporté plus d’un milliard USD sous forme de contributions à la campagne électorale. Les crises bancaires islandaise et irlandaise, où les actifs des banques dépassaient de loin le PIB national, illustrent l’une comme l’autre que ces grandes banques retiennent la nation en otage lorsqu’elles menacent de faire faillite.

Par conséquent, la véritable question concernant les entreprises trop grandes pour qu’on les laisse faire faillite revient à se demander si l’on devrait laisser le secteur financier continuer de croître indéfiniment grâce à l’endettement et de croître d’engranger des bénéfices qui génèrent des bonus pour ses dirigeants, tout en faisant payer au grand public les coûts considérables de ses défaillances ?

Il est donc fondamental de se demander si les bénéfices du secteur financier sont illusoires ou bien réels. Haldane et d’autres ont commencé à se demander si l’industrie de la finance contribuait de manière substantielle à la valeur sociale, notamment si le secteur public renfloue les faillites financières. Selon une étude réalisée par le Centre for Research on Socio-Cultural Change de l’Université de Manchester, alors que le secteur bancaire a payé 203 milliards GBP sous forme d’impôts dans les cinq années qui ont précédé 2006/07, ce montant a été plus que compensé par les 289 milliards GBP versés pour renflouer les banques. En effet, même le président de l’autorité des services financiers du Royaume-Uni a affirmé que certaines activités du secteur financier n’avaient « aucune utilité sociale ».

Dans son analyse prémonitoire des forces internes du marché qui ont engendré la crise financière actuelle, Hyman Minsky affirmait qu’« une banque qui accroît son degré d’endettement sans affecter négativement ses bénéfices par dollar d’actif accroît sa rentabilité. L’effet combiné des bénéfices non distribués et de la rentabilité d’un endettement accru peut se traduire par une croissance de l’offre de financement si rapide que les prix des immobilisations, le rendement de l’investissement et, finalement les prix à la consommation s’envolent tous ». En d’autres termes, Minsky a compris à raison que la banque est un élément déstabilisant endogène de l’économie de marché capitaliste, car « les entrepreneurs de la sphère bancaire ont beaucoup plus à perdre ou à gagner que les bureaucrates de la banque centrale ». « Dans un monde de finance capitaliste, il est tout


simplement erroné de prétendre que la recherche par chaque entité de son propre intérêt confère à l’économie un équilibre28 ».

4. **Expérience de différents pays – Australie, Canada et Chine**

La question de fond posée par le débat sur les ententes de crise revient à déterminer si le coût supporté par les consommateurs du fait de l’existence d’ententes est plus élevé que les pertes totales qu’encourt la société lorsque s’effondre une entente essentielle dans un environnement construit en réseau, et vice-versa. Les crises financières se traduisent par une perte en bourse et par une perte de trésorerie. Par conséquent, la question à laquelle il est difficile de répondre est celle de savoir si la valeur actualisée du flux de trésorerie correspondant au « tribut » versé au fil du temps aux ententes est inférieure aux pertes « en bourse » encourues lors d’une crise financière.

Étant donné que l’ampleur des pertes consécutives à une crise financière est a priori inconnue, il existe une volonté implicite de tolérer la concentration des banques comme on souscrirait à une assurance contre les crises, étant entendu que concentration n’est pas forcément synonyme d’ententes. Cela dépend de chaque contexte et du poids du passé. Dans les économies cycliques riches en matières premières telles que le Canada, l’Australie, le Chili ou la Malaisie, le niveau de surveillance bancaire et de tolérance des ententes est plus élevé, l’accent étant mis davantage sur le contrôle et moins sur la répression financière (c’est-à-dire que le marché est ouvert à la concurrence étrangère, mais avec une pénétration limitée).

D’après l’OCDE (2010)29, « la résistance du Canada et de l’Australie à la récente crise financière semble indiquer que la concentration permet aux systèmes financiers de mieux résister aux difficultés financières ».

4.1 **Le cas de l’Australie**

Le marché bancaire australien30 se caractérise par des niveaux élevés de concentration. Les quatre principales banques détiennent : (1) 70 % de l’épargne des foyers ; (2) 70 % des prêts aux foyers ; (3) 71 % des prêts personnels ; et (4) 68 % des prêts aux entreprises.

En particulier, au milieu de l’année 2008, la Commission australienne de la concurrence et des consommateurs (ACCC) a approuvé l’acquisition de la cinquième plus grande banque par l’une des quatre autres leaders du marché. Ces quatre principales banques – Commonwealth Bank of Australia (CBA), Westpac Banking Corporation (Westpac), National Australia Bank (NAB) et Australia and New Zealand Banking Corporation (ANZ) – sont très grandes par rapport à leurs concurrentes et représentent à elles seules une part substantielle du marché des prêts aux foyers et aux entreprises et de la réception de dépôts. Elles participent également au marché financier en exerçant des fonctions telles que la souscription de titres, avec les banques d’investissement mondiales. Outre leurs activités bancaires, chacune de ces grandes banques propose une palette d’autres services financiers tels que l’assurance et la gestion de patrimoine.

Les quatre plus grandes banques australiennes se sont historiquement partagé la majorité du marché des dépôts, des cartes de crédit, des prêts personnels et des hypothèses (tableau 4.1).

---

28 Minsky, op.cit. pp. 279 et 280.

29 Soumission du Comité de la concurrence du Comité consultatif économique et industriel auprès de l’OCDE (BIAC) à la Table ronde de 2010 sur la concurrence, la concentration et la stabilité dans le secteur bancaire.

30 Soumission du Comité de la concurrence du Comité consultatif économique et industriel auprès de l’OCDE (BIAC) à la Table ronde de 2010 sur la concurrence, la concentration et la stabilité dans le secteur bancaire.
### Tableau 4.1 : Concentration dans le secteur bancaire australien (1890 – 2009)\(^{(a)}\)

<table>
<thead>
<tr>
<th>Année</th>
<th>Actifs</th>
<th>Dépôts</th>
<th>Prêts immobiliers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Part des quatre plus grandes banques</td>
<td>Indice HH(^{(b)})</td>
<td>Part des quatre plus grandes banques</td>
</tr>
<tr>
<td>1890</td>
<td>0.34</td>
<td>0.06</td>
<td></td>
</tr>
<tr>
<td>1913</td>
<td>0.38</td>
<td>0.10</td>
<td></td>
</tr>
<tr>
<td>1950</td>
<td>0.63</td>
<td>0.14</td>
<td>0.64</td>
</tr>
<tr>
<td>1970</td>
<td>0.68</td>
<td>0.16</td>
<td>0.68</td>
</tr>
<tr>
<td>1990</td>
<td>0.66</td>
<td>0.12</td>
<td>0.65</td>
</tr>
<tr>
<td>Oct. 2008</td>
<td>0.65</td>
<td>0.11</td>
<td>0.65</td>
</tr>
<tr>
<td>Juillet 2009</td>
<td>0.74</td>
<td>0.15</td>
<td>0.78</td>
</tr>
</tbody>
</table>

\(^{(a)}\) Les données concernent uniquement les activités des banques (sous-ensemble d’institutions de dépôt autorisées). Elles excluent toutes les activités des coopératives d’épargne, des sociétés de crédit à la construction et sociétés de crédit hors institutions de dépôt autorisées. Par conséquent, les valeurs réelles de la concentration et de l’indice HH sont inférieures à celles annoncées.

\(^{(b)}\) Indice de concentration Herfindahl-Hirschman (qui peut varier de 0 (soit les conditions de concurrence parfaite) à 1 (le monopole) ; étant entendu qu’un marché comptant x concurrents de taille égale aura un indice de 1/x).

\(^{(c)}\) En partant du principe que tous les prêts concédés à des propriétaires occupants de logements ont été octroyés par des banques de dépôt et ont représenté l’ensemble des prêts octroyés par elles.

**Source** : Report on Bank Mergers, Australian Senate Economics Committee, septembre 2009

L’augmentation de la concentration dans le secteur bancaire reflète à la fois la consolidation, qui s’est opérée au fil du temps, et les effets plus récents de la crise financière mondiale. Malgré les nouvelles entrées, le nombre total de participants a chuté depuis la fin des années 1990, les fusions et acquisitions compensant les nouveaux entrants. On a assisté à une grande vague de fusions entre petites institutions, et le nombre de coopératives de crédit a chuté de 213 en 2001 à 143 en 2008\(^{31}\).

Malgré cette hausse de la concentration, l’indice Herfindahl-Hirschman (IHH), calculé uniquement pour les banques, suggère que s’agissant à la fois des actifs et des dépôts, le marché australien reste relativement concurrentiel, en dessous du seuil de 0,18 des États-Unis, à partir duquel on considère qu’un secteur est hautement concentré\(^{32}\).

Le secteur bancaire australien est devenu plus concentré pendant la crise financière mondiale, suite à des consolidations intervenues sous forme de fusions. Les banques étrangères ont également diminué leurs opérations en raison de contraintes de financement, même lorsque les marchés de titrisation ont fermé. Les grandes banques se sont mises à racheter les banques plus petites.

Jusqu’à présent, les fusions et acquisitions impliquant le secteur bancaire ont été soigneusement évaluées par l’ACCC indépendante, ce qui n’a pas empêché la poursuite de la consolidation du marché.

Il convient de noter qu’en décembre 2010, le gouverneur de la banque de réserve australienne, dans sa soumission à l’examen par le Sénat australien de la concurrence dans le système bancaire, se disait assez satisfait du niveau de concurrence dans le secteur financier australien, affirmant que « le marché reste plus concurrentiel qu’il ne l’était au milieu des années 1990 et [que] les emprunteurs ont accès à un plus grand

---

\(^{31}\) APRA Insight, Issue 1 2001 et Issue 1 2008.

\(^{32}\) Ministère américain de la Justice, Horizontal Merger Guidelines, sous-section 1.51.
éventail de produits qu’auparavant. Plus particulièrement, la disponibilité globale de financements destinés à l’achat de biens immobiliers semble adéquate.

4.2 Le cas du Canada

Historiquement, de 1920 to 1980, le Canada a toujours compté 11 banques (Bordo 1995). Avant 1980, l’industrie des services financiers avait été segmentée par la loi de manière à refléter les lignes de produits traditionnelles, comme la banque commerciale, la fiducie, la souscription d’assurance, le courtage, ainsi que la souscription et la vente de titres. Il existait aussi des restrictions à l’entrée de banques étrangères sur le marché canadien. En 1987, le Bureau du surintendant des institutions financières du Canada a été créé par la loi, car il a été reconnu que les marchés financiers se développaient de manière transversale par rapport aux lignes traditionnelles et devaient être surveillés différemment. Depuis, les entrées d’institutions financières étrangères ont été plus nombreuses, et fin 2006, le Canada comptait 22 banques nationales et 50 banques étrangères, dont 26 étaient des filiales de banques étrangères et 24 des succursales de banques étrangères.

Le Canada présente un marché bancaire hautement concentré. Par exemple, les six plus grandes banques représentent plus de 90 % des actifs du système bancaire. L’indice Herfindahl-Hirschman du Canada, qui mesure la concentration des banques, indique un niveau de concentration du marché moyen à élevé. Cela étant, les indices de concentration négligent la concurrence (notamment pour les activités de banque de détail et de banque pour les petites entreprises) que constituent les plus de mille coopérations de crédit et caisses populaires implantées dans le pays.

Dans une étude très sérieuse de la Banque du Canada sur l’efficience et la concentration du secteur bancaire au Canada34, Allen et Engert concluent que, globalement, malgré leur concentration, les banques canadiennes sont des prestataires de services financiers relativement efficaces, notamment par rapport à leurs voisines des États-Unis. Plus important encore, la recherche suggère que les banques canadiennes n’exercent pas de pouvoir de monopole ni d’oligopole collusoire, et que le secteur bancaire pourrait être considéré comme un secteur concurrentiel de type monopolistique.

Il convient de préciser que les décideurs politiques et la représentation nationale du Canada et de l’Australie étaient parfaitement conscients de l’existence d’un compromis à trouver entre concentration, stabilité et efficience. Ces deux pays ont régulièrement procédé à des réexams de leurs politiques publiques (citons les rapports Campbell et Wallis sur le secteur financier australien), pour vérifier que la structure financière née de la concentration du marché n’enlevait rien à l’efficience ni à l’équité sociale de ce dernier. Par conséquent, les changements législatifs et réglementaires opérés dans le passé en passant par d’autres pays ont requis l’efficience des services financiers nationaux en améliorant la contestabilité, notamment de la part des entrants étrangers. Parallèlement, la philosophie réglementaire de ces deux économies a privilégié la voie conservatrice, ce qui n’a pas permis à l’innovation financière injustifiée et à la concurrence excessive de pousser la limite du risque jusqu’au point de rupture.

Par exemple, dans son examen de 2002 sur l’efficience et la consolidation du secteur bancaire canadien, le Comité sénatorial permanent du Canada s’est dit d’avis que « les fusions bancaires sont une stratégie commerciale valable et qu’elles contribueront à la croissance et à la prospérité de l’économie canadienne. Nous pensons également que l’évaluation de l’incidence sur l’intérêt public et l’examen du Bureau du surintendant des institutions financières et plus encore celui du Bureau de la concurrence – ou

33 Sénat australien (2010).
34 Allen et Engert (2007).
35 Comité sénatorial permanent du Canada (2002).
les engagements éventuellement requis – garantiront une concurrence suffisante dans le secteur des services financiers pour protéger l’intérêt du public. Les banques canadiennes sont solides actuellement. Elles pourraient l’être encore plus sur le marché nord-américain et les marchés étrangers si on leur permet d’adopter les stratégies commerciales dont elles ont besoin tout en sauvégeant l’intérêt public ».

4.3 **Le cas de la Chine**

La Chine est un exemple classique de pays où le secteur bancaire est considéré comme étant au service de l’économie réelle. De 1949 à 1979, alors que les banques étaient nationalisées, le pays a adopté un système mono bancaire de style soviétique. La Banque populaire de Chine jouait le rôle de banque centrale et de fournisseur de mécanisme de paiement, tandis que les autres banques faisaient, aux termes de la loi, partie intégrante de la banque centrale. Après 1979, le système bancaire a été progressivement décentralisé en grandes banques commerciales et en banques de soutien aux politiques publiques. Des réformes de grande ampleur dans le système bancaire sont intervenues dans les années 1990, lorsqu’a été prise la décision de commercialiser et finalement de coter en bourse les plus grandes banques. Avec l’entrée en vigueur de son adhésion à l’OMC en 2001, la Chine a ouvert ses portes à la concurrence étrangère dans le domaine des services bancaires et financiers en 2007.

En 2003, avec l’essaimage de la fonction de réglementation bancaire, ancien pré carré de la banque centrale, il a été décidé de créer une structure de réglementation financière fondée sur une institution. La structure de réglementation financière actuelle comprend la banque centrale en charge de la politique monétaire et de la stabilité financière systémique, la China Banking Regulatory Commission (CBRC), qui surveille le secteur bancaire, la China Securities Regulatory Commission (CSRC), en charge du marché des titres et des capitaux, et la China Insurance Regulatory Commission, en charge du secteur de l’assurance. Un comité de la stabilité financière présidé par une vice-premier ministre, et rassemblant non seulement la banque centrale et les trois instances de réglementation financière, mais aussi le ministère des Finances et le conseil de réforme pour le développement national, se charge de coordonner globalement la stabilité financière

Fin 2009, le secteur bancaire chinois comptait deux banques de soutien aux politiques publiques et la China Development Bank (CDB), cinq grandes banques commerciales, 12 banques commerciales par actions, 143 banques commerciales urbaines, 43 banques commerciales rurales, 196 banques coopératives rurales, 11 crédits coopératifs urbains (UCC), 3 056 crédits coopératifs ruraux (RCC), une banque d’épargne postale, 4 sociétés bancaires de gestion de patrimoine, 37 institutions bancaires étrangères constituées localement, 58 sociétés de fiducie, 91 sociétés financières de groupes d’entreprises, 12 sociétés de crédit-bail, 3 courtiers en devises, 10 sociétés d’auto-financement, 148 banques locales de village et de ville, 8 sociétés de prêt et 16 coopératives mutuelles rurales. Le nombre total d’institutions bancaires enregistrées s’élevait à 3 857, avec environ 193 000 points de vente et 2.845 millions d’employés.

Fin 2009, l’actif total des institutions bancaires chinoises avait crû de 26.3 % à 78 800 milliards RMB (11 500 milliards USD), avec des fonds propres en hausse de 17 % à 4 400 milliards RMB (644 milliards USD). Fin 2009, le ratio de capital moyen pondéré de l’industrie bancaire chinoise s’élevait à 11.4 % des actifs à risque. Les 239 banques commerciales présentaient un ratio de capital minimum conforme à la norme requise. Fin 2009, les prêts non performants des banques mesurés selon les critères de classification des cinq catégories de prêts atteignait 497.3 milliards RMB, avec un taux de prêts non performants de 1.58 pourcent de la totalité des prêts.

---


Les grandes banques commerciales, les banques commerciales par actions et les institutions coopératives rurales ont été les trois plus grands types d’institutions bancaires par taille des actifs, et ont compté pour respectivement 50,9 %, 15,0 % et 11 % du volume total des actifs bancaires en 2009. Les banques étrangères ont représenté environ 2 % de la totalité des actifs bancaires, même si leur réseau de succursales connaît une croissance rapide.

En d’autres termes, le système bancaire chinois est passé par une phase de décentralisation puis de recentralisation. Bien que les plus grandes banques aient conservé la plus grande part du marché bancaire, les petites coopératives rurales et urbaines, ainsi que le système bancaire postal ont fourni la majeure partie des réseaux de succursales. Néanmoins, des problèmes opérationnels et de gouvernance ont donné lieu à une phase de consolidation également marquée par l’arrivée de nouveaux entrants.

En 2009, les crédits coopératifs urbains (UCC) et les banques commerciales urbaines ont également accompli des progrès décisifs dans l’amélioration de leurs structures historiques. Fin 2009, le nombre d’UCC avait été ramené de 37 à 11, tandis que certaines banques commerciales urbaines se sont définitivement débarrassées de leurs prêts non performants et ont achevé leur restrucutation.

Depuis sa création en 2003, la CBRC a engagé une réforme complète de la structure du système financier en se concentrant sur le renforcement des plus grandes institutions financières et en consolidant et réformant les institutions financières rurales et urbaines les plus petites. Des fusions ont eu lieu, et des nouveaux entrants sont arrivés. Le principe de base consistait à améliorer les services financiers dans les zones rurales, et notamment dans les régions mal desservies du centre et de l’ouest de la Chine. En 2009, un total de 43 banques commerciales et de 196 banques coopératives rurales ont été constituées. Parmi elles, 6 banques situées à Wuhan, Ma’anshan, Chengdu, Guangzhou, Dongguan et Jiangnan ont été autorisées à lancer leurs activités.

La priorité étant à la réforme de l’industrie bancaire, les questions de concurrence ont été laissées aux forces du marché, tandis que le secteur commençait à se débarrasser des prêts non performants dont il avait hérité et à améliorer son gouvernement d’entreprise. En 2001, l’accord d’accession à l’OMC, qui prévoyait l’entrée d’entités étrangères en 2007, a été une évolution de politique publique délibérée qui visait à accroître la concurrence face aux banques nationales et à améliorer la qualité des services financiers.

Le droit de la concurrence est nouveau en Chine, et pas encore pleinement applicable au secteur bancaire. Étant donné que la concurrence s’intensifie dans le pays, tandis que les banques étrangères et nationales continuent de se faire concurrence en terme de produits et de services, la CBRC commence à étudier de plus près les questions de concurrence, non seulement pour ce qui est du secteur bancaire, mais aussi des services financiers en général.

4.4 Droit de la concurrence en Chine

La loi anti monopole (Anti-Monopoly Law - AML) chinoise a été édictée le 30 août 2007 et est entrée en vigueur le 1er août 2008. Elle a été conçue sur le modèle du droit de la concurrence de l’UE et régis les accords anticoncurrentiels ou dits ‘monopolistiques’ (comme les ententes, par exemple), l’abus de position dominante et le contrôle des fusions.

L’AML s’applique aux ‘comportements monopolistiques en Chine’, mais aussi aux ‘comportements monopolistiques’ en dehors des frontières chinoises dans la mesure où ils ‘suppriment ou restreignent’ la concurrence sur le marché national chinois. Au sens de l’AML, le terme ‘Chine’ désigne la Chine

---

38 Freshfields Bruckhaus Deringer LLP (2010).
continentale uniquement, ce qui exclut donc notamment Hong-Kong (qui a récemment édicté en la matière des projets de loi exhaustifs qui lui sont propres).

L’AML établit des principes de portée générale destinés à guider la répression des ententes en Chine. Beaucoup de détails concernant les modalités d’application de l’AML dans la pratique sont encore à préciser dans les règlements d’application et les conseils et recommandations, dont une grande partie est d’ailleurs encore à l’état de projet.

Près de deux ans après l’entrée en vigueur de l’AML, de nombreuses incertitudes demeurent, et un certain nombre de questions restent ouvertes, dont certaines ont trait aux caractéristiques spécifiques de l’environnement et de la politique économiques chinois.

4.4.1 Les instances en charge de l’exécution

D’un point de vue organisationnel, il existe une structure institutionnelle complexe à deux niveaux d’administration et d’exécution :

- Au niveau supérieur, la Commission de lutte contre les monopoles (Anti-Monopoly Commission - AMC), qui rend compte de ses actes directement au Conseil d’État, est chargée de la formulation et de la coordination des politiques ; et

- Au niveau inférieur, pas moins de trois instances de répression des monopoles (AMEA) ont été conçues pour faire appliquer l’AML dans la pratique :
  - le Bureau anti-monopole du ministère du Commerce (MOFCOM) est exclusivement chargé d’examiner et de contrôler les fusions ;
  - la Commission pour la réforme et le développement national (NDRC), en tant qu’instance nationale de régulation des prix, est chargée de faire appliquer les dispositions de l’AML relatives aux accords monopolistiques et aux abus de position dominante ayant des répercussions en termes de prix ; et
  - l’Administration d’État pour l’industrie et le commerce (SAIC) est chargée de faire respecter les aspects de l’AML ayant trait aux accords monopolistiques et aux abus de position dominante sans lien avec les prix.

Les questions de politique qui ont trait au secteur bancaire font encore l’objet de discussions en interne, tandis que les meilleures pratiques et les expériences internationales sont en cours d’examen et d’évaluation.

5. Conclusion

Ce rapide tour d’horizon de la littérature et des expériences en matière d’ententes de crise dans le domaine bancaire suggère que la finance, en tant que secteur organisé en réseau, montre une propension ‘naturelle’ à se concentrer. Même s’il est vrai que des institutions financières de plus grande taille reposant sur des réseaux plus développés peuvent réaliser des économies d’échelle et générer de la rentabilité, la crise financière actuelle laisse penser qu’au-delà d’une certaine taille, il existe forcément des fragilités systémiques, et que certaines questions d’économie politique n’ont pas été bien comprises et insuffisamment débattues à ce jour.

La première question de politique publique consiste à se demander si les institutions financières largement plus grandes que leurs concurrents sont prêtes à engager un comportement ‘monopolistique’
accompagné d’importants conflits d’intérêts, et si elles sont également prêtes à s’adonner à des comportements ‘prédateurs’ au détriment de leurs clients et concurrents. Les données relevées jusqu’à ce jour ne permettent aucune généralisation à cet égard, mais il est avéré que de tels comportements existent bel et bien dans la pratique. Ce problème peut être résolu en améliorant l’exécution de la législation.

La deuxième considération de politique publique qui a été mise en lumière par la crise financière, mais à laquelle aucune réponse satisfaisante n’a été apportée, relève de la politique économique et consiste à déterminer à quel moment l’industrie de la finance devient tellement démesurée par rapport à l’économie réelle que les institutions financières deviennent des entreprises trop grandes et trop puissantes pour qu’on les laisse faire faillite. Bien que les réformes réglementaires actuelles aient commencé à introduire des exigences de financement contre-cycliques et tenté de mettre en place des ratios d’endettement globaux, le pouvoir de lobbying du secteur a réussi à diluer les effets de la loi Volcker et à retarder la mise en œuvre de ces contraintes en les soumettant à une étude plus approfondie et à d’éventuelles exemptions.

Étant donné que personne n’est encore parvenu à déterminer de manière théorique et satisfaisante jusqu’à quelle taille la finance génère une utilité sociale grâce à la croissance qu’elle dégage et à son effet de levier, on ignore donc toujours quelle devrait être la taille maximale d’une banque ou d’une institution financière. Le problème des incitations qui poussent les directions des banques à accroître leur degré d’endettement et leurs bonus au détriment de la stabilité systémique n’a pas été entièrement résolu. Les systèmes financiers asiatiques ne posent pas de problème économico politique en ce sens que les plus grandes de ces banques sont pour la plupart détenues par l’État ou soumises au contrôle de ce dernier. Soulignons, en revanche, que dans les cas australien et canadien, où les représentations nationales sont conscientes des pouvoirs excessifs que détient le secteur bancaire du fait de sa concentration, des examens réguliers sont réalisés pour contrôler l’efficience de ce secteur, ainsi que sa stabilité et l’efficacité de la réglementation, et les défaillances liées à la crise ont jusqu’à présent été sans conséquence.

Conformément aux conclusions d’Evenett et d’autres chercheurs, il n’existe pas une politique commune applicable à tous, car chaque pays présente un niveau de développement différent, ainsi qu’un passé institutionnel et économico politique qui lui est propre.

Ce rapport soutient que le plus important pour les décideurs politiques nationaux est de déterminer quels sont les pratiques et principes exemplaires internationaux qui correspondent le mieux à leur situation nationale. Le rôle de la communauté institutionnelle financière internationale est de vérifier que les politiques nationales ne vont pas à l’encontre des pratiques et principes exemplaires et de déterminer si ces incohérences, carences et chevauchements sont susceptibles de donner lieu à des problèmes systémiques ou d’induire des coûts à l’échelon mondial. Grâce aux PESF et à la surveillance régionale, il serait possible d’évaluer si les politiques et pratiques nationales et régionales ont des répercussions mondiales.

Cette vision des choses est à la fois pragmatique et réaliste. Vu les difficultés que pose la mesure a priori des coûts des options de politique alternatives et des initiatives réglementaires aux niveaux national et mondial, il semble irréaliste d’imposer à l’échelon mondial des règles ou des lois communes à tous en matière d’ententes de crise. Il ne fait aucun doute qu’à l’échelon local, le décideur politique est à même de comprendre les conditions auquel il est soumis et jouit d’une légitimité souveraine pour déterminer quel équilibre permettra de parvenir à l’efficience et à la stabilité sans entraver l’innovation. Le rôle de la communauté internationale est de conseiller et d’apporter une expertise technique (ainsi qu’une expérience internationale exemplaire) afin que le décideur national puisse trouver un équilibre entre les intérêts nationaux et les intérêts mondiaux.

En conclusion, le débat sur les ententes de crise dans la finance est toujours en cours. Il reste beaucoup à faire pour cerner pleinement les questions complexes qui sont en jeu.
RÉFÉRENCES


Jason Allen et Walter Engert, Efficience et concurrence dans le secteur bancaire canadien, Département des Études monétaires et financières, Banque du Canada, Revue de la Banque du Canada, mai 2007


Economist, Why Newton was wrong – Momentum in Financial Markets, Briefing, The Economist, 8 janvier 2011, p.67.

Economist, Dismal ethics, Economics Focus, The Economist, 8 janvier 2011, p.74.


OCDE, Soumission du Comité de la Concurrence du Comité consultatif économique et industriel auprès de l’OCDE (BIAC) à la Table ronde sur la concurrence, la concentration et la stabilité dans le secteur bancaire (2010).


Stevens, G., The Role of Finance (2010), The Shann Memorial Lecture, University of Western Australia.


OTHER
SUGAR MARKET AND AGRICULTURAL CARTEL INVESTIGATIONS IN COLOMBIA
COLOMBIAN ANTITRUST LAW FRAMEWORK

• Colombia established one of the first competition regimes in Latin America (Law 155 of 1959).

• In 2009, such antitrust regime was reformed by the Law 1340, making significant amendments to the preceding legal framework.

• The main effects of the new competition regulations are the following:

  • The Superintendence of Industry and Commerce (SIC) was appointed as the sole authority to enforce competition regulations.

  • The new law established unified independent criteria on competition matters.

  • The new regime was updated with latest competition developments in the world.
PRINCIPAL GOALS OF THE NEW COMPETITION LAW

- Grant free participation of competitors in the market
- Guarantee consumer welfare
- Ensure economic efficiency

EXCEPTIONS ON THE APPLICATION ON COLOMBIAN ANTITRUST LAW

- There are exceptions in the application of Colombian competition law:
  - Agreements on R&D
  - Agreements on norms, standards and measures when they do not limit the entry of new competitors to the market.
  - Agreements on procedures, methods, systems and ways to use common facilities.
  - Efficiency justifications in mergers cases.
• Colombia has not experienced an economic crisis per se in the last four years.

• The country's economic activity has not presented severe symptoms of deceleration.

• Nonetheless, some economic indicators reflect the impact of the world economic situation in the country.
AN OVERVIEW OF MACROECONOMIC INDICATORS IN COLOMBIA

• In terms of international trade, 2009 reflects the effect of the global economic situation.

• 2010 evidences the recovery of the economic situation around the world.

• The financial indicators reflect a solid and stable economy, including the critical period of the world recession.
Sugar prices were stable due to the stabilization fund created in 2001 which gave a boost to exports and avoid the saturation of the internal market.

Source: Asocaña
AGRICULTURAL CARTELS IN COLOMBIA  
(SUGAR CANE CARTEL)

Anticompetitive agreement investigation against 13 sugar mills:

• Purpose of the Investigation:
  
  • Establish if the sugar mills agreed to buy sugar cane at a fixed price.

  • Establish if the alcohol mills agreed to buy sugar cane at a given price intended for alcohol fuel production.

  • Establish if there was a previous agreement to share sugar cane supply sources.

  • Establish if the legal representatives of the mills executed or accepted the investigated practices.

SUGAR CANE CARTEL, FINDINGS OF THE SUPERINTENDENCE

• Some mills had agreed on a fixed amount of 58 kilos per ton of sugar, others on a variable amount depending on the cane yield.

• Evidence of interaction between competitors (meetings and exchange of sensitive information, including production)

• Evidence that the agreement dated from 1992.

• A cap of 25 kg/t in contracts with producers. Sharing guidelines regarding the terms of the contracts and how cane growers should share costs with sugar mills in order to prepare their land prior to cultivation.
CONCLUSION: APPLICATION OF COMPETITION POLICIES IN TIMES OF CRISIS

• Colombia’s new competition regime does not contemplate specific exceptions for times of crisis, however, it authorizes the policy making authority to establish special treatment to some economic sectors (direct specific State intervention or aid).

CONCLUSION: We find the Colombian legislation approach to be appropriate specially for developing economies, considering:

1. It does not compel the competence authority to change the decision standards in time of crisis, which protects the consistency, stability and predictability of the competition law.

2. Notwithstanding it allows competition policy decision makers to provide provisional and exceptional regulations for basic agricultural products, which opens the possibility for the government to approve more lenient regimes for specific sector facing severe crisis.
In times of crisis, economic downturn in which businesses face potential to go bankrupt and exit of the market.

This situation makes businesses to coordinate their actions in order to regulate the production and prevent falling prices and profits (can be in the form of cartel).

On the other hand, in an important sector of the public who meet the basic needs such as food, agriculture, healthcare and energy, economic crisis often make food, healthcare and energy, the economic crisis is often make the price of those basic needs become volatile and rise sharply. The economic situation like that, often used as an excuse by businesses to raise prices together or coordinate the price by reason to stabilize price fluctuations that disrupt.

Many argue that in times of crisis, the application of competition law should be relaxed in order to save businesses from bad due to crisis.
Exemption from Competition Law for a Cartel

- Law Nr.5/1999 make allowances in the form of exceptions in applying the prohibitions set forth in this law. In relation with cartel action there are at least two things that can be used as the basis of such exemptions.

- If the cartel is:
  - 1. An act and / or agreements that aims to implement the legislation in force (article 50 letter a)
  - 2. Agreement and / or act aimed to export that does not interfere with the needs and or supply the domestic market (article 50 letter g)

Exemption from Competition Law for a Cartel

- However, such exemptions would be applied by the commission based on a thorough and careful analysis.

- In addition, if the commission considers that an exception based on government policy (article 50 letter a), it provides a greater negative impact, the commission may submit suggestions and considerations to the government to revoke or improve the regulation and policy.

- This is in accordance with the authority and duty of the commission mandated by the law, to provide advice and advocacy to the government policies that affect competition.
The Cartels, which addressed the Commission at the time of Economic crisis

- In the year 2010, the commission dealing with cartel cases which were monitored from the increase in world oil prices, and international CPO price that triggered the rising prices of goods and services concerning the lives of many people in Indonesia that are related to cooking oil and air transportation services that apply to airline fuel surcharge.

- The Commission observed that in the world oil price increases, making businesses in order to raise the price at those moments together, by using the reason of a significant increase in production costs.

- But when world oil prices go down, business is not necessarily reduce prices as fast as when to raise prices due to rising world oil prices. The Commission considers that resulted in the phenomenon of Asymmetric Price Transmission (APT).

- Based on these APT phenomena, the Commission began investigating whether the slow response to falling prices of good and service when the cost of production decreased, was blocked by cartel action. Result of investigation in the case of cooking oil and airlines in the year 2010, the commission stated that producers of cooking oil and airlines businesses legally and convincingly guilty in price fixing cartel.

Related questions

- What can be the consideration of the cartel in the crisis period can be excluded from the application of competition law?

- How the institutional system in times of crisis provide an assessment that the crisis cartel made the business is necessary actions to protect the interest of lives of many people in a country? (Pro poor and pro job policy in Indonesia as example)

- Does only with the implementation of competition law and competition authority can be used to dampen price fluctuation of public goods and services that occur? (Country specific set-up is required).
FROM CARTEL TO COMPETITION AND FROM COMPETITION TO DIFFERENTIATION:

TROUBLE BREWING IN THE COFFEE MARKET

Frederic Jenny
Professor of Economics ESSEC Business School
1. Types of coffee (1)

- "There are four broad types of coffee distinguished on the world market.
- The highest quality are the Colombian milds, produced in Colombia, Kenya and Tanzania.
- Next are the other milds, a broad category of arabica coffee produced in Latin America as well as in Asian countries like India and Papua New Guinea.
- Below that in quality, are the Brazilian arabicas, also produced in Paraguay and Ethiopia.
- The lowest quality are the Robustas which have a harsher taste and are grown in many African and Asian countries."


2. Downward concentration and barriers to vertical integration (1)

- Green coffee is sold and shipped to roasters. Four multinational conglomerates (Nestlé, Kraft, Procter & Gamble, Sara Lee) buy 40% of the world’s green coffee and own the best known brand (Nescafé, Maxwell House, Folgers etc...). They have developed distinctive national blends. The use of blends allows the large roasters to substitute coffees within the four broad types (and/or geographical origins) to maintain the overall taste of the blend while purchasing the cheapest coffee available.

3. Downward concentration and barriers to vertical integration (cont.)

Producing countries have difficulties breaking into the roasting, packing and selling of coffee in major consumer markets:

1. They would have to import coffee to produce blends comparable to the blends of the major roasters;
2. Roasted coffee goes stale quickly and they would have difficulties shipping roasted coffee over long distances;
3. They have neither the market knowledge nor the financial clout of the MNF roasters.

4. Production

<table>
<thead>
<tr>
<th>Crop year</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>WORLD</td>
<td>111 247</td>
<td>128 913</td>
<td>120 014</td>
<td>128 500</td>
<td>123 074</td>
<td>134 498</td>
</tr>
<tr>
<td>Brazil</td>
<td>32 944</td>
<td>42 512</td>
<td>36 070</td>
<td>45 992</td>
<td>39 470</td>
<td>48 095</td>
</tr>
<tr>
<td>Vietnam</td>
<td>13 842</td>
<td>19 340</td>
<td>16 467</td>
<td>18 500</td>
<td>18 200</td>
<td>18 000</td>
</tr>
<tr>
<td>Indonesia</td>
<td>9 159</td>
<td>7 483</td>
<td>7 777</td>
<td>9 612</td>
<td>11 380</td>
<td>9 500</td>
</tr>
<tr>
<td>Colombia</td>
<td>12 564</td>
<td>12 541</td>
<td>12 504</td>
<td>8 664</td>
<td>8 098</td>
<td>9 000</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>4 779</td>
<td>5 551</td>
<td>5 967</td>
<td>4 949</td>
<td>6 931</td>
<td>7 450</td>
</tr>
<tr>
<td>India</td>
<td>4 090</td>
<td>4 563</td>
<td>4 319</td>
<td>4 062</td>
<td>4 827</td>
<td>5 000</td>
</tr>
<tr>
<td>Mexico</td>
<td>4 225</td>
<td>4 200</td>
<td>4 150</td>
<td>4 651</td>
<td>4 200</td>
<td>4 500</td>
</tr>
<tr>
<td>Guatemala</td>
<td>3 676</td>
<td>3 950</td>
<td>4 100</td>
<td>3 785</td>
<td>3 835</td>
<td>4 000</td>
</tr>
<tr>
<td>Honduras</td>
<td>3 204</td>
<td>3 461</td>
<td>3 842</td>
<td>3 450</td>
<td>3 575</td>
<td>3 850</td>
</tr>
<tr>
<td>Peru</td>
<td>2 489</td>
<td>4 319</td>
<td>3 063</td>
<td>3 872</td>
<td>3 315</td>
<td>3 718</td>
</tr>
<tr>
<td>Uganda</td>
<td>2 159</td>
<td>2 700</td>
<td>3 250</td>
<td>3 197</td>
<td>2 797</td>
<td>3 200</td>
</tr>
<tr>
<td>Côte d'Ivoire</td>
<td>1 691</td>
<td>2 177</td>
<td>2 317</td>
<td>2 397</td>
<td>1 795</td>
<td>2 200</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>1 489</td>
<td>1 425</td>
<td>1 903</td>
<td>1 442</td>
<td>1 831</td>
<td>1 800</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>1 778</td>
<td>1 580</td>
<td>1 791</td>
<td>1 320</td>
<td>1 450</td>
<td>1 414</td>
</tr>
<tr>
<td>El Salvador</td>
<td>1 502</td>
<td>1 252</td>
<td>1 505</td>
<td>1 450</td>
<td>1 065</td>
<td>1 365</td>
</tr>
</tbody>
</table>
4. Coffee consumption

<table>
<thead>
<tr>
<th>Rank</th>
<th>Countries</th>
<th>Amount (in thousands USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td># 1</td>
<td>United States</td>
<td>2,075,050</td>
</tr>
<tr>
<td># 2</td>
<td>Germany</td>
<td>1,272,700</td>
</tr>
<tr>
<td># 3</td>
<td>France</td>
<td>692,048</td>
</tr>
<tr>
<td># 4</td>
<td>Japan</td>
<td>683,060</td>
</tr>
<tr>
<td># 5</td>
<td>Italy</td>
<td>502,965</td>
</tr>
<tr>
<td># 6</td>
<td>Canada</td>
<td>402,870</td>
</tr>
<tr>
<td># 7</td>
<td>Netherlands</td>
<td>375,987</td>
</tr>
<tr>
<td># 8</td>
<td>Belgium</td>
<td>361,999</td>
</tr>
<tr>
<td># 9</td>
<td>Nigeria</td>
<td>309,323</td>
</tr>
<tr>
<td># 10</td>
<td>Spain</td>
<td>305,561</td>
</tr>
</tbody>
</table>

Total: 9,838,010

40% of world consumption in 4 countries

Source: International Trade Centre UNCTAD/WTO

5. Coffee trade

Source: FTI/LATI
6. Instability of supply of coffee (1)

- The supply of coffee is geographically concentrated. Thus, **coffee production fluctuates depending on bumper crops or natural disasters** in a small number of exporting countries.
- The instability of supply, causing price fluctuations, is exacerbated by the fact that coffee is a tree crop. **Coffee trees take three to five years after planting to begin bearing coffee, and another two years or so to reach full production.** Thus a frost in Brazil lowers world supplies for the next one or two years, before the trees recover, causing a prolonged period of shortage and high prices. The high price encourages overplanting. Beginning about five years after the frost, production from the new trees causes a glut on the market with a period of low prices.
- For example, the frost of June 1975 reduced Brazil’s production for 1976-1977 to 25% of its pre-frost level, producing record high prices. World market prices fell in 1980 as the new trees planted in the 1976-77 boom began to produce.

(1) "Where does your coffee dollar go?: the division of income and surplus along the coffee commodity chain", John Talbott; studies in comparative development, Spring 97, Vol 32, Issue 1.

7. Importance of coffee for LDCs (1)

- In many least developed countries (especially in Africa and Central America), coffee plays a key role in rural development and incomes earned by the industry have an important impact on the quality of living conditions of many small farmers. **Coffee production employs 20 to 25 million people throughout the world.**

8. Importance of coffee for LDCs

In some of the coffee-producing countries, coffee revenues are:

1. An **important source of cash income for small farmers** (ex-Ethiopia, Uganda, Ivory Coast, Kenya, Cameroon, DR Congo, Madagascar, Tanzania) or a significant proportion of agricultural output in smaller countries such as Burundi, Rwanda, Togo, Guinea).

2. A **main source of government revenues**. Taxes derived from coffee production accounted for as much as 20% of total government revenues in some countries.

3. A **major source of foreign exchange**. « A one cent decline in coffee prices means a foreign-exchange loss to Latin America of about 45 million dollars a year » (1)


9. Coffee dependence

<table>
<thead>
<tr>
<th>Country</th>
<th>Value of green and roasted coffee (US $ 1000)</th>
<th>Coffee as % of total exports</th>
<th>Exports as % of GDP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burundi</td>
<td>30,951</td>
<td>56</td>
<td>8</td>
</tr>
<tr>
<td>Uganda</td>
<td>308,721</td>
<td>52</td>
<td>12</td>
</tr>
<tr>
<td>Rwanda</td>
<td>17,402</td>
<td>27</td>
<td>6</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>255,306</td>
<td>26</td>
<td>16</td>
</tr>
<tr>
<td>Honduras</td>
<td>410,039</td>
<td>16</td>
<td>42</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>134,826</td>
<td>15</td>
<td>37</td>
</tr>
<tr>
<td>Guatemala</td>
<td>575,357</td>
<td>15</td>
<td>20</td>
</tr>
<tr>
<td>Ecuador</td>
<td>24,349</td>
<td>11</td>
<td>42</td>
</tr>
<tr>
<td>El Salvador</td>
<td>340,342</td>
<td>9</td>
<td>28</td>
</tr>
</tbody>
</table>

In the US, semiconductors the largest export earnings only accounted for 5.6% of total exports in 2000
10. The ICO and the ICA’s

- Producing countries began to organize in the 1950s and were successful in negotiating an *International Coffee Agreement* (ICA) with the major consuming countries in 1962 and in establishing an International Coffee Organization.

- The 37 States members of the ICA are almost all coffee exporting countries, representing over 99% of exports and most of the importing countries. Export to non members importing countries represented 10-20% of the world trade during the 1980’s quota regime.

- The International Coffee Agreement has been renewed at approximately 6-year intervals since 1962. *This agreement established an export quota system to limit the flow of coffee to the world market*, thereby stabilizing and propping up the price. Export quotas were in effect between 1962 and 1972, and again between 1980 and 1989.

---

11. The International Coffee Agreements: the quota system

- The ICA restrict exports to maintain coffee price within an agreed upon target range for prices. *Exporting countries receive a percentage of the total export quota, and exports to the member market are constrained so as not to exceed the quota amount.*

- Binding decisions concerning the allocation of the quota require a two-thirds majority of the producing countries and of the consuming countries.

- Adherence to the quota is enforced through a system of stamps and certificates: *the customs authorities of importing nations remit copies from each shipment to the headquarters of the organization which in the case of overshipment calls for a reduction of the exporting country quota.*

---

12. The ICAs: success and failure

- Although not exempt from problems, the agreement achieved its objectives of raising and stabilising coffee prices. The relative success has been attributed to different factors, among which are the key role of governments in producing countries monitoring decisions concerning exports, the willingness of Brazil to contract its market share, the recognition of import substitution strategies which required maximisation of export earnings through high commodity prices and the effective participation of importing/consuming countries in the monitoring and control of the quota system. (1)

- The ICA collapsed in 1989 when the US, the largest consuming country, refused to continue the agreement.


13. The stabilisation of the price of coffee (cont.)

* International Coffee Agreement
14. Why enter a cartel agreement?

For coffee-consuming states:

- They had no interest in letting the coffee-producing countries enter into a cartel agreement without negotiating with them;

- For security reasons, they were interested in the stability of the price of coffee and in indirect transfers to the producing states in the form of price supports. (1)


15. Why enter a cartel agreement?

- «A free market economy in coffee should perhaps be an ultimate goal. But the reality is that many of the developing countries of the World which depend so much on coffee cannot now cope with the severe economic dislocations which are caused by wide swings in the price of their principal revenue and foreign exchange earner. (...) The coffee agreement (...) serves our foreign policy objectives of building strength and freedom in developing areas of the world while protecting the American consumers. (...) The key question is whether it is in the U.S. interest to allow these countries, a large number of them, to go through the wringer, as it were, at a time when populations are doubling every 18 to 20 years and take a chance that they would stay on our side of the curtain which divides the free and the Communist world (...)». (1)

(1) Hon. Thomas C. Mann, Executive Hearings on S 701 before the House Common Ways and means, 89th Congress (1965), quoted in « Can cooperation Survive Changes in Bargaining power ? The case of Coffee », Barbara Koremenos, UCLA.
16. Market developments in the 1990’s

1. Development of new coffee processing technology, by the big four (Nestlé, Kraft, Procter & Gamble, Sara Lee) which buy 50% of the world production. This development prompted a shift away from high quality arabica beans to cheaper, lower quality robusta.

2. Emergence of a new producer (Vietnam): In 1975, fewer than 20,000 acres were under cultivation. During the late 80’s, the harder Robusta plant was introduced and in 1990 200,000 acres were planted. Between 1990 and 2000 Vietnamese farmers planted more than 1,000,000 acres of the crop. Annual production swelled from 84,000 tons to 950,000 tons enabling Vietnam to surpass Colombia as the world’s second largest producer.

3. Expansion of the market in the past ten years from $30 billion to $70billion.

17. The price instability of coffee (cont.)

![Comparing International Coffee Prices and World Coffee Exports](chart.png)

- **US leaves ICA**
- **Frost in Brazil**
- **Price**
- **Volume**

![Graph showing price instability](chart.png)
18. Prices in the early 2000

- In 1997, a frost in Brazil sent the price of green (unroasted) coffee on New York’s Commodity Exchange soaring above $3 a pound. In 1999 prices began to fall sinking in December 2001 to $.42 a pound, their lowest level in a century. For three consecutive years prices have not even covered the cost of production (in Vietnam).

- In Central America, where the costs of production are triple, those of Vietnam repercussions have been particularly severe. USAID estimates that at least 600,000 coffee workers have lost their jobs. Conditions are equally dire in Africa, where impoverished nations such as Uganda, Burundi and Ethiopia rely on coffee for the majority of their export revenues.

19. Crop Substitution

![Farmers of Ethiopia turn to khat as world coffee prices tumble](image)

Financial Times Dec. 9 2003
20. The price instability of coffee (cont.)

Coffee, robusta

![Coffee robusta price chart]

Units: U.S. cents per kilogram

21. Coffee: developing a niche market

- Six east African countries plan to launch a new specialty coffee branding system for their product in a depressed world market. The countries also hope the strategy to be fully implemented by 2005 will revamp coffee husbandry practices in the region which have deteriorated as farmer’s earnings have fallen because of the global slump in prices.
- We want to zero in on exceptional qualities of different coffees grown in the different parts of the six countries, name them after these regions and sell these to buyers ».
- “We plan to increase the volume and value of specialty coffee to capture more of the specialty market » said Fred Kawuma the Executive Director of the East African Fine Coffee Association.
Rwanda has a National Coffee Strategy. Rwandan specialty coffee is winning international competitions, commands some of the world’s highest prices, and is sought out by Starbucks, Green Mountain Coffee, Intelligentsia, and Counter Culture Coffee.

There is preliminary evidence that the coffee industry is creating jobs, boosting small farmer expenditure and consumption, and possibly even fostering social reconciliation by reducing “ethnic distance” among the Hutus and Tutsis who work together growing and washing coffee.

How did this happen?

First, the Rwandan government lowered trade barriers, and lifted restrictions on coffee farmers.

Second, Rwanda developed a strategy of targeting production of high-quality coffee, a specialty product whose prices remain stable even when industrial-quality coffee prices fall.

Third, international donors provided funding, technical assistance and training, creating programs like the USAID-funded Sustaining Partnerships to Enhance Rural Enterprise and Agribusiness Development (SPREAD). SPREAD’s predecessor started the first Rwandan coffee cooperative as an experiment in 2001, and the project continues its work improving each link in newly-identified high-value coffee supply chains.
Some problems and constraints still plague the Rwandan coffee sector. For example, transport costs remain high, and poor management at some coffee cooperatives points to a persistent need for good training and financial management skills.

Still, Rwanda’s revenues from coffee are still growing in the face of global recession, and these revenues bring real benefits to Rwanda’s rural poor.
26. Uganda

27. Kenya

Burundi
28. Conclusion

- Small developing countries highly dependent on a primary product face specific economic challenges associated with the price level and the price instability of the primary product they depend on (loss of revenue for small farmers, loss of government revenues, loss of foreign exchange).

- The coffee export cartel reached its goal of stabilising the market price of coffee (and therefore the revenues of small producing countries and farmers) while the US, the largest coffee consuming country, participated in the agreement thus allowing a monitoring of the exports of producing countries.

- Resorting to a cartel agreement may have been justified by the incompleteness of markets. In particular there were no financial instruments allowing countries and farmers to insure against the risk of sudden decreases in prices.

29. Conclusion

- But governments of coffee producing countries could have created alternative instruments to help farmers face the instability in the price of coffee (for example through the accumulation of funds in good times which could have been released to farmers when prices were low).

- Furthermore, the existence of the coffee export cartel may have, among other things, deterred farmers from engaging into alternative strategies such as product differentiation and the creation of niche markets to fight the long term decline in price and demand for coffee produced in east african countries.
Crisis Cartels – Lessons from Steel
Ian Christmas, Director General, World Steel Association
OECD 10th Global Forum on Competition, Paris 18 February 2011

Steel – Man’s No 1. Engineering Material

Global steel production 2010 : 1,414,000,000 tonnes

China: 44 % / OECD: 34% / Developing & CIS: 66%

International trade: 40 %
World Steel Association

130 steel companies and regional associations

85% total world steel

Vision: “Sustainable Steel in a Sustainable World”

Expertise: strategic forum, economic forecasting, statistics, safety, education and training, market development, sustainability, technology and environment

Cartels in Steel

Illegal

Legal

Cartels in steel industry suppliers
Q. What is a crisis?

A. Steel company(s) unable to compete, losing money. But is a legal cartel in the public interest?

- Is the problem cyclical or structural?
- Is it the result of poor management and operation?
- Is there a prospect that the industry can be competitive in the future?
- Will closure create major social problems?
- What is the impact on steel customers?

The tools for cartels / protectionism

- Price controls
- Production quotas
- Imports and export restrictions, quotas, tariffs
- Restrictions on raw material trade and prices
- Subsidies for companies, employees
Examples from Steel: EU Davignon Plan

Legal basis:
European Coal and Steel Community Treaty

Cartel:
Price controls, production quotas, trade restrictions, ban on subsidies

+ ve : - ve :
Social issues penalise most dynamic companies

Examples from Steel: INDIA

1950 – 1990:
Flat steels reserved for state-owned company plus TATA

1990’s:
Remove restrictions: new entrants, reduced tariffs, removal of price controls
Examples from Steel: USA

The Bush Initiative 2003 – 2006

- Trade restrictions (WTO compliant)
- Government takes over pension liabilities
- Competition authorities allow mergers

Steel in Developing Countries

- Not every country needs a steel industry
- Technology is freely available for all scales of production
- No case for control for “infant” industry
- Protectionism will harm steel users
Conclusions

- Steel is a cyclical business
- Steel is essential for economic development
- No strong arguments for cartels
- Any legal cartel should be:
  - temporary
  - clear business objectives
  - not based on special pleading of private interests
Principal policy question

• During severe sectoral, national, or global economic crises, is there a case for encouraging or permitting the creation of cartels?
• Of direct relevance to competition authorities and other government bodies.
• Context: Two decades of tougher enforcement against cartels in both developing and industrialised countries.
• Note: This question is not the same as asking whether a jurisdiction's competition law allows for the creation of cartels in circumstances associated with economic crises.
• Organisation of this presentation.
The contested economics of cartels

- *Neoclassical, dominant view.*
- Cartels raise prices and distort markets away from efficient market outcomes.
- Cartels slow down transfer of technology (development significance).
- Private cartels are unstable.
- Enforcement can deter cartels.

- *Heterodox views.*
- Historical accounts claim cartels helped bring supply and demand back into line and to prevent monopolisation during crises.
- Costs of cartel-induced market power pale compared to forgone economies of scale.
- Promoting rationalisation of a sector and limit job losses.

What do empirical studies of the effects of crisis cartels show?

- Evidence mainly from the early stages of development of the richer OECD countries.
- Sharp price falls tended to trigger crisis cartels.
- Government involvement was rarely limited to cartelisation—if anything, state involvement grew over time.
- When foreign competition was significant before a cartel was formed, steps to eliminate imports were a frequent feature of crisis cartels.
- When cartels raised prices, no attempt was made to estimate harm done to buyers.
- Little attempt to estimate the magnitude of the other alleged benefits of crisis cartels.
What happened during the recent global economic crisis?

- Resort to crisis cartels was rare (see section 5 of the background paper plus country submissions.)
- Resort to subsidisation—direct from government or through the banking system—was far more widespread.
  - Cash flow problems can be remediated far quicker through direct subsidies than through cartel-induced price increases.
- Not arguing that the subsidies given were sensible public policy. Rather, the key policy relevant point is that governments have alternatives to crisis cartels.
- It is not enough to argue that crisis cartels have a certain effect, rather it must be shown that they are the most efficient means available to policymakers.
Crisis Cartels in the Agricultural/Food Sector

Professor Steve McCorriston
Department of Economics
Session on Crisis Cartels
Typical Perspectives of Crisis Cartels

- Declining demand
- Low/falling prices
- Excess capacity
- ‘Need’ for orderly re-structuring
- Role for competition policy in this context

Crisis in Agricultural/Food Markets

- If this topic was raised 10 years ago….!
- Growing demand and shortfalls
- Price surge of 2007-2008
- Recent spike in commodity prices, late 2010/early 2011
- FAO forecasts relatively high and more volatile prices over the medium run
Figure 1: World Food Price Index (Nominal Prices): 1990-2008

![Graph showing World Food Price Index (Nominal Prices) from 1990 to 2008.](image)

Figure 3: Recent Price Developments in World Agricultural Markets.

![Graph showing FAO Food Price Index with data for 2006 to 2010.](image)
How should we think about crisis cartels in the context of…

• High and volatile prices and occasional price spikes

• High food price inflation experienced in many countries, particularly developing countries

• From Evenett’s list of potential justifications: “promoting consumer welfare” & “price stabilisation”
Questions to Address

- Do less competitive markets reduce price transmission?
- What is the impact of price shocks on firms?
- Are (domestic) prices likely to be less volatile with less competitive markets?
- Are firms’ responses likely to be asymmetric?

Questions to Address-cont.

- Do high prices and other cost shocks encourage cartel behaviour?
- “Consumer welfare”…what of “producer welfare”?
- Is the experience/response of developing countries different? (Should it be?)
- Justification for state-sanctioned cartels (e.g. with respect to international markets)?
Even if... what other policy options would be available?

• Risk management tools; safety nets; trade policy; agricultural policy; build up of stocks; etc

• Directly address the problem

• Transparency, flexibility, predictability
Crisis Cartels in The Financial Sector: An Overview

Andrew Sheng
Chief Adviser,
China Banking Regulatory Commission,
Global Forum on Competition,
Feb 18, 2011
Views are personal to author

Outline

I. Crisis Cartel - definition and issues
II. Financial sector objectives, roles and relationship between Crisis, Moral Hazard and Fiscal Debt
III. Country experience - Australia, Canada and China
IV. Tentative Conclusions
Crisis cartel – definition

A crisis cartel is defined as “a cartel that was formed during a severe sectoral, national, or global downturn without state permission or encouragement ... or... situations where a government has permitted, in other cases fostered, the formation of a cartel among firms during severe sectoral, national or global economic downturns”. (Simon Evenett, (2011), Pg.3)

II. Financial sector objectives and role of financial regulations
2. Financial Sector Objectives

- Resource Allocation
- Price Discovery
- Risk Management
- Reinforcing Governance
- Protection of Property Rights
- Payments Mechanism
- Justice and Equity – finance is natural oligopoly
Financial Sector Competition and Crisis

- Financial sector is a network industry, which exhibits competitive, winner-take-all, concentration effect.
- Financial sector is an interactive game between institutions and regulators
- Financial institutions compete on:
  - Regulatory arbitrage
  - Tax arbitrage
  - Information arbitrage
  - Creation of Shadow Banking

Networked Globalized Finance

Network Topology determines efficiency vs robustness

Cartel competition: trade-off between efficiency and stability

- Objectives of public policy are very different depending on the stage of development of the different countries in question, and that the outcomes of different policies and different national conditions do not add up to an “inevitable” global stability
- At the global level, we can have global “principles of good public policy objectives”, but at the national level, with different levels of development and financial sophistication and local conditions, priorities and implementation of these “universal principles” can be very different.
Concentration of financial services

<table>
<thead>
<tr>
<th>Financial Services</th>
<th>Number of top players</th>
<th>Combined global share of business (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asset Custodian</td>
<td>Top 4 firms</td>
<td>60</td>
</tr>
<tr>
<td>Insurance brokerage</td>
<td>Top 3 firms</td>
<td>64</td>
</tr>
<tr>
<td>Foreign Exchange trading</td>
<td>Top 10 firms</td>
<td>64</td>
</tr>
<tr>
<td>Accounting Services</td>
<td>Top 4 firms</td>
<td>53</td>
</tr>
<tr>
<td>Equity underwriting</td>
<td>Top 10 firms</td>
<td>70</td>
</tr>
<tr>
<td>Debt underwriting</td>
<td>Top 10 firms</td>
<td>62</td>
</tr>
</tbody>
</table>


Concentration in US Banks

[Chart showing concentration of US banks, 1935-2008]
Financial Institutions make profit through scale and leverage

Chart 24: Leverage at the LCFIs

Financial Crisis Inquiry Commission (FCIC) Report

- The crisis was avoidable, due to human faults;
- Widespread failures in financial regulation and supervision;
- Failures of corporate governance and risk management at SIFIs;
- Excessive borrowing, risky investments, lack of transparency put system at risk;
- Government was ill-prepared to manage crisis;
- Systemic breakdown in accountability and ethics;
- Trigger was bad mortgage-lending standards and securitization; and
- Contributors were OTC derivatives and rating agency failures.

What’s missing: Excessive competition?
Four Failures of Finance Theory and Regulatory Practice

1. Failure to KNOW YOUR INDUSTRY - finance industry morphed into the larger and under-regulated shadow banking;
2. Failure to KNOW YOUR RISKS – under-appreciation of systemic risks, spillover and moral hazard;
3. Failure to KNOW YOUR COUNTERPARTY – under-appreciation that the financial sector larger than real sector, and TOO POWERFUL TO FAIL; and
4. Failure to KNOW YOURSELF - take courageous stand against build up of risks.

→ Intellectual and regulatory capture!

Concentration leads to stability?

- “More competition in banking results in greater instability and more market failures, other things being equal”
- Banks operating in a concentrated market (or in a market that restricts entry) will earn profits that can serve as a buffer against fragility, and as an incentive against excessive risk taking.
- Excessive competition could put more pressure on profits and may create higher incentives for banks to take greater (potentially excessive) risks, resulting in greater instability.
- More concentrated banking system might reduce the supervisory burden of regulators, thus enhancing overall stability.

— Beck, T (2008)
Concentration leads to fragility?

- Allowing banks to boost the interest rates they charge to firms which may induce firms to assume greater risk, resulting in a higher probability of non-performing loans.
- A higher concentration of larger firms is also thought to increase contagion risk.
- Banks will tend to receive larger subsidies via Too-Big To Fail policies, thereby intensifying risk-taking incentives and increasing banking system fragility.
- More greater need for supervision in a highly concentrated market with the idea that concentrated banking systems tend to have larger banks, which offer an array of services, making them more complicated to monitor

— Beck, T (2008)

Is there a trade-off?

- There is no consensus in the theoretical literature as to whether perfect competition or market power best promotes allocative efficiency.
- It might be optimal to facilitate an environment that promotes competitive behaviour (contestability), thereby minimizing the potential costs of market power while realizing benefits from any residual that remains.
- The goal may not be to eliminate market power, but to facilitate an environment that promotes competitive behaviour

Too big to fail (TBTF)

- TBTF issue as (a) exacerbating systemic risk (b) distorting competition and (c) lowers public trust due to privatization of gains and socialization of losses. — Morris Goldstein and Nicholas Veron focused on the Transatlantic debate
- Financial sector is on average five times larger (in asset size) than the real sector as measured by GDP and before the inclusion of shadow banking and derivative measures (US$673 trillion in notional terms)
- The FCIC Report notes not only were the GSEs and investment banks too leveraged (75 to 1 and 40 to 1 respectively), they were major contributors to the lobbying and campaign funds.
- From 1999 to 2007, the financial sector expended $2.7 billion in reported federal lobbying expenses

Finance is natural oligopoly, with moral hazard

- Stable Retail banking needs deposit insurance, which is a state guarantee.
- NPL of banks are quasi-fiscal deficits
- Therefore, moral hazard is heart of this crisis, since it involves STATE GUARANTEE (Fiscal debt) of Bank credit creation (leverage).
- Bank management abuse moral hazard, by taking larger share of bank profits through moral hazard
- Bank credit growth increases liquidity, which lowers interest rates, create bubbles, hide insolvency and increase public fiscal burden.
Two critical finance issues: Information Asymmetry & Principal Agent Problem

- **Information Asymmetry: Fallacy of Composition** – private sector cannot see total picture, and private profit maximizing creates systemic problems. Only State can collect system-wide data, but State Bureaucracy is also silo-based, leading to coordination failure at national and global level.

- **Private financial institutions maximize regulatory arbitrage to create Shadow Banking**

Principal-Agent Problem – Finance becomes Principal by Capturing Real Sector

- **Capital Market activities involve high risks that can spillover into Retail Banking [Glass-Steagall separation]**

- **Capital Market involves Private Speculation through Proprietary Trading.**

- **Problem is when Carnivorous Tigers (Investment Banks) are put in same cage as Herbivorous Elephants (Retail banking with deposit guarantee).**
Proprietary Trading with State Guarantee violates Level Playing Field

- Investment banks with state guarantee of liabilities (in event of failure) creates massive more hazard (private gain at social loss)
- Violation of level playing field principle – since other private sector competitors and counterparties.
- Market makers with 50% of market share has informational advantage over other players, since they see almost all flows and proprietary trading worsens market momentum – they create their own profits at public expense.

Division of Responsibility between State and Private Sector

- Only State has right and ability to manage systemic information-gap (address Fallacy of Composition) and to protect injustice and ensure fair markets – State handles Macro-risks
- Private self-interest can manage micro-risks, but sum of private risk-taking behaviour = systemic risk.
- State guarantee of private risk = Unsustainable Fiscal Burden.
### Public-Private Checks & Balance

<table>
<thead>
<tr>
<th></th>
<th>Private</th>
<th>Public</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private</td>
<td>I – Private Self Interest for Private Gain</td>
<td>II – Private Effort for Public Good</td>
</tr>
<tr>
<td></td>
<td>[Business]</td>
<td>[Civil Society]</td>
</tr>
<tr>
<td>Public</td>
<td>III – Bureaucratic Self-Interest [Capture]</td>
<td>IV – Public Sector for Public Good</td>
</tr>
</tbody>
</table>

Adam Smith assumed I + IV. Risk in practice I + III (Crony Capitalism).

#### Tentative Conclusions

- Retail banking can have state guarantee of deposit if they remain agents [Volcker Rule]
- They are public utilities and should be regulated as such
- Investment banking imposes huge risks, but should never be allowed for level playing field purposes to have state guarantee and avoid capture.
- Hence, Glass-Steagall was not wrong, and Anti-Trust should be used to ensure Investment banking does not capture retail banking/state guarantees
Ⅲ. Country experiences – Australia, Canada and China

Australian banking sector

• The four major banks: Commonwealth Bank of Australia (CBA), Westpac Banking Corporation (Westpac), National Australia Bank (NAB) and Australia and New Zealand Banking Corporation (ANZ)

• The four major banks have: (1) 70% of household savings; (2) 70% of household loans; (3) 71% of personal lending; and (4) 68% of business lending.

• The Australian market remains relatively competitive, below the USA’s threshold of 0.18 for considering an industry to have high concentration.
Concentration in Australian banking sector, 1890-2009

Table 4.1  Concentration in Australia’s Banking Sector – 1890 – 2009(4)

<table>
<thead>
<tr>
<th>Year</th>
<th>Share of 4 largest banks</th>
<th>HH index</th>
<th>Share of 4 largest banks</th>
<th>HH index</th>
<th>Share of 4 largest banks</th>
<th>HH index</th>
</tr>
</thead>
<tbody>
<tr>
<td>1890</td>
<td>0.34</td>
<td>0.06</td>
<td>0.38</td>
<td>0.10</td>
<td>0.63</td>
<td>0.14</td>
</tr>
<tr>
<td>1970</td>
<td>0.68</td>
<td>0.06</td>
<td>0.68</td>
<td>0.16</td>
<td>0.68</td>
<td>0.16</td>
</tr>
<tr>
<td>1990</td>
<td>0.66</td>
<td>0.12</td>
<td>0.65</td>
<td>0.12</td>
<td>0.65</td>
<td>0.12</td>
</tr>
<tr>
<td>2009</td>
<td>0.74</td>
<td>0.15</td>
<td>0.78</td>
<td>0.16</td>
<td>0.90</td>
<td>0.27</td>
</tr>
</tbody>
</table>

(a) Data refers only to activities of banks (a subset of ADIs). Data excludes all activities of credit unions, building societies, and non-AAD lenders. Consequently, the actual concentration and HH index values are lower than stated.

(b) The Herfindahl-Hirschman concentration index (which can vary from 0 representing perfect competition to 1 representing monopoly; a market with X equally-sized competitors will have an index of 1/X).

(c) Assuming all owner-occupy housing loans were made by savings banks and accounted for all their loans.

Source: Report on Bank Mergers, Australian Senate Economics Committee, September 2009

Canadian banking sector

- Historically, 1920 to 1980, Canada consistently had 11 banks.
- In 1987, the Office of the Supervisor of Financial Institutions was created. By the end of 2006, there were 22 domestic banks and 50 foreign banks operating in Canada, of which 26 were foreign bank subsidiaries and 24 foreign bank branches.
- Canada has a highly concentrated banking market; for example, the largest six banks account for more than 90 per cent of the assets in the banking system.
- Canadian banks appear to be relatively efficient producers of financial services, and they do not exercise monopoly or collusive-oligopoly power, and that banking can be considered to be a monopolistically competitive industry.
Experience from Australia and Canada

- Both countries have had regular policy reviews, to reassure the policy makers and legislatures that the legacy concentrated financial structure was not at the expense of market efficiency and social equity.
- Consequently, both economies’ past legislative and regulatory changes have pushed for efficiency in domestic financial services, through improving contestability, particularly from foreign entrants.
- The regulatory philosophy in both economies erred on the conservative side, not allowing undue financial innovation and excess competition to push risk frontiers to breaking point.

Development of China’s banking sector

- China is a classic case of banking being viewed as a service to the real economy.
- From 1949 to 1979, when the banks were nationalized, the country adopted a Soviet-style mono-banking system, with the People’s Bank of China being the central bank as well as provider of the payments mechanism, and banks were legally part of the central bank.
- After 1979, the banking system was gradually devolved into large commercial banks and policy banks.
- Large-scale reforms in the banking system occurred in the 1990s, when it was decided to commercialize and eventually publicly list the largest banks.
- With the coming into force of the WTO membership in 2001, China has opened up doors to foreign competition in the banking and financial services in 2007.
Financial Regulatory Framework in China

Chaired by Vice Premier

PBOC  CBRC  CSRC  CIRC
Central Bank  Banking Regulator  Securities Regulator  Insurance Regulator

What does China’s banking sector look like?

• 2 policy banks and China Development Bank (CBD),
• 5 large commercial banks,
• 12 joint-stock commercial banks,
• 143 city commercial banks,
• 43 rural commercial banks,
• 196 rural cooperative banks,
• 11 urban credit cooperatives (UCCs),
• 3,056 rural credit cooperatives (RCCs),
• one postal savings bank,
• 4 banking asset management companies,
• 37 locally incorporated foreign banking institutions,
• 58 trust companies,
• 91 finance companies of enterprise groups,
• 12 financial leasing companies,
• 3 money brokerage firms,
• 10 auto financing companies,
• 148 village and township banks,
• 8 lending companies and
• 16 rural mutual cooperatives.

The total number of banking institutions registered at 3,857, which had approximately 193,000 outlets and 2.845 million employees.
Competition law in China

• The China’s Anti-Monopoly Law (AML) was enacted on 30 August 2007 and came into effect on 1 August 2008. It is modeled on EU competition law and includes provisions governing anti-competitive or so-called ‘monopoly’ agreements (e.g. cartels), abuse of dominance and merger control.

• The AML applies to ‘monopolistic conduct within China’ but also to ‘monopolistic conduct’ outside China that ‘eliminates or had a restrictive effect’ on competition in the Chinese domestic market.

• The AML contains broad principles that will guide antitrust enforcement in China. Many of the details of how the AML will be enforced in practice are yet to be specified in the implementing regulations and guidance, much of which is still in draft form.

IV. Tentative Conclusions
Three policy considerations

• Whether financial institutions that are very large relative to their competitors would engage in “monopolistic” behaviour that have large conflicts of interest and also engage in “predatory behaviour” at the expense of their customers and also competitors.

• Political economy question – when does the finance industry becomes so large to the real sector, that they become TBTF and Too Powerful to Fail?

• What is Perimeter when Finance has moved from Social Value Added to Social Value Subtraction?

Conclusions

• There’s no “one policy fits all” choice, given the differences in stages of development and institutional and political economy legacy considerations.

• It is more important for national policy makers to understand the “best fit” of global “best principles and practices” to their own domestic conditions.

• The debate over crisis cartels in finance is still a work-in-progress. Much needs to be done to consider the complex issues at hand.
SUMMARY OF DISCUSSION

By the Secretariat

Organisation and opening remarks

Following remarks by the Chairman of the OECD Competition Committee and the Chairman of this session, this session was divided into four consecutive sections (on the historical lessons from crisis cartels, including the key matter of whether one approach to evaluating such cartels makes for sound policy; on crisis cartels and their relationship to the allocation of resources; on crisis cartels and price instability in developing countries, in particular for food and agricultural commodities; and on whether any trade-off between development considerations and efficiency justified resort to crisis cartels.) Five presentations were made by experts, followed by numerous illuminating interventions from governmental participants. Twenty-one contributions from official delegates were received by the Secretariat and were circulated in addition to three papers by experts and one background document.

Mr. Frédéric Jenny, Chairman of the OECD Competition Committee, began the session by describing some of the policy-relevant issues that would be discussed in session 3, namely, whether there was a justification for crisis cartels and the appropriate policy responses to such cartels, including potential competition advocacy efforts by competition authorities. Such advocacy, he noted, might highlight alternatives to crisis cartels by which a government could attain a known objective. Professor Jenny also introduced Mr. Prem Narayan Parashar, a member of the Competition Commission of India, who chaired this session.

The purpose of this session, remarked Mr. Parashar, was to examine whether the formation of cartels during economic crises can be justified. Although such crisis cartels may not have been that prevalent during the recent global economic downturn, historically governments have resorted to such cartels in times of economic distress. Whether there are any contemporary lessons for policymaking from such historical experience is clearly of relevance to this session and the background paper and its author would address these matters.

In interpreting the historical evidence Mr. Parashar cautioned that there were a number of considerations that should be taken into account. One ought to distinguish between the justification for forming crisis cartels, from the subsequent development of such cartels, the objectives and effects of such cartels, as well as the implications for consumers, society, and the work programme of a competition authority.

Drawing upon the experience of developing and industrialised countries (in particular, during the latters' early phases of development), reference could be made to specific cartels and to the lessons that could be drawn from such experiences. Such cartels may arise in sharp sectoral, national, and global economic downturns. Where available, evidence on the impact of such cartels should be taken into account. Plus a range of options for policymakers should be identified and compared, affording decision-makers potential alternatives to cartelisation that can be employed during times of severe economic distress.

In addition crisis cartels raise a number of matters concerning the application of competition law and policy. Approaches – legal and otherwise – to these matters differ across jurisdictions. In some jurisdictions there are provisions for the approval of exemptions from cartel law, subject to meeting certain
conditions. Those provisions may be administered by the competition authority or by some other governmental body. The determination of penalties against cartels during severe economic downturns and the application of leniency programmes during such times are matters of interest too. With variation in law and practice across the jurisdictions opportunities arise to contrast experience, examine pros and cons, and potentially to identify better practices.

1. **Crisis Cartels: Does one size fit all? Historical lessons**

This section began with a presentation by Mr. Simon Evenett on the form of crisis cartels, the potential justifications for such cartels, and historical evidence on such cartels in prior sectoral, national, and global downturns. The principal policy question is whether during such downturns there is a case for encouraging or permitting the creation of crisis cartels. To help lay the ground for the subsequent discussion Mr. Evenett noted that the phrase crisis cartels could be taken to have two meanings. First, it could mean the creation of a cartel between private firms that is not approved by the state. A second interpretation is that a crisis cartel refers to an agreement between firms that a government body sanctions during a period of economic distress. The first type of crisis cartel may well contravene the competition law of the jurisdiction in question, while the second type of crisis cartel may well require an exemption from that law.

In principle the matter of whether a crisis cartel has a particular justification can be approached in a number of ways. First, does the introduction of a crisis cartel improve the functioning of a market? Second, does the creation of a crisis cartel improve consumer welfare (or some measure of the allocation of national resources) more than any other available policy with similar cost? A third alternative is whether a crisis cartel attains some non-welfare objective, such as reducing unemployment by a certain amount, at lowest possible cost to the economy? Clarity about the benchmark used is, therefore, important. So is the need to evaluate the merits of crisis cartels relative to other forms of government intervention, including non-intervention. Ideally, the goal should be to identify the best policy responses in sharp economic downturns, not just those policy options that improve matters.

The above considerations are of direct relevance to competition authorities and to other government bodies for several reasons. Competition authorities have to decide how much priority to give to cartel enforcement and whether that priority should change over the business cycle. Other government bodies may have to decide whether to intervene, permit, or even encourage the formation of cartels. Some have argued that these questions are of greater relevance to developing countries with fewer public policy instruments effectively available to them during downturns. For instance, developing countries may not be able to afford the same range of bailouts and financial transfers given by industrialised countries during economic crises. Under these circumstances, are crisis cartels the next best alternative available to developing country policymakers?

Another important point of context is that tolerating crisis cartels goes against two decades of tougher enforcement against price-fixing and the like in both developing and industrialised countries. If the policymaking community were to accept that there are circumstances under which crisis cartels could be justified then this would mark a significant point of departure from prevailing views on cartel enforcement. Many of country contributions to this session discussed this very matter.

As to the economics of crisis cartels, this is contested. The dominant view among the competition policy community is to be contrasted with that of certain development economists, who argue that the institutions and circumstances of developing countries warrant a different approach to crisis cartels. The first view is that crisis cartels – as other cartels – raise prices above incremental costs and so harm customers, limit output, and distort market outcomes away from efficient outcomes. Also during crises bid rigging cartels reduce the effectiveness of fiscal stimulus packages by reducing the value for money obtained
by state purchasers, the number of units purchased and therefore the increase in labour demand. There is also some evidence that cartels slow down the transfer of technology to firms in developing countries.

The attention given to incentives in the first view has implications not just for the justification of crisis cartels. With respect to the enforcement actions against cartels, the desire to avoid forcing the exit of cartel conspirators from a sector implies that in a crisis, when demand tends to be lower, fines may have to be lower than otherwise. In turn, this reduces the deterrence effect of a cartel enforcement regime, perhaps calling for consideration of alternative sanctions for cartel law violations.

In contrast, the heterodox view emphasises a different set of factors. On this view the first point to note is that the analysis of cartels originated in the 19th century when, principally German, authors stressed that cartels were useful devices for bringing supply and demand back into balance within industries. Cartels facilitated, it was said, the closure of capacity. Moreover, some argued that one purpose of cartels was to prevent crises resulting in the monopolisation of a sector. The fear at the time was that without cartels the lowest cost firms would take over an industry. Cartels were seen then as a way to constrain those lowest cost firms, although this begs the question as to why the latter would voluntarily agree to or comply with any cartel accord.

More recent defences of crisis cartels have argued that, in evaluating their merits, it is important to compare two costs: the cost of market power that are created by a cartel and the cost of forgone economies of scale if output in an industry is allocated across a large number of smaller firms instead of being spread over a small number of large firms as the result of the accord. Certain heterodox development economists argue that the former are smaller than the latter, and so conclude that cartel-encouraged rationalisation is to be encouraged. That, at least, is the contention, whether the evidence supports the heterodox interpretation is another matter.

Turning to the evidence on crisis cartels, Mr. Evenett noted that there was relatively little quantitative evidence of the impact of these accords. He highlighted five findings from the empirical record on crisis cartels. First, it is sharp price falls – rather than other features of crises – that appear to trigger the creation of crisis cartels. Second, when a government intervenes to create or allow a crisis cartel, the government’s intervention rarely stops there. Over time there is a strong tendency for other regulations to be sought by incumbent firms and policymakers pursue their own objectives through additional interventions. Third, in sectors facing competition from imports, the creation of a crisis cartel is often associated with measures to curb or eliminate those imports. Crisis cartels, therefore, frequently involve an international trade dimension. Fourth, although studies have shown that crisis cartels have raised prices and limited output, not a single estimate of the harm done to customers could be found. An important piece of information for policymaking is, therefore, missing. Finally, none of the alleged benefits of crisis cartels – mentioned above – have ever been estimated. So there is no way of knowing if the losses to customers that follow from the creation of a cartel are offset, partially or fully, by benefits to other parties. Mr. Evenett concluded that the existing literature is far from complete and that it is hard to base an argument in favour of crisis cartels on the basis of the available empirical evidence.

Mr. Evenett’s presentation concluded with some remarks about the resort to crisis cartels in the recent global economic downturn. He argued that the many contributions from countries and his own research suggested that resort to crisis cartels had been rare in recent years, subject to the caveat that some crisis cartels may remain undetected. Instead of resorting to crisis cartels many governments appear to have engaged in widespread subsidisation of firms in trouble.

In at least one important respect, he argued, subsidies are more effective than cartels because the impact of financial infusions is felt immediately whereas the creation of a cartel takes time to affect prices, sales, and revenues of cartel members. An important implication for policymaking follows. That point is
not that subsidisation is the optimal response. Rather it is that supporters of crisis cartels must show that their proposals are less harmful, or more beneficial, than other available policy instruments, such as subsidies. In this regard it is important to point out that developing countries may not have the resources to offer subsidies from their state budgets. However, it should be noted that some developing countries direct their banking systems to advance loans to distressed firms, which can result in an indirect form of subsidisation. In industrial and developing countries, then, there are plausible alternatives to crisis cartels and so the case for the latter should not be made without reference to the former.

This last point also implies that competition advocacy by competition authorities should identify and highlight plausible alternatives to crisis cartels. Such advocacy need not be confined to those government bodies responsible for the evaluation of requests for exemptions for cartel law, but also to the press and to other opinion formers that might be influential.

After this presentation of the background paper, several official representatives made interventions. A representative from Korea elaborated on that country's enforcement experience with respect to recession cartels. Under Korean law such cartels must be approved by the national competition agency. Approval turns in part on whether the sector in question is in recession and here Korean law impose three requirements.\(^1\) Even if a recession can be shown to exist, there are four circumstances under which the Korean competition authority can deny the creation of a recession cartel.\(^2\)

The application of these rules to a request for a recession cartel from the ready mix concrete industry in 2009 was then described. This request was denied precisely because the industry could not demonstrate to the satisfaction of the Korean competition authority that it was in recession. The speaker also suggested that the authority probably would not have been persuaded by the separate argument that this industry's woes could only be addressed by the creation of a recession cartel. Finally and separately, the role for competition advocacy mentioned above was endorsed in this intervention.

Thinking on the merits of cartels in Germany has evolved considerably since the 19th century, a representative from that country suggested in an intervention. No longer are cartels seen as the outcome of unrestricted trade and are, on that view, unobjectionable. During the hyperinflation of the 1920s the pernicious effects of cartels on customers were recognised and policy evolved in response. For this reason contemporary views cast doubt upon the contention that a crisis cartel can be justified merely because there has been an economic downturn.

Turning to other arguments for crisis cartels, the speaker from Germany noted that while there may be legitimate reasons for a developing country government to seek to stabilise prices of certain goods and services there were three practical reasons why a cartel-based solution was unwise. First, such cartels are difficult to set up in a timely fashion. Second, these cartels are very difficult and costly to monitor. Finally, recession cartels are difficult to unwind after they are set up, not least because the sector involves parties that get to know each other very well during the cartel phase. Good intentions may well founder on the

---

1 The three requirements are (i) that demand for the products in question has continued to decrease and remains far below potential supply for a long period of time and that this situation is likely to remain so, (ii) that the price paid by customers is below the average total cost for a certain period of time (ensuring losses are being made), and (iii) that a considerable number of companies in the sector in question are having difficulty growing, therefore ruling out cases where only a few firms are facing difficulties and are seeking a recession cartel.

2 The four grounds for denying a recession cartel are (i) that the proposed cartel goes beyond what is necessary to meet its stated purpose, (ii) that the proposed cartel has the potential to “unfairly” harm customers, (iii) that the proposed cartel "unfairly" discriminates in favour of some members over others, and (iv) that there are limitations on joining or withdrawing from the proposed recession cartel.
back of these practical concerns. More generally, the speaker argued, developing country competition authorities should not be tasked with the implementation of industrial policy considerations.

A participant from the European Commission made several observations. It was noted that firms have alternatives to cartelisation, including mergers, joint ventures and other legal forms of co-operation (on research and development, for example). With respect to the latter, it was noted that in December 2010 the European Commission issued a new set of guidelines. More generally, the existence of alternative corporate actions highlights the pitfalls of considering proposals for crisis cartels in a vacuum.

This participant also acknowledged the challenges that arise when sanctioning cartels during a sharp economic downturn. The European Commission has developed a complex set of criteria to evaluate the ability of cartel members to pay. However, it was stressed that the application of those criteria was separate and subsequent to any initial decision for infringing cartel law.

The final speaker in this section was from Chinese Taipei, who described their experiences with respect to the approval of exemptions from cartel law. Exemptions for recession cartels were allowed but applicant firms have to submit a “Concerted Action Assessment” report as well as meeting other criteria, such as demonstrating that market prices had fallen below average production cost. Until now only one application for a recession cartel had been filed, by the man-made fibre industry in 1992. This application was turned down by the competition authority on the grounds that the industry as a whole was expected to survive.

2. Crisis Cartels and the reallocation of resources

The Chairman introduced the principal theme to be discussed in this section, namely, whether during a sharp economic downturn the “need” to reduce excess capacity in a sector provides a rationale for co-ordinated responses among firms – including potentially the creation of a crisis cartel. In so doing a direct potential link between resource allocation during economic downturns and crisis cartels could be developed.

The first speaker in this section Mr. Ian Christmas, Director-General of the World Steel Association, addressed this theme by making reference to the steel industry. Having noted that the total amount of steel produced worldwide was 1.4 billion tons in 2010 and that the global steel industry is very unconcentrated (where the largest steel firms account for less than eight percent of total worldwide steel production), Mr. Christmas focused on legal cartels in the steel sectors motivated by “crises”. Whenever a steel company is in severe financial troubles it claims it is in a crisis. The question for policymakers, he contends, is whether the firm’s problems are a cyclical one (in which case tiding the firm over may be appropriate) or a structural, competitiveness one (in which case, unless firm practices are reformed, state intervention may be useless). Given the considerable fluctuations in demand in the steel business, claims that a firm’s difficulties are cyclical cannot be ruled out. Moreover, some governments are concerned about the social consequences of a firm’s potential collapse (on unemployment and possibly the environment) and this may influence state responses. Finally, the impact of any collapse on the buyers of steel might be taken into account. Overall, then, in practice a number of factors determine the decision to intervene.

Another important factor are changes in the business models of the firms themselves. This is of particular relevance to the steel industry, especially in recent years. In 2009 steel use in OECD countries fell 30 percent compared to the previous year, meanwhile steel use grew in China, India, and in Latin America. Despite this variation there have not been many departures from the steel industry and this is because companies – the speaker cited Nucor, the largest U.S. producer, favourably in this regard – had altered their business models so as to be able to better survive over the economic cycle. Other steel firms, in particular in Europe, were assisted by economy-wide government schemes to subsidise employment.
This recent intervention stands apart from the cartel-related tools used yesteryear in the steel industry, that include price controls, production quotas, import and export restrictions, restrictions on raw material prices and trade, as well as direct subsidies for particular companies and employees.

The speaker gave the 1970’s Davignon plan as an example of a crisis cartel in the steel industry. After the first international oil crisis in the 1970s European governments were heavily subsidising their steel firms, so much so that the European Commissioner responsible, Vicomte Davignon, felt these subsidies were becoming a threat to the formation of a future common market. As a result, a system of price controls, production quotas, trade restrictions, and bans on the use of subsidies were imposed on every steel producers in the European Economic Community. The speaker noted that social pressures were indeed eased, perhaps at the expense of the performance of the more competitive steel plants. Overall, it was argued, the so-called Davignon plan went on for too long and stalled the rationalisation process in the European steel industry.

The speaker gave two other examples, one from India and from the United States. Up until the early 1990s there were only two steel producers in India, only one of which (Tata) was in the private sector. New investment in the flat steel sector was banned and production quotas in force. Once lifted, along with reductions in import tariffs on steel, the steel sector in India blossomed. Entry resulted in a sector in which there are now five or six major producers and productivity has increased considerably. The speaker conceded that this adjustment was made easier in an economy whose growth rate has accelerated over time and where the demand for steel has grown correspondingly.

The restructuring of the steel industry in the United States in the early part of the last decade had benefited from cartel-like interventions, the speaker asserted. In particular, the imposition of trade restrictions relieved U.S. steel firms of competitive pressure from abroad. Consolidation followed, including foreign firms buying up U.S. steel plants. The U.S. government took over the substantial pension liabilities of steel companies and trade unions came to new arrangements with management. As a result of these changes the American steel industry is much more competitive internationally than it used to be.

The speaker then turned to the lessons for developing countries. He argued that rising steel demand in emerging markets did not always provide sufficient economic justification for developing steel production there. Economies of scale are not needed for a steel plant to thrive and grow; small scale producers can be competitive. For this reason the arguments often advanced for infant industries do not apply to the steel industry. Worse, to the extent that protectionism is used to protect a national steel sector it raises the prices paid by steel buyers that are almost always other national producers.

To conclude, Mr. Christmas recommended that any legal cartels be temporary and be specified with clear business objectives. Policymakers should be mindful of the special pleading of corporate interests. He acknowledged that this may be far from easy. Even so, public interest considerations should guide policymaking.

This introductory presentation on the steel sector was followed by four interventions from country participants. A representative from Brazil spoke first and expressed some scepticism concerning the logical and empirical case for crisis cartels. A cartel implemented as a result of a sharp economic downturn would effectively transfer the harm done by the downturn from producers to customers and this was unacceptable. Consequently, alternatives to the creation of a cartel should be considered.

Brazilian experience with crisis-motivated cartels reinforced this representative’s scepticism. Instead of stimulating the sectors that were cartelised, an anti-competition culture developed that has persisted to this day. These lessons have been taken on board and two recent applications from the sugar and alcohol
sectors for permission to form associations, that would have distributed quotas and sold production jointly, were denied.

An Irish representative described the Irish beef processing industry case, which was the subject of both official and judicial scrutiny in the 1990s. The case began in the 1990s when, for various reasons, demand for Irish beef fell. A government report recommended rationalisation of the sector and this was taken up by the industry which proposed the creation of the Beef Industry Development Society (BIDS). The proposed scheme would facilitate exit from the beef sector with the remaining firms paying a levy that was to be used to compensate the exiting firms.

The Irish competition authority refused to grant an exemption for the BIDS scheme from national competition law because it felt that the claimed efficiencies were not demonstrated adequately and that market forces could have effectively facilitated the rationalisation of the beef sector. This decision was contested in the courts. Ultimately, the Irish Supreme Court supported the authority's judgement and the beef industry decided not to implement the agreement. Specific reference was made to the utility of the European Commission's guidelines on agreements that might facilitate the rationalisation of sectors.

These comments from the Irish representative were reinforced by an intervention from the European Commission. The latter highlighted the importance attached to the guidelines for implementing Article 101 (3) of the Treaty on the Functioning of the European Union. In this speaker's view an agreement by firms to reduce overcapacity constitutes a restriction of competition by object. The only way to make such an agreement legal is to fulfil all the conditions of Article 101 (3) and, in the speaker's view, this is very difficult. Not only must efficiencies be demonstrated and there must be no less competition-restrictive means of achieving those efficiencies than the proposed agreement. Specific attention should, it was argued, be given to the incentives faced by individual firms to reduce capacity. If those incentives are strong, why do firms need to co-ordinate in order to facilitate rationalisation of a sector?

The gilthead sea bream case, considered by the Hellenic Competition Commission, was the subject of an intervention from a representative of Greece. The gilthead sea bream sector is a major exporter and sought an exemption from national competition law to facilitate rationalisation of production capacity. The sector claimed that there was over-production, that prices were below production costs, and that exit was expected, which in turn would hurt consumers. This notification was rejected by the competition authority on several grounds. First, the firms concerned did not produce a convincing restructuring plan. The competition authority suspected that the firms in question were not that interested in consolidation and specialisation, but rather in the proposed agreement to raise prices. Second, the overcapacity that existed was due to bad judgement on the part of the firms involved and not due to some other factor, such as a demand slump.

The final observation in this section came from a representative from the United Kingdom who argued that a government-sanctioned cartel, however short-lived, is likely to result in co-ordinated behaviour among firms after the official cartel lapses. Whatever short term benefits, if any, arise from the creation from crisis cartels will, by this logic, be offset in part or wholly by adverse longer term effects.

3. Crisis Cartels and price instability in developing countries

In recent years commodity price instability and the prices witnessed in the agro-food sector have been the subject of much concern among policymakers, the Chairman noted. Transitory shocks in these development-sensitive sectors can jeopardise the survival of marginal market participants threatening, for example, farmers’ livelihoods when prices are very low and the welfare of poor buyers when prices are very high. Some have contended that cartels in sectors affected by transitory shocks could stabilise prices
and the purpose of this section was to explore these matters in greater depth. Two expert presentations facilitated this discussion.

The first presentation was made by Mr. Steve McCorriston, Head of the Department of Economics at the University of Exeter. He began his presentation with an observation that ten years ago international organisations were interested in whether market manipulation or international commodity agreements could reverse the low prices seen in agricultural and food markets. Nowadays these prices are much higher (although the price surge seen in 2007-8 was in fact less severe than in 1972-4), but the question before policymakers is still the same. The speaker also questioned the strength of the linkages between developments in commodity markets, crisis cartels and competition factors more generally. Apparently competition perspectives have not received as much attention as they could have in discussions on food security, despite the attention given to the latter in the past few years. In that regard the speaker made reference to recent media reports to food price inflation in Bolivia, China, and India.

In order to better understand the role that competition factors might play in accounting for food and commodity price behaviour a number of distinctions should be borne in mind. First, high prices (more generally, the level of prices) and the volatility of prices are conceptually distinct. Competition-related factors may affect each differently. Second, it is important to distinguish between prices of food and commodities in national markets and the comparable prices in international markets. The extent to which shocks in global markets influence national prices is an interesting matter and may speak to the level of competition in the distribution sector. Third, price volatility of final goods (such as unprocessed and processed food) may be affected by shocks to the costs of key inputs.

The degree of price transmission between global and national markets and between input and final goods markets has been the subject of research. Less competitive markets typically see less than one-for-one pass through. Indeed, the speaker contended that as a first approximation (and assuming markets to be competitive), the extent of pass-through should be related to the share of the raw commodity in downstream firms’ costs. This share can be relatively small particularly for processed food products. If markets become less competitive – potentially in response to the creation of a crisis cartel – then the rate of pass through would in principle fall, lowering the degree of perceived price volatility. In which case, price hikes in global markets or in input markets would be absorbed in profit margins more than before.

Overall, then, if a market for food or commodities becomes less competitive there would be effects on the volatility as well as the level of prices, each of which affects customers and producers. The speaker reminded participants that in some markets in developing countries the producers just as well as their customers could be facing poverty. The competition policy community often privileges customer welfare over producer welfare; a developmental perspective might legitimately consider the impact of changes (firm-led or policy-led) in agricultural and commodity markets on poor producers too. For these reasons the speaker argued that agricultural markets may be more development-sensitive than most and the application of competition principles should be more flexible.

Trade in agricultural and commodities, and in the inputs necessary to make them, can be affected by cross-border anti-competitive practices. The speaker made reference to a recent proposed – but failed – international takeover that would have had implications for the prices charged in world fertiliser markets. Likewise, an export cartel for rice involving certain Asian governments, advocated during the recent global economic downturn and associated with the recent price spikes on world commodity markets, highlights how competition-related factors can shape market outcomes in these development-sensitive markets. These competition-related factors are not to be confused with other developments, such as export bans, which fall under the remit of trade policy.
The second presentation in this section, given by Mr. Jenny, focused on a specific government induced cartel: the International Coffee Agreement which lasted from 1962 to 1989. This cartel enhanced the terms received by the very large number of poor coffee farmers in developing countries to the detriment of the then four principal multinational buyers of coffee. Without this cartel, it was contended, the latter would have used their considerable market power to negotiate prices that would have lowered the incomes of the former.

The market for coffee is concentrated both on the buyer and seller sides, with a small number of countries responsible for a large proportion of consumption and production. The total volume of coffee sold is greatest in the United States, whereas to largest volume supplier is Brazil. Moreover, for a small number of countries (Burundi, Ethiopia, Rwanda, and Uganda being examples) overseas revenues from coffee sales constitute a large share of total national exports. For these countries the level and volatility of coffee prices, the latter being quite substantial due to the length of the growing cycle and the price inelastic nature of demand, have important implications for macroeconomic stability as well as for the welfare of coffee farmers.

In the 1950s and 1960s the International Coffee Organization attempted to establish a worldwide cartel for coffee to counter low prices and high price volatility. Thirty-seven countries signed an International Coffee Agreement (ICA) in which a quota system for the exports of coffee was established. Interestingly the largest coffee consumer, the United States, was a member of this agreement and was central to the monitoring of this accord. The cartel system operated from 1962 to 1989, when the United States withdrew from the ICA. While the impact of the cartel was to raise prices, the effect on coffee price stability was less clear. Price spikes still occurred, such as that observed in 1975 following a major frost in Brazil.

Why did a major consuming nation support the cartelisation of a product that it buys? The speaker argued that the ICA was seen as enhancing the economic stability of a number of developing nations and this met certain foreign policy objectives of the United States during the Cold War. Moreover, by being a party to this agreement, the United States could “protect” by influencing the degree of harm done to US consumers through the level of imported coffee prices.

Following the collapse of the ICA, the introduction of a new technology which enabled the processing of Robusta coffee beans as well as the considerable expansion of coffee production in Vietnam led to an imbalance between supply and demand and a substantial decline in prices over time. Farmers are reported to have substituted production away from coffee towards other crops, which in turn has created problems. In East Africa an alternative response has been to develop niche products and to market higher-end coffees.

From this episode the speaker drew the following lessons. First, the lack of diversification in many developing countries implies that price volatility has developmental implications, not least through affecting the incomes of vulnerable farmers. Second, in the case of coffee the international cartel that existed between 1962 and 1989 did maintain prices and reduce price instability and therefore met its signatories’ objectives. Third, while certain financial instruments could have insured producers against price volatility, they were not developed at the time this cartel was in operation. Other alternatives, such as mergers, would not have been feasible on a large enough scale without generating huge concentrations of land ownership in developing countries. Fourth, while a niche strategy was an alternative for some producers, whether it is a generalised solution remains to be established. Having said all this, the speaker wondered if the adaption to market and technological developments might have been faster in the absence of the cartel.

These two presentations were followed by four interventions from representatives of developing countries. The first intervention came from Colombia, where an official recounted the cartel exemptions
that may be granted under that nation's competition legislation. It turns out that the national competition authority has never accepted an application for an exemption. To the contrary, the authority has enforced its cartel law rigorously during sectoral, national, and global economic downturns. Specific reference was made to investigations into the pricing of sugar cane (where a cartel existed from 1993 to 2010) and into the green onion and pasteurised milk industry. In both of the latter cases, which involve food and so affect the cost of living, falling prices were used by market incumbents to justify cartelisation. Arguments that each sector was in crisis were rejected by the competition authority.

The second country intervention was from Costa Rica. This representative noted that the enforcement of cartel law in times of crisis often led the competition authority to be painted as heartless, attacking arrangements that jeopardise the incomes of poor farmers and producers that have few perceived alternative sources of income. In Costa Rica there is no mechanism for the competition authority to grant an exemption to cartel law in a crisis, or indeed in any other circumstances. When the most recent competition law was being debated proposals were made to include such a mechanism but ultimately they were rejected. The rejection was appropriate as crisis-related exemption mechanisms beg more questions than they answer. For example, what constitutes a crisis? Does a crisis need to be global or can it be sector-specific? Are crises always associated with excess capacity? Which body determines whether a crisis is over and that the cartel needs to be disbanded? Which body determines the rules by which the cartel will operate? Who is the cartel trying to protect? Instead of answers to these tough questions, it was argued, we know for sure the answer to the following question: Who is going to pay for the cartel? Customers.

The speaker from Costa Rica emphasised that they were not against government intervention per se. Indeed, government intervention that makes industries more competitive is to be welcomed. However, the reality is often different as interest groups seek favour from governments. Worse, as noted in the background paper, demands for government support rarely cease with exemptions from cartel law. These demands were said to be particularly damaging in industries that produce or cultivate materials bought by other sectors. Recognition of such damage is growing in Costa Rica, it was argued, as the Agriculture ministry recently referred certain proposed regulations to the competition authority for examination, opening the door to competition advocacy by the authority.

The third country intervention came from Indonesia. Times of economic crisis were ones where, the speaker said, firms might co-ordinate their actions to cut production or otherwise act as a cartel. While this may harm buyers the alternative is bankruptcy and exit from the market. Moreover, there are some basic needs of the public (in food, agriculture more generally, health care, and energy) where prices become more volatile and can rise sharply. Under these circumstances producers may co-ordinate actions so as to stabilise prices. In the light of these competing considerations many have argued that, in times of crisis, competition law enforcement should be relaxed.

In Indonesian competition law (Law number 5 passed in 1999) there are grounds for providing exemptions for cartels. Article 3 allows for exemptions to safeguard the public interest and to improve national economic efficiency. Article 50 allows for exemptions on the grounds of meeting the objectives of national legislation (including regulation) or for promoting exports, so long as the additional exports do not interfere with supplies to the domestic market. Such exemptions are only granted after a thorough analysis by the national competition authority. Moreover, the authority can submit suggestions to other government bodies to revoke or improve regulations and their implementation.

The outcome of two recent Indonesian cartel cases with potential development significance were then summarised. In an investigation of the price of cooking oil, the Indonesian competition authority found that suppliers did not cut their domestic prices as quickly as they raised them in response to fluctuations in comparable world prices. Such asymmetric price transmission was part of the evidence used to find the
relevant suppliers guilty of price fixing. A case involving airline transportation services was resolved on a similar basis.

This enforcement experience prompted the speaker to conclude by raising several questions. During economic crises under what circumstances can a cartel fall beyond the application of competition law? In what ways during times of economic crisis can a competition authority take proper account of the interests of the lives of many people in the country, bearing in mind many are poor and face loss of jobs? Can the design and application of competition law be used to dampen price fluctuations of public goods and services?

The final intervention came from South Africa whose competition law has a well-known public interest exemption. The speaker acknowledged upfront that this exemption causes concern among local businesses that fear it will be applied arbitrarily and by what were referred to as competition purists that regard this exemption as altering the way in which enforcement decisions are taken. It was contended that, in practice, this exemption was not used widely. The South African competition bodies interpret the law in quite an orthodox manner and are well aware that there are often more effective policy instruments for attaining many governmental goals than competition law.

The recent economic crisis has not influenced the enforcement of South African competition law. While that law does allow for exemptions of otherwise prohibited anti-competitive practices on four grounds (promoting exports, promoting small businesses controlled by historically disadvantaged individuals, changes in productive capacity to stop the decline of an industry, and promoting the stability of an industry designated by the relevant Minister), in fact very few exemptions have been granted. Those exemptions that have been granted relate principally to promoting exports and certain small businesses.

As for an exemption based on the decline of an industry it was argued that this is a double-edged sword for the firms in question. After all, the invocation of such an exemption sends a clear signal to the financial markets of the incumbents' own assessment of their industry's prospects, calling the former to question the competence of the incumbent management. The speaker readily acknowledged that, from the perspective of promoting competition, granting of such an exemption might lead to firms continuing to co-operate after the exemption lapses.

With respect to an exemption designated by the Minister, the legislation contemplates a situation where an industry cannot survive without cartelisation. This exemption was enacted as a result of lobbying by the diamond sector, where price instability is a concern for suppliers. Ultimately, only one exemption has been granted under this provision and that was to the petroleum industry around the time when the football World Cup was held in South Africa. There are, however, two pending applications before the Minister for such exemptions, in the dairy and health care markets.

The speaker described how an application for an exemption from the maize industry, citing the promotion of exports and the economic instability, was turned down by the South African competition authority. Without such an exemption, the industry argued, farmers would not invest for the next growing season and this would cause future problems of food insecurity. The authority found the evidence to support this claim unconvincing. Moreover, the Minister did not issue a certificate stating the industry was having difficulties.

Even when there is Ministerial involvement in the exemption process the speaker emphasised that it is the competition authority that ultimately makes the decision on whether to issue the exemption. It does so after publishing notices in the government gazette, inviting comments from stakeholders, and on the basis of evidence. In granting exemptions the authority specifies exactly what behaviours are exempted and for how long.
4. **Is there a trade-off between development and efficiency that could justify crisis cartels?**

The fourth section was introduced by the Chairman, who noted that in principle there could be a trade-off between development - or other economic considerations such as financial stability - and efficiency during crises. The question before participants is whether that trade-off provides adequate justification for the creation of cartels in certain sectors during economic crises? The Chairman then introduced the first speaker, Mr. Andrew Sheng, chief advisor to the China Banking Regulatory Commission, whose focus was on crisis-related developments in the financial sector.

Mr. Sheng began his presentation by noting that in his 35 years as a financial regulator this was the first time he had met competition regulators, implying that there was insufficient communication between financial regulators and competition regulators. This was a comment that others later would remark upon. The first substantive distinction he made was between cartels in the real sector, where the losses from the exercise of market power were in his view tiny compared to the costs of market failure in the financial sector. The latter is a natural oligopoly with strong network effects between participants whose commercial viability tends to rise and fall together. Regulatory, tax, and information arbitrage are also part of the competition between firms in the financial sector – and when regulations become too demanding then activity migrates to an unregulated shadow banking system.

Under these circumstances it is not surprising that financial regulators have examined whether there is a trade-off between efficiency (driven by competition) and stability. Some contend, Mr. Sheng noted, that a more concentrated financial system is a more a stable one. Concentration in small emerging markets may lead to oligopoly in the internal market, but these large local players are in fact relatively small when compared to the size of the global market, which is the relevant comparator for those economies whose financial systems are integrated into global markets. What is worrying, in his view, is the concentration at the global level in certain financial segments. The latter concentration can lead to so-called momentum plays and market manipulation, since many of the off-shore and over-the-counter markets are non-transparent and largely unregulated. Moreover, since every concentrated financial player is a counterparty to most, if not all, other major players then concentration is in reality associated with greater potential global financial instability, not less.

The speaker also pointed to other, non-competition-related factors that have exacerbated financial instability: poor internal risk management by financial institutions, poor regulatory oversight, failure to separate investment banking from retail banking, and government guarantees for depositors and others that generate moral hazard. Mr. Sheng argued that Australia, China, and Canada were not so adversely affected by the recent global financial crisis, precisely because they focused their banks' activities on retail operations and not on building the leverage associated typically with investment bank functions. The history of prior speculation taught policymakers in Australia and Canada to have concentrated banking systems – even cartelised systems he claimed – that are reviewed from time to time by competition regulators or other parties that are concerned with promoting efficiency. More generally, Mr. Sheng advocated attention to national circumstances and doubted whether any sound best practice to guide policymaking could be identified.

Following this presentation were interventions from two OECD members. First an official from Australia explained that in his country the promotion of competition and stability were seen as complementary goals of government policy. It is accepted that competition between banks can have implications for both and that bank sector outcomes can have important knock-on effects for the rest of the economy, and these must all be taken into account. In Australia the competition authority confines itself, however, to the assessment of mergers on the intensity of competition, whereas the Australian Prudential Regulatory Authority concerns itself with any consequences for financial stability. The resilience of the Australian financial system during the recent global financial crisis should, it was argued, be attributed in...
part to this system of regulatory oversight, demonstrating that it is possible to design regulatory systems to simultaneously meet policy objectives relating to competition and financial stability.

A representative from Portugal noted that national financial systems have three functions, relating to mobilising savings and investment, operating payment systems, and undertaking risk management. Four types of transactions were associated with these functions: spot transactions, risk-adjusted non-spot transactions, payment transactions, and securitisation (the shifting of risk to others). Having characterised national financial systems thus, this representative asked what role there was for competition authorities? Examining fees for spot transactions, the ease with which customers can move between financial suppliers, and the impact of state aids and financial guarantees are clearly areas where competition authorities can contribute. However, it was argued, when it comes to risk-adjusted transactions and premiums paid for insurance and securitisation, much more care is needed as clear answers are not so readily available.

This representative agreed with the presenter that the implications of state guarantees and financial institutions being “too big to fail” needs to be solved. However, the presenter's apparent assumption that all concentration led to cartelisation was contested by this representative. A more nuanced appreciation of the differences across markets and firms was recommended here. Moreover, while the representative agreed that there may be no single policy prescription for all countries concerning the regulation of financial services, the presenter's recommendation that investment banking and retail banking be separated was rejected on the grounds that this is a matter for regulators to decide, not competition authorities.

5. **Wrap up and general discussion**

The Chairman of the session asked Mr. Evenett and Mr. Jenny to summarise the key lessons from this session's deliberations. Mr. Evenett highlighted three lessons. First, although few, if any, participants defended the heterodox views in favour of crisis cartels, as a practical matter governments should have the means and established procedures to evaluate proposals for such cartels during economic crises. A number of jurisdictions in fact have sophisticated procedures which have been applied in practice and other jurisdictions may want to reflect on this experience.

Second, there are alternative public policy measures available to governments in both developing and industrialised countries that might improve market outcomes more effectively than crisis cartels. This points to an important role for competition advocacy by competition authorities, as they seek to influence governmental decision-making during economic crises.

Third, in markets where prices are volatile or where the consequences of volatility are severe (possibly for producers as well as consumers) crisis cartels are an option but, again, not necessarily the only practical option. Financial market and other innovations should be considered as well.

Mr. Jenny began by noting that there was agreement that there are better alternatives to crisis cartels as both means to solve economic crises or to mitigate crises. What remains open is to decide how far the competition community goes in developing its thinking about alternative approaches. This is all the more necessary as there have been important policy debates - over food security and financial stability - where the competition perspective has barely been aired over the years.
COMPTE RENDU DE LA DISCUSSION

Structure et remarques liminaires

Après le discours d’ouverture du Président du Comité de la concurrence de l’OCDE et du Président de la présente session, la discussion est divisée en quatre sections consécutives (sur les enseignements à tirer des expériences d’ententes de crise, y compris la question clé de savoir si une approche de l’évaluation de ces ententes constitue une politique recommandable ; sur les ententes de crise et leurs relations avec la redistribution des ressources ; sur les ententes de crise et l’instabilité des prix dans les pays en développement, en particulier pour les produits alimentaires et les denrées agricoles ; et sur la question de savoir si un quelconque compromis entre les considérations de développement et d’efficacité pourrait justifier le recours aux ententes de crise.) Cinq présentations d’experts seront suivies de nombreuses interventions extrêmement instructives de représentants officiels. Les vingt-et-une contributions de délégués reçues par le Secrétariat ont été diffusées ainsi que trois documents d'experts et une note de référence.

M. Frédéric Jenny, Président du Comité de la concurrence de l’OCDE, ouvre la session en évoquant certaines questions relatives à l’action des pouvoirs publics qui seront débattues dans le cadre de la troisième session. Il s’interroge plus précisément sur le point de savoir si les ententes de crise peuvent se justifier et sur la réponse qu’il convient que les pouvoirs publics apportent, mentionnant notamment les actions de sensibilisation des autorités de la concurrence. Il fait remarquer que ces actions pourraient mettre l’accent sur des solutions alternatives aux ententes de crise qui permettraient aux pouvoirs publics d’atteindre un objectif connu. Monsieur Jenny présente ensuite M. Prem Narayan Parashar, membre de la Commission de la concurrence de l’Inde, qui préside cette session.

M. Parashar remarque que la session a pour objet de se poser la question de savoir si la création d’ententes peut se justifier en période de crise. Même si les ententes de crise n’ont pas été particulièrement présentes au cours de la récente crise économique mondiale, historiquement, les pouvoirs publics ont eu recours à ces ententes en période de marasme économique. La question de savoir si l’on peut tirer des enseignements utiles d’ententes de crise qui permettraient aux pouvoirs publics d’atteindre un objectif connu, Monsieur Jenny présente ensuite M. Prem Narayan Parashar, membre de la Commission de la concurrence de l’Inde, qui préside cette session.

En interprétant les données historiques, prévient M. Parashar, il convient de prendre en compte certaines considérations. Une distinction s’impose entre la justification de la création d’ententes de crise et l’évolution ultérieure de ces ententes, leurs objectifs et leurs effets, ainsi que leurs implications pour les consommateurs, la société et le programme d’action de l’autorité de la concurrence.

Mettant à profit l’expérience des pays en développement et des pays industrialisés (pour ces derniers, en particulier durant leurs phases initiales de développement), on pourra s’inspirer d’ententes spécifiques qui se sont constituées et des enseignements que l’on aura pu en retirer. Ces ententes peuvent intervenir dans le contexte de graves crises économiques sectorielles, nationales ou mondiales. Les données factuelles disponibles sur l’impact de ces ententes devront être prises en compte, lorsqu’elles existent. Il conviendra en outre d’identifier et de comparer l’éventail d’options ouvert aux pouvoirs publics afin d’offrir aux décideurs des alternatives potentielles aux ententes susceptibles d’être utilisées en périodes de marasme économique.
Les ententes de crise posent en outre plusieurs questions du point de vue de la mise en œuvre du droit et de la politique de la concurrence. Les approches, juridiques et autres, de ces questions diffèrent selon les juridictions. Dans certaines juridictions, des dispositions existent pour l’approbation de dérogations à la législation contre les ententes, sous réserve de respecter certaines conditions. L’application de ces dispositions peut être confiée à l’autorité de la concurrence ou à une autre autorité. La détermination des sanctions contre les ententes en période de crise économique grave et la mise en œuvre des programmes de clémence durant ces périodes sont également des points qui méritent l’attention. La diversité des législations et des pratiques à travers les juridictions crée des opportunités de comparer les expériences, d’examiner les atouts et les inconvénients et éventuellement de définir les meilleures pratiques.

1. **Ententes de crise : la même approche convient-elle à tous ? Leçons de l’histoire**

Cette section débute par une présentation de M. Simon Evenett sur la forme des ententes de crise, leurs justifications potentielles et les données historiques sur ces ententes dans le contexte de récessions antérieures, sectorielles, nationales ou mondiales. La principale question de politique qui se pose est de savoir si ces récessions justifient que l’on encourage ou autorise la formation d’ententes de crise. Afin de faciliter la préparation du débat à suivre, M. Evenett fait remarquer que l’expression « ententes de crise » peut avoir deux acceptions. Elle peut d’abord désigner la création d’une entente entre des entreprises privées sans l’autorisation des pouvoirs publics. Dans une seconde acception, il peut s’agir d’un accord entre des entreprises avec l’autorisation des pouvoirs publics en période de récession économique. Le premier type d’entente peut être en contravention avec le droit de la concurrence de la juridiction concernée, tandis que le second peut exiger une dérogation au droit applicable.

En principe, la question de la justification des ententes de crise peut être envisagée depuis différents points de vue. Premièrement, la création d’une entente de crise améliore-t-elle le fonctionnement d’un marché ? Deuxièmement, la constitution d’une entente de crise améliore-t-elle le bien-être des consommateurs (ou un indicateur quelconque de la répartition des ressources nationales) davantage que toute autre politique envisageable qui aurait un coût similaire ? Une troisième approche consiste à se demander si une entente de crise peut servir un objectif autre que le bien-être, tel que la réduction du chômage dans une certaine mesure au moindre coût possible pour l’économie. Il est par conséquent important de clarifier à quel repère l’on se réfère. Il convient également d’évaluer les avantages des ententes de crise par rapport à d’autres formes d’action ou d’inaction. Idéalement, l’objectif serait d’identifier les meilleures réponses susceptibles d’être apportées par les pouvoirs publics face à des crises économiques graves et non seulement celles capables de produire une amélioration.

Les considérations qui précèdent intéressent directement les autorités de la concurrence et d’autres autorités, pour un certain nombre de raisons. Les autorités de la concurrence doivent décider quelle priorité accorder à l’application de la législation contre les ententes et si ce degré de priorité doit évoluer sur la durée du cycle économique. D’autres autorités peuvent être amenées à décider si elles doivent intervenir, permettre, voire encourager, la formation d’ententes. Il est apparu à certains que ces questions revêtent davantage de pertinence pour les pays en développement qui disposent d’un arsenal plus réduit d’instruments de politique publique en période de récession. Les pays en développement peuvent, par exemple, ne pas disposer des mêmes moyens que les pays industrialisés pour financer les sauvetages ou accorder des subventions en période de crise économique. Dans ces circonstances, les ententes de crise constituent-elles la meilleure solution de rechange pour les pouvoirs publics des pays en développement ?

Autre aspect contextuel important, tolérer les ententes de crise va à l’encontre de deux décennies d’application renforcée de la législation contre la fixation des prix et les accords similaires dans les pays en développement comme dans les pays industrialisés. Si les décideurs publics venaient à accepter qu’il existe des circonstances dans lesquelles les ententes de crise pourraient se justifier, cela représenterait une rupture.
considérable avec le point de vue dominant sur l’application de la législation contre les ententes. De nombreuses contributions de pays à cette session abordent cette question.

Le bilan économique des ententes de crise est, quant à lui, sujet à contestation. Le point de vue dominant parmi les autorités de la concurrence diffère de celui de certains économistes du développement qui considèrent que les institutions et les situations des pays en développement justifient une approche différente des ententes de crise. Les autorités de la concurrence estiment que les ententes de crise, à l’instar des autres ententes, ont pour effet d’augmenter les prix au-delà des coûts marginaux au détriment des consommateurs, de limiter la production et de créer des distorsions sur les marchés et, partant, des inefficacités. En outre, en période de crise, les ententes de manipulation des procédures d’appels d’offres réduisent l’efficacité des dispositifs de relance budgétaire en diminuant le pouvoir d’achat des acheteurs publics, les quantités qu’ils achètent et donc l’accroissement de la demande de main d’œuvre. L’observation indique en outre que les ententes ralentissent le transfert de technologie aux entreprises des pays en développement.

L’attention accordée aux incitations par le premier point de vue a des implications qui vont au-delà de la justification des ententes de crise. En ce qui concerne l’application de sanctions à l’encontre des ententes, le souci d’éviter de forcer les conspirateurs à quitter un secteur implique qu’en période de crise, lorsque la demande tend à baisser, les sanctions pénales devront être d’un montant moindre. Cela revient à diminuer la force de dissuasion de la mise en œuvre de la législation contre les ententes, ce qui justifierait peut-être d’envisager d’autres sanctions à appliquer en cas de violation de cette législation.

Le point de vue hétérodoxe met en avant un bilan différent. Notons tout d’abord, en ce qui concerne cette approche, que l’analyse des ententes remonte au XIXème siècle. Les auteurs de cette époque, allemands principalement, ont souligné l’utilité de ces accords pour rétablir l’équilibre entre l’offre et la demande au sein des secteurs d’activité. Selon eux, les ententes facilitaient les fermetures de capacité. Certains ont en outre considéré que l’un des objets des ententes était de prévenir les crises induites par la monopolisation d’un secteur. On craignait à l’époque qu’en l’absence d’entente, les entreprises aux coûts les plus faibles ne monopolisent un secteur. Les ententes étaient alors considérées comme un moyen de limiter le développement de ces entreprises aux coûts les plus faibles, encore que l’on soit fondé à se demander ce qui aurait bien pu pousser ces dernières à accepter de se plier à une quelconque entente.

Plus récemment, les défenseurs des ententes de crise ont avancé que l’on pouvait évaluer les avantages des ententes de crise en comparant deux coûts : le coût de la puissance commerciale induite par l’entente et le manque à gagner en termes d’économies d’échelle si la production d’un secteur est répartie entre un nombre plus important d’entreprises plus petites au lieu d’un nombre réduit de grandes entreprises, ce que favoriserait une entente. Certains économistes hétérodoxes du développement estiment le premier inférieur au second et ils concluent par conséquent en faveur d’une optimisation par l’encouragement d’ententes. C’est en ce tout cas ce qu’ils affirment. Il reste toutefois à établir si les faits soutiennent effectivement l’interprétation hétérodoxe.

Considérant les données disponibles sur les ententes de crise, M. Evenett remarque que l’on ne dispose que de relativement peu de données quantitatives sur l’impact de ces accords. Il souligne cinq conclusions tirées de l’observation des données empiriques sur les ententes de crise. Premièrement, c’est l’effondrement des prix, plus qu’aucun autre effet des crises, qui semble déclencher la création d’ententes de crise. Deuxièmement, lorsque les pouvoirs publics interviennent pour créer ou autoriser une entente de crise, leur intervention s’arrête rarement là. Avec le temps, il arrive fréquemment que les entreprises en place demandent que d’autres aspects soient réglementés ou que les autorités poursuivent leurs objectifs propres par d’autres interventions. Troisièmement, dans les secteurs concurrencés par les exportations, la création d’ententes de crise est souvent associée à des mesures visant à freiner ou à éliminer ces importations. Les ententes de crises ont donc souvent des implications du point de vue du commerce.
international. Quatrièmement, même si les études montrent que les ententes de crise ont pour effet d'augmenter les prix et de limiter la production, on n’a trouvé aucune estimation du préjudice causé aux consommateurs. Les décideurs publics sont par conséquent privés d'informations importantes. Enfin, aucun des avantages supposés des ententes de crise discutés plus haut n'a jamais fait l'objet d'une estimation. On ne dispose donc d'aucun moyen de savoir si le préjudice induit pour les consommateurs par la création d'une entente est compensé, partiellement ou en totalité, par les avantages bénéficiant à d'autres. M. Evenett conclut que la littérature existante est loin d’être complète et qu’il est difficile d’asseoir un argument en faveur des ententes de crise sur les données empiriques dont on dispose.

M. Evenett clôt sa présentation par quelques remarques sur le recours aux ententes de crise lors de la récente récession économique mondiale. Il considère que de nombreuses contributions de pays et ses propres recherches tendent à démontrer que l’on a rarement eu recours aux ententes de crise ces dernières années, encore que certaines aient pu ne pas être détectées. Plutôt que de recourir aux ententes de crise, les pouvoirs publics semblent avoir souvent préféré accorder des subventions à grande échelle aux entreprises en difficulté.

A au moins un égard important, estime-t-il, les subventions sont plus efficaces que les ententes parce que l’impact des injections de liquidité est immédiatement ressenti, alors que la création d’une entente met du temps à affecter les prix, les ventes et les revenus des membres concernés. Il s’ensuit une implication importante pour l’élaboration des politiques. Ce n’est pas tant que les subventions constituent une réponse optimale. C’est que les défenseurs des ententes de crise doivent démontrer que leurs propositions causent moins de préjudice ou apportent plus de bienfaits que les autres instruments à la disposition des pouvoirs publics, tels que les subventions. De ce point de vue, il est important de souligner que les pays en développement peuvent ne pas disposer des ressources budgétaires qui leur permettraient de proposer des subventions. Il convient toutefois de remarquer que certains pays en développement donnent pour instruction à leur système bancaire d'avancer des fonds aux entreprises en difficulté, ce qui peut conduire à une forme de subventions indirectes. Dans les pays industriels et en développement, il existe donc des mesures alternatives possibles aux ententes de crise et il convient donc de les prendre en compte lorsque l'on envisage d'y recourir.

En outre, cette dernière observation implique que l'action de sensibilisation des autorités de la concurrence devrait consister notamment à identifier et faire connaître les mesures alternatives possibles aux ententes de crise. Cette action de sensibilisation ne doit pas s'adresser exclusivement aux autorités chargées d’étudier les demandes de dérogation à la législation contre les ententes, mais aussi à la presse et aux autres fasseurs d'opinions susceptibles d'exercer une influence.

Plusieurs représentants officiels interviennent à la suite de cette présentation. Un représentant de la Corée élabore sur le traitement juridique appliqué dans son pays aux ententes de crise. En application de la législation coréenne, ces ententes requièrent l’approbation d’une agence nationale de la concurrence. Cette approbation se fonde d’une part sur le fait de savoir si le secteur concerné est en crise, ce qui exige, en droit coréen, que trois conditions soient remplies.1 Même si l’existence d’une crise est démontrée, quatre

---

1 Ces trois conditions sont : (i) que la demande de produits en question ait continué de diminuer et demeure très en deçà de l’offre potentielle pendant une période prolongée et qu’il soit probable que la situation n’évolue pas ; (ii) que le prix payé par les consommateurs soit inférieur au coût total moyen pendant un certain temps (induisant des pertes), et (iii) qu’un nombre considérable d’entreprises du secteur concerné connaissent des difficultés pour se développer, ce qui exclut les situations dans lesquelles seules certaines entreprises sont en difficulté et souhaitent former une entente de crise.

406
circonstances peuvent conduire l’autorité coréenne de la concurrence à refuser la création d’une entente de crise. 2

Il explique comment ces règles se sont appliquées à une demande d’entente de crise formulée en 2009 par le secteur du béton prêt à l’emploi. L’autorisation a été refusée précisément parce que le secteur n’est pas parvenu à convaincre l’autorité coréenne de la concurrence qu’il était en crise. L’orateur laisse également entendre qu’il est probable que l’autorité n’aurait pas été persuadée par l’argument distinct selon lequel seule une entente de crise était à même de remédier aux difficultés du secteur. En conclusion et dans un autre ordre d’idée, l’intervenant se déclare favorable au rôle de sensibilisation de l’autorité de la concurrence mentionné plus haut.

Un représentant de l’Allemagne remarque que la réflexion sur les ententes a considérablement évolué dans ce pays depuis le XIXème siècle. Les ententes ne sont plus perçues comme le résultat du libre-échange et sont, de ce point de vue, considérées comme acceptables. Pendant l’hyperinflation des années 20, les effets pervers des ententes sur les consommateurs ont pu être observés et ont conduit les pouvoirs publics à adapter leur politique en conséquence. Ceci explique que l’on remette aujourd’hui en cause l’idée selon laquelle la récession justifierait à elle seule que l’on mette en place une entente de crise.

Considérant d’autres arguments en faveur des ententes de crise, le représentant de l’Allemagne remarque que s’il peut y avoir des raisons légitimes pour que les pouvoirs publics d’un pays en développement s’emploient à stabiliser les prix de certains biens et de certains services, il y a trois raisons pratiques qui militent contre le recours à une solution mettant en jeu une entente. D’abord, il est difficile de mettre ces ententes en place dans un délai suffisamment court. Ensuite, leur suivi est complexe et onéreux. Enfin, il est difficile de dénouer ces ententes de crise une fois qu’elles ont été mises en place, ne serait-ce que parce que des liens se créent entre les intervenants du secteur durant l’entente. Les bonnes intentions paraissent bien frêles face à ces considérations pratiques. De façon plus générale, l’orateur estime que, dans les pays en développement, les questions liées à la mise en œuvre de la politique industrielle ne devraient pas incomber à l’autorité de la concurrence.

Un intervenant de la Commission européenne fait plusieurs observations. Il note que les entreprises disposent d’autres outils, tels que les fusions, coentreprises et autres accords juridiques de coopération (pour la recherche et le développement, par exemple). En ce qui concerne ces derniers, il note qu’en décembre 2010 la Commission européenne a émis un nouvel ensemble de lignes directrices. De façon plus générale, le fait que les entreprises disposent d’autres alternatives met en évidence les dangers d’une réflexion en vase clos sur les remèdes à appliquer face aux crises.

L’intervenant reconnaît en outre les défis que pose l’application de sanctions contre les ententes en période de récession économique prononcée. La Commission européenne a élaboré un ensemble complexe de critères afin d’évaluer la capacité de paiement des parties à des ententes. Il est toutefois souligné que l’application de ces critères s’effectue distinctement et postérieurement à toute décision initiale concernant l’infraction à la législation contre les ententes.

Le représentant du Taipei chinois clôt cette section par une description de l’expérience de ses concitoyens en matière de dérogation à législation contre les ententes. Les dérogations au titre d’ententes de crise sont autorisées. Toutefois, les entreprises doivent présenter un rapport d’évaluation d’action

2 Les quatre motifs de rejet d’une demande de formation d’entente de crise sont : (i) que l’entente envisagée aille au-delà de ce qui est nécessaire pour atteindre l’objectif affirmé, (ii) qu’une entente envisagée ait la possibilité de nuire « exagérément » aux consommateurs, (iii) que l’entente envisagée privilégie « indûment » certains membres par rapport à d’autres et (iv) que des restrictions limitent l’accès ou le départ des membres de l’entente envisagée.
concertée et répondre à d’autres critères. Elles doivent notamment prouver que les prix de marché ont chuté en deçà du coût moyen de production. On ne dénombre jusqu’à présent qu’une seule demande de dérogation, qui remonte à 1992 et émane du secteur des fibres synthétiques. L’autorité de la concurrence a refusé la dérogation au motif que la survie du secteur dans son ensemble ne paraissait pas menacée.

2. **Les ententes de crise et la redistribution des ressources**

Le Président introduit le principal sujet de discussion de cette section, à savoir si en période de grave crise économique, la « nécessité » de réduire la capacité excédentaire d’un secteur justifie des réponses coordonnées des entreprises, y compris éventuellement la création d’une entente de crise. Ce faisant, un lien potentiel direct pourrait être institué entre l’affectation des ressources en période de récession économique et les ententes de crise.

Le premier orateur de cette section, M. Ian Christmas, Directeur-Général de la World Steel Association, aborde ce sujet en faisant référence à la sidérurgie. Il remarque en préambule qu’1,4 milliard d’acier a été produit au total dans le monde en 2010 et que le secteur de la sidérurgie est très atomisé (les plus grosses entreprises sidérurgiques fabriquant moins de 8 % de la production mondiale total d’acier). Il considère ensuite les ententes légales dans l’industrie de la sidérurgie car motivées par des « crises ». Chaque fois qu’une entreprise sidérurgique connaît des difficultés financières, elle prétend traverser une crise. Selon lui, la question qui se pose aux décideurs publics est de déterminer si les difficultés de l’entreprise sont de nature cyclique (auquel cas il pourrait être judicieux d’aider l’entreprise à travers cette mauvaise passe) ou proviennent d’un défaut structurel de compétitivité (auquel cas, si l’entreprise ne modifie pas ses pratiques, l’intervention de l’État pourra être de peu d’utilité). Compte tenu des fluctuations importantes de la demande d’acier, on ne peut écarter la possibilité de difficultés cycliques. En outre, certains gouvernements peuvent s’inquiéter des conséquences sociales de la déconfiture éventuelle d’une entreprise (sur l’emploi et éventuellement sur l’environnement) et cela pourra influencer la réponse des pouvoirs publics. Enfin, il faut peut-être tenir compte de l’impact de toute faillite pour les acheteurs d’acier. Dans l’ensemble, donc, plusieurs facteurs déterminent dans la pratique la décision d’intervention.


L’orateur cite le Plan Davignon des années 70 comme exemple d’une entente de crise dans le secteur sidérurgique. Dans le sillage du premier choc pétrolier, dans les années 70, les gouvernements européens ont fortement subventionné les entreprises sidérurgiques, à tel point que le Commissaire européen en charge, le vicomte Davignon a estimé que ces subventions devenaient une menace pour la création à venir d’un marché commun. En conséquence, un système de contrôle des prix, de quotas de production, de restrictions commerciales et d’interdiction d’utilisation des subventions a été imposé à l’ensemble des producteurs d’acier de la Communauté Économique Européenne. L’orateur remarque que les pressions sociales se sont en effet dissipées, peut-être aux dépens de la performance des aciéries les plus
compétitives. Dans l’ensemble, il considère que le plan Davignon a été appliqué trop longtemps et a retardé le processus de rationalisation de l’industrie sidérurgique en Europe.

L’orateur cite deux autres exemples, l’un en Inde et l’autre aux États-Unis. Jusqu’au début des années 90, il n’y avait que deux producteurs d’acier en Inde, dont un seul (Tata) dans le secteur privé. Les nouveaux investissements dans le secteur des aciers plats étaient interdits et des quotas de production étaient en vigueur. Une fois qu’ils ont été levés et les taxes d’importation réduites, le secteur indien de la sidérurgie s’est considérablement développé. Le secteur a attiré cinq à six nouveaux producteurs importants et la productivité s’est grandement améliorée. L’orateur reconnaît que cet ajustement a été facilité par l’accélération de la croissance économique sur la période, qui s’est accompagnée d’une augmentation correspondante de la demande d’acier.

La restructuration de l’industrie sidérurgique américaine au début de la dernière décennie a bénéficié d’interventions s’apparentant à des ententes, estime l’orateur. En particulier, l’imposition de restrictions commerciales a protégé les entreprises sidérurgiques américaines des pressions concurrentielles étrangères. La concentration a suivi, avec notamment des rachats d’usines sidérurgiques américaines par des entreprises étrangères. Le gouvernement des États-Unis a assumé les engagements de retraire importants des entreprises sidérurgiques et les syndicats ont conclu de nouveaux accords avec les directions des entreprises. En conséquence de ces changements, l’industrie sidérurgique américaine est beaucoup plus compétitive au niveau international qu’elle ne l’était.

L’orateur en tire des enseignements pour les pays en développement. Il estime que l’augmentation de la demande d’acier des marchés émergents ne fournit pas toujours une justification économique suffisante pour y développer la production d’acier. Les économies d’échelle ne sont pas nécessaires pour qu’une aciérie prospère et se développe ; les petits producteurs peuvent être compétitifs. C’est pourquoi les arguments souvent défendus pour les industries naissantes ne s’appliquent pas à la sidérurgie. Au contraire, quand on a recours au protectionnisme pour protéger un secteur sidérurgique national, on augmente les prix que payent les acheteurs d’acier, qui sont presque toujours d’autres producteurs nationaux.

Pour conclure, M. Christmas recommande que toute entente légale ne soit que temporaire et qu’elle s’accompagne d’objectifs commerciaux clairement définis. Les décideurs publics doivent se préoccuper des demandes spécifiques des entreprises. Il reconnaît que cela peut certes être loin d’être facile. Quoi qu’il en soit, l’intérêt public doit guider l’action des pouvoirs publics.

Quatre délégations souhaitent intervenir dans le sillage de cette présentation sur le secteur de la sidérurgie. Un représentant du Brésil prend d’abord la parole et exprime un certain scepticisme sur la justification logique et empirique des ententes de crise. Une entente mise en œuvre en conséquence d’une grave récession économique aurait pour effet de transférer des producteurs aux consommateurs le préjudice causé par la crise, ce qui est inacceptable. Il convient par conséquent d’envisager des solutions alternatives à la formation d’une entente.

L’expérience du Brésil en matière d’ententes de crise renforce le scepticisme du représentant. Au lieu de stimuler les secteurs dans lesquels de telles ententes ont été instaurées, une culture contraire à l’esprit de concurrence s’est installée qui perdure aujourd’hui. Des leçons en ont été tirées et deux demandes récentes émanant des industries du sucre et de l’alcool en vue de former des associations pour répartir des quotas et vendre conjointement la production ont été refusées.

Un représentant irlandais présente le cas de l’industrie irlandaise de transformation de la viande bovine, sur laquelle s’est portée l’attention des autorités officielles et judiciaires dans les années 90. L’affaire a commencé dans les années 90, durant lesquelles, pour diverses raisons, le prix de la viande bovine a chuté. Un rapport administratif a recommandé la rationalisation du secteur, tâche à laquelle la
filière s’est attelée, proposant la création de la Beef Industry Development Society (BIDS). Cette organisation entendait faciliter la sortie de la filière, les entreprises restantes devant acquitter une cotisation permettant de dédommager les entreprises sortantes.

L’autorité irlandaise de la concurrence a refusé d’accorder une dérogation à la BIDS, estimant que les efficiences annoncées n’étaient pas suffisamment prouvées et que les forces du marché étaient en mesure de faciliter efficacement la rationalisation de la filière. Cette décision a été contestée devant les tribunaux. En dernier ressort, la cour suprême a confirmé la décision de l’autorité et la filière a renoncé à mettre en place l’accord envisagé. Se référant aux lignes directrices de la Commission européenne sur les accords, l’intervenant estime qu’elles pourraient faciliter la rationalisation des filières.

Une intervention de la Commission européenne vient renforcer ces commentaires du représentant irlandais. Le représentant de la Commission européenne souligne l’importance des lignes directrices pour la mise en œuvre de l’alinéa 3 de l’article 101 du Traité sur le fonctionnement de l’Union européenne. Du point de vue de l’intervenant, un accord entre entreprises visant à réduire les capacités excédentaires constitue par son objet une entrave à la concurrence. La seule façon de rendre cet accord légal serait de remplir toutes les conditions de l’alinéa 3 de l’article 101, ce qui, selon l’orateur, n’est pas chose facile. Il faut non seulement prouver les efficiences, il faut aussi qu’il n’existe pas de moyen de parvenir à ces efficiences qui limiterait moins la concurrence que l’accord envisagé. L’orateur estime qu’il conviendrait de s’intéresser aux incitations qui poussent les entreprises individuellement à réduire leurs capacités. Si ces incitations sont fortes, pourquoi les entreprises ont-elles besoin de coordonner leurs efforts pour faciliter la rationalisation d’un secteur ?

Un représentant de la Grèce évoque le cas de la dorade royale, soumise à l’attention de la Commission de la concurrence hellénique. Le secteur de la dorade est un exportateur important. La filière a demandé une dérogation au droit national de la concurrence afin de faciliter la rationalisation de la capacité de production. Le secteur prétendait souffrir de surproduction, que les prix étaient inférieurs aux coûts de production et que les producteurs envisageaient de quitter la filière, ce qui nuirait aux consommateurs. Cette demande a été rejetée par l’autorité de la concurrence pour plusieurs raisons. D’abord, les entreprises concernées n’ont pas fourni de plan de restructuration convaincant. L’autorité de la concurrence soupçonnait les entreprises en question de ne pas être tant intéressées par la concentration et la spécialisation que par la proposition d’un accord visant à augmenter les prix. Ensuite, les surcapacités existantes étaient le résultat d’erreurs de jugement de la part des entreprises impliquées et n’étaient pas dues à quelque autre facteur comme une baisse de la demande.

Cette section est close par une observation d’un représentant du Royaume-Uni estimant qu’une entente autorisée par les pouvoirs publics, même très brève, risque fort d’engendrer un comportement unilatéral des entreprises une fois l’autorisation officielle caduque. Tous les bienfaits immédiats éventuels d’une entente de crise seraient donc logiquement compensés en tout ou partie par un préjudice à long terme.

3. Les ententes de crise et l’instabilité des prix dans les pays en développement

Le Président remarque que ces dernières années, l’instabilité des prix des denrées et les prix observés dans le secteur agroalimentaire ont considérablement préoccupé les décideurs publics. Les chocs transitoires dans ces secteurs sensibles au développement peuvent mettre en danger la survie des acteurs économiques les plus faibles, menaçant par exemple les moyens d’existence d’agriculteurs lorsque les prix sont très bas et le bien-être des consommateurs défavorisés lorsqu’ils sont très élevés. Certains ont soutenu l’idée selon laquelle les ententes pourraient stabiliser les prix dans les secteurs affectés par les chocs transitoires. Cette section a pour objet d’explorer ces questions plus avant. Le débat est facilité par deux présentations d’experts.
La première présentation est celle de M. Steve McCorriston, Directeur de la faculté d'économie de l’Université d’Exeter. Il commence par faire observer qu’il y a dix ans, les organisations internationales s’intéressaient au fait de savoir si les manipulations de marchés ou les accords internationaux sur les denrées étaient en mesure de corriger la baisse des prix observée sur les marchés agricoles et alimentaires. Aujourd’hui, ces prix sont beaucoup plus élevés (même si la flambée des prix observée en 2007-8 était moindre que celle de 1972-4), mais les décideurs publics restent confrontés à la même question. L’orateur s’interroge en outre sur la solidité des liens entre l’évolution des marchés de denrées, les ententes de crise et les facteurs de concurrence de façon plus générale. Apparemment, le point de vue de la concurrence n’a pas suscité toute l’attention qu’il mérite dans le débat sur la sécurité alimentaire, qui fait pourtant rage depuis plusieurs années. A cet égard, l’orateur se réfère aux récents rapports des médias sur l’inflation des prix alimentaires en Bolivie, en Chine et en Inde.

Pour mieux comprendre le rôle que les facteurs de concurrence sont susceptibles de jouer au niveau de l’évolution des prix des denrées et des aliments, il convient d’opérer plusieurs distinctions. D’abord, des prix élevés (de façon plus générale, le niveau des prix) et la volatilité des prix sont des concepts distincts. Les facteurs de concurrence peuvent les affecter différemment. Ensuite, il est important de distinguer les prix des aliments et des denrées sur les marchés nationaux des prix comparables sur les marchés internationaux. L’impact qu’exercent sur les prix nationaux les chocs sur les marchés mondiaux est un aspect intéressant et peut par exemple fournir une indication du niveau de concurrence dans le secteur de la distribution. Troisièmement, la volatilité des prix des produits finis (comme les aliments, transformés ou non) peut être affectée par des chocs de coûts d’intrants clés.

Des études ont été réalisées sur le degré de répercussion des prix entre les marchés mondiaux et nationaux et entre les marchés d’intrants et de produits finis. De façon générale, sur les marchés les moins concurrentiels, la répercussion est inférieure à 100 %. L’orateur estime qu’à priori (et dans l’hypothèse de marchés concurrentiels), le degré de répercussion devrait être fonction de la part de la denrée brute dans les coûts des entreprises en aval. Cette part peut être relativement réduite, en particulier pour les produits alimentaires transformés. Si les marchés deviennent moins concurrentiels, en réaction peut-être à la création d’une entente de crise, le degré de répercussion devrait en principe diminuer, réduisant l’importance de la volatilité des prix perçue. Dans ce cas, les hausses de prix sur les marchés mondiaux ou sur les marchés d’intrants seraient davantage absorbées par les marges bénéficiaires qu’auparavant.

Dans l’ensemble, donc, si un marché d’aliments ou de denrées devient moins concurrentiel, cela affecte la volatilité et le niveau des prix et chacun de ces facteurs affecte les consommateurs et les producteurs. L’orateur rappelle que sur certains marchés des pays en développement, les producteurs sont tout autant menacés par la pauvreté que les consommateurs. Les autorités de concurrence privilégient souvent le bien-être des consommateurs par rapport à celui des producteurs, alors qu’une perspective de développement devrait légitimement prendre également en compte l’impact sur les producteurs pauvres des évolutions (induites par les entreprises ou par les pouvoirs publics) sur les marchés des denrées agricoles et des produits de base. L’orateur estime que, pour ces raisons, les marchés agricoles sont peut-être davantage sensibles au développement que la plupart des autres marchés et devraient en conséquence bénéficier d’une application plus souple des principes de concurrence.

Le commerce des denrées agricoles et des produits de base, et celui des intrants nécessaires à leur production, peuvent en outre être affectés par des pratiques anticoncurrentielles transfrontières. L’orateur fait référence à un projet récent d’OPA internationale (qui n’a pas abouti) qui aurait eu des implications sur les prix des engrais sur les marchés mondiaux. De la même façon, une entente sur les exportations de riz préconisée entre plusieurs gouvernements d’Asie durant la récente crise économique mondiale et associée à la récente flambée des cours sur les marchés mondiaux de denrées montre comment les facteurs liés à la concurrence peuvent affecter le fonctionnement de ces marchés sensibles au développement. Ces facteurs
liés à la concurrence ne doivent pas être confondus avec d’autres évolutions comme les interdictions d’exportations, qui sont du ressort de la politique commerciale.


Le marché du café est concentré aussi bien du côté des acheteurs que du côté des vendeurs, un nombre très réduit de pays étant responsable d’une grande partie de la consommation et de la production. Les États-Unis sont le premier consommateur de café, par le volume vendu, et le Brésil en est le premier producteur. En outre, le commerce du café représente un pourcentage important des exportations nationales d’un nombre réduit de pays (Burundi, Éthiopie, Rwanda et Uganda, notamment). Pour ces pays, le niveau et la volatilité des prix du café provoquent des problèmes de stabilité macroéconomique ainsi que pour le niveau de vie des caficulteurs, d’autant que la volatilité est importante, compte tenu de la longueur du cycle de production.

Dans les années 50 et 60, l’Organisation internationale du café a tenté de mettre en place une entente mondiale sur le café afin de lutter contre la baisse et la volatilité des prix. Trente-sept pays ont signé l’Accord international sur le café (AIC) instaurant un système de quotas pour les exportations de café. De façon intéressante, le premier consommateur de café, les États-Unis, a signé cet accord et a joué un rôle central pour son suivi. L’entente a existé entre 1962 et 1989, date à laquelle les États-Unis se sont retirés de l’AIC. Si l’entente a eu pour effet d’augmenter les prix, son effet sur la stabilité des prix du café est moins évident. Des variations de prix importantes ont été observées, en 1975 notamment après que le gel ait causé des dommages majeurs aux cultures au Brésil.

Qu’est-ce qui a poussé un grand pays consommateur à soutenir une entente pour un produit qu’il achète ? Selon l’orateur, l’AIC était perçu comme un moyen de renforcer la stabilité économique de plusieurs nations en développement et cela répondait à certains objectifs de politique étrangère des États-Unis durant la Guerre froide. En outre, en tant que partie à l’accord, les États-Unis pouvaient « se protéger » en influençant le degré de préjudice pour les consommateurs américains à travers le niveau de prix du café importé.

Après le démembrement de l’AIC, l’introduction d’une nouvelle technologie de transformation du café Robusta et le développement important de la production de café du Vietnam ont créé des déséquilibres entre l’offre et la demande et induit à terme une baisse considérable des prix. Il semblerait que les caficulteurs se soient tournés vers d’autres cultures, engendrant d’autres problèmes. En Afrique de l’Est, une solution alternative a été mise en œuvre consistant à élaborer des produits de niche et à commercialiser des cafés plus haut de gamme.

L’orateur tire plusieurs enseignements de cette expérience. D’abord, l'absence de diversification de la production dans de nombreux pays producteurs implique que la volatilité des prix a des implications pour le développement, notamment parce qu'elle affecte les revenus des agriculteurs vulnérables. Ensuite, dans le cas du café, l’entente internationale qui a existé entre 1962 et 1989 a permis de soutenir les prix et de réduire leur instabilité et donc d'atteindre les objectifs des membres signataires. En troisième lieu, si certains instruments financiers auraient pu couvrir les producteurs contre la volatilité des prix, ils n’existent pas au moment où cette entente était en vigueur. D’autres solutions alternatives, comme les fusions, n’étaient pas réalisables à une échelle suffisante sans créer d’énormes concentrations de propriété terrienne dans les pays en développement. Quatrièmement, si certains producteurs pouvaient envisager
comme alternative une stratégie de niche, il n’est pas certain que cette solution ait pu être généralisée. Ceci dit, l’orateur se pose la question de savoir si l’adaptation au marché et les évolutions technologiques n’auraient pas été plus rapides en l’absence d’une telle entente.

Quatre interventions de représentants de pays en développement suivent ces deux présentations. La première émane de la Colombie, dont le représentant évoque les dérogations susceptibles d’être accordées dans le cadre du droit national de la concurrence. Il se trouve que l’autorité nationale de la concurrence n’a jamais autorisé une seule dérogation. Elle a au contraire appliqué rigoureusement la législation contre les ententes, lors des crises économiques sectorielles, nationales et mondiales. L’orateur fait référence aux enquêtes sur le prix de la canne à sucre (où il a existé une entente de 1993 à 2010) et les secteurs de l'oignon vert et du lait pasteurisé. Dans ces deux derniers cas, portant sur un produit alimentaire et affectant par conséquent le niveau de vie, les producteurs en place ont invoqué la baisse des prix pour justifier leur entente. L’autorité de la concurrence a rejeté l’argument selon lequel chacun de ces secteurs était en crise.

Le deuxième pays à intervenir est le Costa Rica. Le délégué remarque que l’application de la législation contre les ententes en période de crise conduit souvent l’autorité de la concurrence à être perçue comme une force impitoyable, dont les attaques contre les arrangements mettent en danger les revenus des pauvres fermiers et producteurs qui semblent disposer de peu de sources alternatives de revenus. Au Costa Rica, il n’existe pas de mécanisme permettant à l’autorité de la concurrence d’octroyer une dérogation à la législation contre les ententes en période de crise ni en toute autre circonstance. Un tel mécanisme a été proposé dans le cadre du débat sur la dernière loi sur la concurrence, mais cette proposition a été finalement rejetée. Cette décision paraît appropriée car les mécanismes de dérogation au titre des crises soulèvent davantage de questions qu’ils n’en résolvent. Par exemple, qu’est-ce qui constitue une crise ? Une crise doit-elle être mondiale ou peut-elle être spécifique à un secteur ? Les crises sont-elles toujours associées à des excédents de capacité ? A quelle autorité appartient-il de déterminer si une crise est terminée et de décider qu’il convient de démanteler une entente ? Quelle autorité définit les règles de fonctionnement des ententes ? Qui l’entente cherche-t-elle à protéger ? L’orateur estime que si l’on ne dispose pas de réponses à ces questions difficiles, il en est une à laquelle on connaît la réponse avec certitude : qui fera les frais de l’entente ? les consommateurs.

L’orateur du Costa Rica souligne qu’il n’a rien contre l’intervention des pouvoirs publics en soi. Il accueille volontiers les interventions qui rendent les secteurs plus concurrentiels. Toutefois, la réalité est souvent différente, car les groupes d’intérêt cherchent à bénéficier de traitements de faveur. Pire, comme indiqué dans la note de référence, l’autorisation d’une dérogation à la législation contre les ententes met rarement fin aux exigences de soutien. Ces exigences causent un préjudice important lorsqu’elles émanent de secteurs qui produisent ou cultivent des denrées qui seront achetées par d’autres secteurs. Le délégué estime que l’on a de plus en plus conscience de ce préjudice au Costa Rica, où le Ministre de l’agriculture a récemment soumis certains projets de réglementation à l’examen de l’autorité de la concurrence, ouvrant la voie à une intervention de sensibilisation de la part de cette autorité.

Le troisième pays à intervenir est l’Indonésie. L’orateur estime que c’est pendant les périodes de crise économique que les entreprises cherchent à coordonner leurs actions pour réduire la production ou mettre en place d’autres ententes. Si ces actions peuvent porter préjudice aux acheteurs, l’alternative est la faillite et la sortie du marché. En outre, les prix de certains produits qui répondent à des besoins fondamentaux (alimentation et agriculture plus généralement, santé et énergie) deviennent plus volatils et peuvent flamber. Dans ces circonstances, les producteurs peuvent coordonner leurs actions pour stabiliser les prix. A la lumière de ces considérations contradictoires, certains considèrent qu’il conviendrait, en période de crise, d’assouplir l’application du droit de la concurrence.
Le droit de la concurrence de l’Indonésie (Loi numéro 5 adoptée en 1999) autorise les dérogations à la législation contre les ententes. L’article 3 autorise les dérogations d’intérêt public et pour améliorer l’efficacité de l’économie nationale. L’article 50 autorise les dérogations visant la réalisation des objectifs de la législation nationale (y compris la réglementation) ou la promotion des exportations, tant que le surcroît d’exportations n’interfère pas avec l’offre sur le marché intérieur. Ces dérogations ne sont accordées qu’après une analyse rigoureuse de l’autorité de la concurrence. L’autorité peut en outre soumettre des suggestions à d’autres pouvoirs publics en vue de la révocation ou de l’amélioration des réglementations et de leur mise en œuvre.

L’orateur résume deux affaires récentes d’ententes en Indonésie dont l’issue serait susceptible de revêtir des implications importantes. Dans le cadre d’une enquête sur le prix de l’huile de cuisson, l’autorité de la concurrence indonésienne a conclu que les fournisseurs n’étaient pas aussi prompts à abaisser les prix qu’à les monter en réponse aux fluctuations de prix de produits comparables sur les marchés mondiaux. Cette asymétrie a notamment permis d’établir que les fournisseurs s’étaient rendu coupables de fixation des prix. Un raisonnement similaire a établi la décision rendue dans une affaire impliquant des services de transport aérien.

Ces expériences d’application de la législation incitent l’orateur à soulever en conclusion un certain nombre de questions. En période de crise économique, dans quelles circonstances une entente peut-elle sortir du champ d’application du droit de la concurrence ? De quelles façons, en période de crise économique, une autorité de la concurrence peut-elle prendre en compte les intérêts des nombreuses personnes vivant dans le pays, en gardant à l’esprit que bon nombre sont pauvres et en situation d’emploi précaire ? La conception et l’application du droit de la concurrence peuvent-ils servir à amortir les fluctuations de prix des biens et services d’intérêt public ?

La dernière intervention émane de l’Afrique du Sud, dont le droit de la concurrence contient une disposition bien connue de dérogation dans l’intérêt public. L’orateur reconnaît d’emblée que cette disposition est source de préoccupations pour les entreprises locales qui craignent qu’elle leur soit appliquée de façon arbitraire et qu’elle suscite l’émotion parmi les puristes de la concurrence, comme il les appelle, qui considèrent qu’elle altère les prises de décision relatives à l’application du droit. Dans la pratique, l’orateur assure qu’elle est rarement utilisée. Les autorités de concurrence d’Afrique du Sud interprètent le droit d’une façon tout à fait orthodoxe et sont bien conscientes que les pouvoirs publics disposent d’instruments beaucoup plus efficaces pour servir les objectifs du droit de la concurrence.

La récente crise économique n’a pas influencé l’application du droit de la concurrence en Afrique du Sud. Si la législation autorise par dérogation des pratiques anticoncurrentielles (autrement interdites) pour quatre motifs (la promotion des exportations, la promotion des petites entreprises contrôlées par des personnes historiquement désavantagées, les modifications de capacité de production visant à enrayer le déclin d’un secteur d’activité et la promotion de la stabilité d’un secteur désigné par le Ministre compétent), dans la pratique il est très rare que des dérogations soient accordées. Celles-ci ont principalement trait à la promotion des exportations et de certaines petites entreprises.

On considère que les dérogations fondées sur le déclin d’un secteur d’activité sont à double tranchant pour les entreprises concernées. Après tout, l’invocation de ces motifs adresse un signal clair aux marchés financiers concernant la façon dont les entreprises en place évaluent les perspectives de leur propre secteur, susceptible de les conduire à s’interroger sur les compétences des équipes de direction en place. L’orateur reconnaît volontiers que dans une perspective de promotion de la concurrence, accorder une telle dérogation pourrait conduire ces entreprises à continuer de coopérer à son terme.

S’agissant d’une dérogation à l’initiative d’un Ministre, la législation envisage une situation dans laquelle le secteur ne survivrait pas en l’absence d’une entente. Une telle dérogation a été votée sous la

L’orateur explique qu’une demande de dérogation du secteur du maïs invoquant la promotion des exportations et l’instabilité économique, a été refusée par l’autorité de la concurrence sud-africaine. Le secteur s’inquiétait de ce qu’en l’absence d’entente, les agriculteurs ne seraient pas en mesure d’investir pour la prochaine campagne, ce qui causerait des problèmes futurs d’insécurité alimentaire. L’autorité a jugé que ces preuves apportées pour étayer ces affirmations n’étaient pas suffisamment convaincantes. En outre, le Ministre n’avait pas émis de certificat attestant des difficultés du secteur.

L’orateur souligne que, même en cas d’intervention ministérielle, la décision finale d’accorder ou non une dérogation appartient à l’autorité de la concurrence. Elle rend sa décision après publication d’avis au journal officiel invitant les parties prenantes à faire part de leurs commentaires et en fonction des preuves à l’appui. Lorsqu’elle accorde une dérogation, l’autorité précise exactement quel comportement elle autorise et pour quelle durée.

4. Y a-t-il un compromis entre le développement et l’efficacité qui justifierait les ententes de crise ?

Le Président introduit la quatrième partie, faisant remarquer qu’en principe, il pourrait exister un compromis entre les considérations de développement et d’autres considérations d’ordre économique comme la stabilité financière et l’efficacité en période de crise. La question posée aux intervenants est de savoir si ce compromis justifie la création d’ententes dans certains secteurs en période de crise économique. Le Président présente le premier orateur, M. Andrew Sheng, Conseiller à la China Banking Regulatory Commission, dont l’intervention porte sur les évolutions liées à la crise dans le secteur financier.

M. Sheng fait remarquer en guise d’introduction qu’en 35 ans de carrière en tant que régulateur financier, c’est la première fois qu’il est en contact avec les autorités de la concurrence, dénonçant une communication insuffisante entre les régulateurs financiers et les régulateurs de la concurrence. Ce commentaire suscitera par la suite des remarques de la part d’autres intervenants. Il convient d’établir une première distinction importante entre les ententes dans le secteur réel, où les pertes induites par l’exercice de la puissance de marché sont de son point de vue minuscules par comparaison avec les coûts liés au dysfonctionnement des marchés financiers. Le secteur financier est par nature oligopolistique, caractérisé par de forts effets de réseaux entre les opérateurs dont la viabilité commerciale tend à évoluer de concert. Les arbitrages réglementaires, fiscaux et administratifs font également partie de la concurrence entre les entreprises du secteur financier, et lorsque la réglementation se fait trop exigeante, l’activité migre vers un système bancaire parallèle, non réglementé.

Dans ces circonstances, il n’est pas surprenant que les régulateurs financiers se soient posé la question de savoir s’il existe un compromis entre l’efficacité (induite par la concurrence) et la stabilité. M. Sheng remarque que certains estiment qu’un système financier plus concentré est plus stable. La concentration de petits marchés émergents peut déboucher sur un oligopole sur le marché intérieur, mais ces gros intervenants locaux sont en fait relativement petits par rapport à la taille du marché mondial, qui constitue une référence pertinente pour ces économies dans les systèmes financiers sont intégrés dans les marchés mondiaux. Ce qui est inquiétant, de son point de vue, c’est la concentration au niveau mondial sur certains segments financiers. Ce type de concentration peut créer des effets de dynamique et des manipulations de marché, car de nombreux marchés offshore et de gré à gré sont opaques et peu réglementés. En outre,
puisque chaque intervenant financier concentré est une contrepartie de la plupart, sinon de la totalité, des autres grands intervenants sur le même marché, la concentration est en réalité associée à une plus grande (et non une moindre) instabilité financière mondiale potentielle.

L’intervenant signale en outre d’autres facteurs, hors du champ de la concurrence, qui exacerbent l’instabilité financière : la mauvaise gestion interne des risques des établissements financiers, la supervision lacunaire des régulateurs, l’absence de séparation entre la banque d’investissement et la banque de détail et la garantie publique des dépôts, contribuent aux côtés d’autres facteurs à la création d’un aléa de moralité. M. Sheng estime que l’Australie, la Chine et le Canada n’ont pas été aussi gravement touchés par la récente crise financière mondiale précisément parce que leurs établissements bancaires sont principalement actifs dans la banque de détail au lieu de s’employer à créer de l’effet de levier comme le veut typiquement le métier de la banque d’investissement. L’histoire des spéculations passées a appris aux décideurs publics australiens et canadiens à concentrer leur système bancaire, allant jusqu’à créer des ententes, et de soumettre à des réexams périodiques des régulateurs de la concurrence et d’autres parties soucieuses de promouvoir l’efficacité. De façon plus générale, M. Sheng considère qu’il faut tenir compte des circonstances particulières des pays et il doute que l’on puisse définir une quelconque meilleure pratique pour guider les décideurs publics.

Deux pays membres de l’OCDE interviennent dans le sillage de cette présentation. Tout d’abord, le délégué de l’Australie explique que, dans son pays, la promotion de la concurrence et de la stabilité sont perçus comme des objectifs complémentaire de l’action des pouvoirs publics. On considère que la concurrence entre banques peut avoir des implications sur ces deux plans et que le fonctionnement du secteur bancaire peut avoir des répercussions importantes pour le reste de l’économie et qu’il faut en tenir compte. En Australie, l’autorité de la concurrence se borne cependant à évaluer l’impact des fusions sur la concurrence, tandis que l’autorité de régulation prudentielle (Australian Prudential Regulatory Authority) s’inquiète de toute conséquence pour la stabilité financière. La capacité de résistance du système financier australien durant la récente crise financière mondiale doit être attribuée en partie à ce système de surveillance réglementaire, ce qui montre qu’il est possible de concevoir des systèmes de réglementation qui permettent aux pouvoirs publics d’atteindre simultanément des objectifs ayant trait à la concurrence et à la stabilité financière.

Un représentant du Portugal remarque que les systèmes financiers nationaux servent trois fonctions : mobiliser l’épargne et l’investissement, mettre en œuvre les systèmes de paiement et assurer la gestion des risques. Quatre types d’opérations sont associés à ces fonctions : les opérations au comptant, les opérations à terme ajustées des risques, les opérations de paiement et la titrisation (le transfert des risques à d’autres). Ayant ainsi défini les systèmes financiers nationaux, le délégué demande quel rôle incombe aux autorités de la concurrence ? Il est clair qu’elles peuvent jouer un rôle en examinant les commissions prélevées sur les opérations au comptant, la facilité avec laquelle les clients peuvent changer de prestataire financier et l’impact des aides publiques et de la garantie de l’État. Toutefois, les opérations ajustées des risques et les primes versées au titre de l’assurance et la titrisation appellement un examen plus attentif car les réponses ne sont pas aussi faciles.

Ce représentant partage l’avis du présentateur sur la nécessité d’apporter des solutions aux implications de la garantie de l’État et de l’importance systémique d’établissements financiers « trop gros pour faire faillite ». Il conteste toutefois l’hypothèse sous-jacente apparente du présentateur selon laquelle toute concentration conduit à la formation d’ententes. Il recommande une appréciation plus nuancée des différences entre les marchés et les entreprises. En outre, s’il convient que l’on ne puisse émettre une recommandation unique pour l’ensemble des pays en ce qui concerne la réglementation des services financiers, il rejette l’idée d’une séparation nécessaire entre la banque d’investissement et la banque de détail, considérant que cette question relève du domaine des régulateurs et non des autorités de la concurrence.
5. Conclusions et discussion générale

Le Président de la session invite M. Evenett et M. Jenny à synthétiser les principaux enseignements des délibérations de la session. M. Evenett souligne trois enseignements. Premièrement, si pas ou peu d’intervenants ont défendu le point de vue hétérodoxe en faveur des ententes de crise, d’un point de vue pratique, les pouvoirs publics doivent disposer de moyens et de procédures établies pour évaluer les propositions de mettre en place de telles ententes en période de crise économique. Certaines juridictions disposent d’ailleurs de procédures sophistiquées qui ont été appliquées en pratique et d’autres juridictions pourraient souhaiter s’inspirer de leur expérience.

Ensuite, les pouvoirs publics ont à leur disposition d’autres instruments tant dans les pays en développement que dans les pays industrialisés, susceptibles d’améliorer le fonctionnement des marchés plus efficacement que les ententes de crise. Il s’ensuit que les autorités de la concurrence ont un rôle de sensibilisation important à jouer, pour s’efforcer d’influencer les prises de décision des décideurs publics en période de crise économique.

Troisièmement, sur les marchés où les prix sont volatils et où la volatilité des prix a des conséquences graves (éventuellement pour les producteurs et pour les consommateurs), les ententes de crise constituent une option, mais ne sont pas, là encore, nécessairement la seule option pratique. Les innovations des marchés financiers et autres devraient aussi être envisagées.

M. Jenny remarque qu’un consensus s’est formé sur le fait qu’il existe de meilleures alternatives que les ententes de crise tant pour résoudre les crises économiques que pour en atténuer les effets. La question reste ouverte de savoir jusqu’à quel point les autorités de concurrence doivent développer leur réflexion sur les approches alternatives. C’est d’autant plus nécessaire qu’il existe d’importants débats concernant l’action des pouvoirs publics, touchant à la sécurité alimentaire et la stabilité financière, dans le cadre desquels la perspective de la concurrence a surtout brillé par son absence au fil des ans.