

Unclassified

DAF/COMP/GF/WD(2009)72

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

06-Feb-2009

English - Or. French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

## Global Forum on Competition

### COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

Contribution by Mr. Elie Cohen

-- Session I --

*This contribution is submitted by Mr. Elie Cohen, Research Director, National Council for Scientific Research (CNRS), France, under Session I of the Global Forum on Competition to be held on 19 and 20 February 2009.*

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JT03259293

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## SYSTEMIC RISK AND COMPETITION LAW

-- Mr. Elie Cohen --

1. Should market regulations and competition authorities be considered tools befitting periods of economic calm, while government assistance, if not industrial policies, are deemed the only tools suitable in times of crisis? As the current crisis deepens, it can be seen that the initial reflex of any government is to put the rules of competition on hold, protect domestic industry and, in some cases, even exploit the crisis by attempting to reap an illusory competitive advantage. Limiting imports by invoking dumping clauses, reserving financial guarantees for nationals alone and lending to local banks on preferential terms are all indicative of one and the same approach: when confronted by a crisis, protection is better than openness, and national identity takes precedence over territorial roots. The government assistance that it was believed could be limited to the financial industry so as to preclude systemic risk has now been extended to the motor and real estate industries, to credit-strapped SMEs, and probably before long to airlines, the chemicals industry and so on. In this way, a dynamic is taking hold which, unless care is taken, will justify protectionist measures, limitations on competition and forms of national preference. We thought the lessons of 1929 had been learned, and that there had been a clean break with the artificial havens of an administered economy, but the lure of national solutions may prove irresistible.

2. Europe, far from responding to the shock of the crisis with common policies, and far from seizing the opportunity to demonstrate the strength of the single market and of the euro area, has adopted a policy that reveals the temptation for each country to fend for itself. Clearly, what is showcased in the media would suggest just the opposite: a G4 meeting convened under the French presidency, a co-ordinated Sarkozy-Brown crisis-resolution plan, a meeting of the G20, a co-ordinated economic stimulus plan. The fact of the matter is that communication has prevailed over substance. For proof, one need only consider the policies carried out in response to the September 2008 liquidity shock and solvency crisis.

3. A shared panoply of tools of intervention was adopted: deposit guarantees, bank recapitalisation, interbank loan guarantees and in some cases the purchase of toxic assets. Yet national implementation of these measures ended up creating distortions. One example of this was the recapitalisation of banks: some countries took a punitive approach tantamount to nationalisation; others lent government funds on highly preferential terms; and the rest made recapitalisation contingent on credit expansion or dividend limitation. There were three practical outcomes to this race to fragment and renationalise financial systems. First, national competition authorities were muzzled, as was the UK Office of Fair Trading in respect of the HBOS-Lloyds-TSB merger. Second, the lack of a European mechanism for salvaging integrated financial corporations gave rise to intergovernmental joint ventures to save Fortis and Dexia, with the probable ultimate result of national dismantling of these integrated European groups. Third, the ever more numerous government bailouts and the competitive distortions they cannot help but generate made DG Competition want to apply the conventional method of *quid pro quos* for public assistance, with rapid capitulation to national demands. It was believed that Europe, being a prescriptive power, would be capable of managing the conflict between systemic risk and competitive risk generated by government assistance, but DG Competition's demand for a cutback in lending by assisted businesses in the midst of a credit crunch put it in an awkward position<sup>1</sup>.

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<sup>1</sup> "Brussels would like to compel all assisted banks to bolster their balance sheets, *i.e.* to lend less in proportion to their equity, even if that equity is strengthened with State funding" (*Le Figaro*, 1 December 2008); "The State is opposed to the Commission on a major issue: Brussels is making its go-ahead for the transaction contingent on limited growth in credit and in bank balance sheets" (*Les Échos*, 1 December 2008).

4. It can be considered that this error has since been rectified, and that DG Competition is gradually getting its bearings back, submitting national assistance plans to swift but effective review. This assumption will soon be put to the test, since we are now witnessing a second wave of recapitalisations with partial nationalisations. If the current governmental schemes were to be carried out with no harmonisation, the European financial landscape would soon be split asunder between British firms heavily recapitalised and subject to prescriptive credit policy, French firms thinly recapitalised but with no strings attached and a merged German group heavily recapitalised on scandalously preferential terms.

5. One might attribute this relative impotence of the competition authority to the urgency of the situation and consider that when the storm has passed the Commission will resume control. The concentrations undertaken in response to the crisis will pose problems of abuse of dominant positions in some markets, and especially the one for mortgage lending; what has been authorised today can thus be dismantled tomorrow.

6. The history of European integration may even prompt us to consider a third scenario for the course of competition policy against the backdrop of a major financial crisis: taking the high road out. Finding the European Union relatively powerless to cope with the break-up of regulatory and prudential supervisory powers may prompt amendments to the Maastricht Treaty that would invest the central bank with supervisory power to foster financial stability. Similarly, the risk of fragmentation of the single market for financial services may give rise to centralised regulation of banks of Community-wide scope. Lastly, a European financial and fiscal power may arise to deal with internal dislocation risks within the euro area should there be a deterioration of national public debts (as measured by sovereign-debt spreads between European countries). The financial crisis is having magnifying effects on the imperfections and dysfunctional aspects of European institutions. The worst is not certain, but to date the European Union has not been up to the tasks at hand.