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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Senegal

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Senegal * --

1. Senegal is a West African country with a twelve million population living in 196 722 km². After two years marked by the effects of the global financial and alimentary crisis, the Senegalese economy began to recover in 2010 thanks to the global economic recovery and measures taken by the authorities to boost national economic activity. Gross domestic product (GDP) was estimated to have grown from 2.2% in 2009 to 4.2% in 2010, and reach 4.5% in 2011. This is largely due to the performance of the three sectors of the economy – primary, secondary and tertiary – which respectively accounted for 14.7%, 20.4% and 64.9% (including administration) of GDP in 2010.
2. The average annual rate of inflation (-1.0% in 2009) was 1.2% in 2010. In 2011 inflation measured by the GDP deflator is forecast at 3% largely as a result of higher energy prices.
3. Senegal's total import trade flows (merchandise) from the world totaled \$4,782,239,577 in 2010. This gives a wide view of how international cartels may affect consumers and harm the economy more generally. The government should strongly take into account the necessity to improve the fight against illegal practices both national and international that may affect the normal functioning of the market. The ongoing national strategy plan called "economic and social policy document 2012-2015" has identified the improvement of business environment and the promotion of private sector as important objectives. Market transparency and competition rules enforcement should play an important role in the achievement of those objectives.
4. In this regard, big steps have been taken by the national competition commission to reform the institutional framework and the competition law, in parallel with the ongoing reforms undertaken on the WAEMU regional level, in order to improve the effectiveness of the enforcement of the competition law and the fight against cartels in particular.
5. When I was asked to take part to the OECD 2012 GFC, I had some hesitation to what could I say about international cooperation in cartels investigations. The question was however, not inappropriate if you look into our enforcement activities since the creation of the authority in 1994.
6. Only one cartel case has been prosecuted and the decision of the commission has been canceled by administrative tribunal which decided that the competence of the commission is limited to agreement on price fixing. It was indeed an astonished decision showing the need for national judges to be trained in competition law.
7. But if you have a closer look at the subject, it is easy to see that even if some developing countries have few activities in cartel enforcement given the scarcity of resources and the lack of political will to spend money in competition enforcement, there is now many changes in developing countries during the last decade.

* Contribution submitted by Mr. Malick DIALLO, General Secretary and Government Commissioner, Senegalese Competition Commission.

8. On one hand competition law have been adopted in many young jurisdictions and is taking a central place in regional organization treaties in West Africa particularly in ECOWAS and WAEMU. On another hand enforcement activities in the WAEMU sub region is going greater and interesting perspectives are expected from the ongoing WAEMU reform project, which will give back to national competition authority the power to fully investigate anticompetitive practices and to make decisions.

9. So what can be needed for national and regional authorities in term of cooperation among themselves and with third part jurisdiction in cartel investigation in particular? What are the pre-requisite for this cooperation and how can it be implemented? What are the impediments in international cooperation in cartel investigation and what are the possible solutions to overcome those obstacles.

10. These are some of the questions this paper will address from the perspective of younger jurisdiction with limited practical experience.

1. The need for young agencies in developing countries to cooperate in cartel investigations

11. As mentioned earlier cartel enforcement in jurisdictions like Senegal is not very developed due to several reasons. However, in many economic sectors in Senegal, the market is very concentrated. It is commonly admitted that concentrated market may facilitates cartels. Cement, telecommunication, milling (wheat flour) are few of concentrated markets in Senegal. Almost all of the enterprises in these sectors are subsidiary of multinationals and are present in at least four countries in the WAEMU. After brief investigations, I have numbered almost thirty multinational with subsidiaries in Senegal which are active in many sectors (distribution, mining, milling, transportation, insurance, banking, cement, medicament, etc...). They often set up and execute common commercial policy which may correspond to the politic of the group. Market sharing and price fixing may result from such situation.

12. Many studies have showed the spread of international cartels in a globalized economy particularly in the 1990. In many sectors, food and feed ingredients, vitamins, chemical products etc. international cartels have been uncovered in many jurisdictions. The document published in 2003 “contemporary international cartels and developing countries: economic effects and implications for competition policy” shows the effects of international cartels on consumers, producers and more generally on the economy of developing countries.

13. The EU Commission and the French Autorité de la Concurrence have imposed fines to corporates (Unilever, Colgate Palmolive, Procter &Gamble, Henkel) for their participation in an international cartel by fixing prices for their products. Those products are imported by Senegal.

14. Senegal has imported \$4,782,239,577 of merchandises in 2010. In 2008, the repartition of the importation was Mineral fuels, oils, distillation products, etc. (27.7%); Cereals (13.1%); Boilers, machinery, nuclear reactors, etc. (8.9%); Vehicles other than railway (5.9%); Electrical and electronic equipment (5%).

15. The top three countries which export merchandise to Senegal, along with percentage of imports, are France (19.7%); United Kingdom (15.2%); China (6.7%).

16. This export structure shows that food price volatility (such as cereals) and oils volatility will affect the economic growth and the welfare of the consumers. Price increase in international markets is often an opportunity for corporate to cartelize and fix prices sometimes with the “passive complicity” of the Government.

17. Secondly an international cartel in these merchandises in these countries may affect the national market and harm the consumers.

18. There is consequently a huge need for competition agencies in WAEMU and ECOWAS to cooperate in the fight against cartels. The national markets structure is quite similar and since 2003, the same law is applicable in all member states with the adoption of the regional competition law.

19. Nowadays, there are neither cooperation agreements between member states agencies nor informal cooperation in cartel enforcement.

20. Nevertheless there is a consultative committee set up by the regional law which regroups all member states agencies and the Competition Directorate of the WEAMU Commission. This committee is in charge of studying all drafts of decisions to be taken by the WAEMU commission and to give an opinion. Furthermore, when investigating in national markets, there is a narrow cooperation between the WAEMU Commission and the national competition agencies. National procedures are followed in these circumstances, warrants are delivered by national judges and investigative teams are composed by the regional and national staffs. The cooperation mechanism is organized by the Regulation n°03/CM/UEMOA relating to the procedures in cartels and abuse of dominant position.

21. Another reason for national agencies and regional authorities (ECOWAS and WAEMU) to cooperate in cartel investigation and more largely in competition law enforcement with other jurisdiction and EU in particular relates to the progress made in the Economic Partnership Agreement with the UE. The ongoing negotiations between ECOWAS and EU have placed competition issues in the agenda and will be fully negotiated later namely called “clause de rendezvous”. Instead, the principle of cooperation has been already considered so far in the Cotonou Agreement through article 45. It states that “ *to eliminate competition distortions with due consideration to the different levels of development and economic needs of each ACP country, parties undertake to implement national or regional rules and policies including the control and under certain conditions the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. They accept also to prohibit the abuse by one or more undertakings of a dominant position ... in the territory of ACP States.* ”

22. More decisively, article 45(3) deals with the obligation of the EU and the ACP countries to cooperate “with a view to formulating and supporting effective competition policies *with the appropriate national competition agencies* that progressively ensure the efficient enforcement of the competition rules by both private and state enterprises.

23. At the end of the day, the need for cooperation will be more necessary since the competition authorities in West Africa are doing their best to set up and implement competition policies and laws to fight against restrictive competition practices.

2. What are the requirements for an effective cooperation in the fight against cartels

24. The third report of the OECD in the implementation of the 1998 council recommendations on the fight against hard core cartel gives very useful information about international cooperation. Many strategies have been developed by competition agencies to improve their cooperation mechanism in order to enhance the fight against international cartels. We will not develop this matter but we’ll insist on their limits and we’ll try to make some proposals as how to improve cooperation particularly for the benefit of younger agencies and LDC.

25. Some of these strategies include formal cooperation with provisions as exchange of information, coordinated investigations, etc... Many agencies use informal cooperation, too, to exchange information and share experiences in the fight against cartels. These mechanisms may produce good results and

enhance cartel enforcement. However there are many impediments for effective and efficient cooperation in the fight against international cartels.

3. Limits and impediments to effective international cooperation

26. First, for many reasons (poor enforcement activities in cartels, lack of resources etc...in LDC agencies), international cooperation agreements are concentrated in developed countries and emerging countries. Young agencies in many less developed countries have limited human and financial resources. They are not involved in international cooperation with more advanced jurisdictions. So the fight against international cartels may not be effective in those countries. It is true that each jurisdiction has the responsibility to built capacities in order to investigate and put an end to hard core cartels, but solutions must be found to better involve young agencies in less developed countries affected by international cartels.

27. Secondly, in many cooperation mechanisms (formal or informal) exchange of confidential information or exchange of evidence are not possible.

28. Thirdly, new investigative tools or case resolution mode such as leniency programs, amnesty plus and settlement are complicating more and more the issue of exchange of information between agencies. Indeed, information gathered through these procedures are confidential and cannot be used in civil action and for the need of international cooperation despite waivers allowing their sharing. Even when exchange of information is possible, it is closely monitored and their use may be very restricted.

4. What solution for an effective cooperation in cartel enforcement

29. Cooperation mechanisms developed by agencies in formal and informal way have proven efficiency in the fight against cartels. Theses mechanisms should be encouraged and promoted in all competition agencies including young agencies in less developed countries. Good practices in this area should be spread largely via international conferences and workshops as it is done in ICN, UNCTAD and OECD.

30. In addition, regional cooperation agreement such as WAEMU, ECOWAS, SADC, EU etc...constitute examples of formal cooperation in cartel enforcement which need to be developed and implement effectively. For that purpose, national competition agencies and national laws should include the possibilities to exchange non confidential and confidential information and the possibility to exchange evidences in less restrictive conditions. We hope that the final text of the EPA between EU and ECOWAS will contain modalities of cooperation including mutual exchange of information.

31. International cartels begin to be more pernicious and more widespread around the world. The harm caused to consumers, producers and economy of less developed countries may be very immense. There is consequently an urgent need to look at the possibility to insert provision in leniency programs or settlement agreements in the EU, US and other advanced jurisdictions which will allow exchange of information or the inapplicability of confidentiality when international cartels affect less developed countries markets. The ICN cartel working group, the UNCTAD IGE and the Competition Division of the OECD may examine the feasibility of such proposal.

32. Finally, information about international cartels must be available for competition agencies around the world. Non confidential information and decisions taken by agencies in international cartels cases may be published in the ICN web site or elsewhere in order to inform other agencies. This can be a way to improve the international cooperation in cartel enforcement.