POLICY ROUNDTABLES

Crisis Cartels

2011

Introduction

The OECD Global Forum on Competition debated Crisis Cartels in February 2011. This document includes an executive summary, an analytical note by the OECD Secretariat and written submissions from Bulgaria, Colombia, Croatia, the European Union, Germany, Greece, Ireland, Japan, Jordan, Korea, Mongolia, Norway, Peru, Philippines, the Russian Federation, Senegal, Singapore, South Africa, Chinese Taipei, the United Kingdom, the United States and Zambia, as well as an aide-memoire of the discussion.

Overview

Resorting to crisis cartels would go against the two decade-long trend of tougher enforcement of cartels in developing and industrialised countries. As a practical matter, governments should have the procedures to evaluate such cartels during economic crises. Any exempted cartel should be granted a finite lifetime and be subject to review according to pre-specified criteria.

Alternative measures are available to governments that can improve market outcomes more effectively than crisis cartels. During economic crises, competition authorities have an important role for competition advocacy. 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.

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.

Related Topics

Information Exchanges between Competitors under Competition Law (2010)
Competition Policy, Industrial Policy and National Champions (2009)
The Interface between Competition and Consumer Policies (2008)
Council Recommendation concerning Effective Action against Hard Core Cartels (1998)

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

18-Oct-2011

English/French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF(2011)11
Unclassified

Global Forum on Competition

CRISIS CARTELS

JT03309303

English/French

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".

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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.

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.

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 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.

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 lisser 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.

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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.[1] 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]

2.1 Cartels and crisis cartels

The focus of this paper will be on the types of explicit agreements between firms[3] 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.[4] Forms of tacit collusion and other anti-competitive practices are not within the purview of this study.[5]

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[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 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.[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

6 It may be the case that certain jurisdiction's competition laws also contain definitions of these terms.

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.[8] 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.[9]

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.

crisis affects the business environment and, more importantly, the incentive to cartelise or to remain a cartel member.[10] Fortunately, there is a well established logic for thinking through such matters.

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:

$$\left(G_1 - pF\right) > G_0 \Rightarrow \left(\frac{G_1 - G_0}{p}\right) > F$$

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.[11]

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.[13]

- Given a non-economic objective[14] and the willingness of policymakers to trade-off attaining this objective against to 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.

Box 1. Sorting through the evidence on crisis cartels

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:

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.

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[15]

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[16], 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).[17] 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.

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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 Law 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]

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[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.[20] 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[21], 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.[22] 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.

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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"[23] 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

[23] Miller, Walton, Kovacic, and Rabkin (1984), page 14.

existing cartel law and, where the codes applied, effectively replace cartel law with regulation.[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-monopolisitic 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.[25] Overall, in his

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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.[26] 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.[27] 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.[28]

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boycott. 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.

26 Specifically Taylor (2007) considers monthly data from January 1927 to December 1937, a total of 120 observations on each of 66 industries.

27 For details see sections II and III of their paper.

28 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*

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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 potash[32] 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.

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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.[33] 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.[34] 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.[35] 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.

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34 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.

35 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 roughly 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[36] 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 prorationing 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.

4.6 US Ferrosilicon cartel, 1989-1991

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 ship-owners 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,

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39 For details see Janet Porter, "Brussels stands firm over shipowner crisis cartel plans," *Lloyds List*, 29 October 2009 and Greenberg, Traurig, and Maher, "Sink or Swim? The Baltic Max Feeder Investigation Signals First Full Competition Probe Under New Maritime Regulatory Framework," *Antitrust & Trade Regulation*, January 2010.

40 A single agent, then, sought to overcome the collective action problem traditionally associated with the organisation of cartels.

41 Press Release "Antitrust: Commission opens formal investigation into the "Baltic Max Feeder" scheme for European feeder vessel owners," 15 January 2010. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/21&format=HTML&aged=0&language=EN&guiLanguage=en.

42 Press Release "Antitrust: Commission closes investigation into "Baltic Max Feeder" scheme," 26 March 2010. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/374&format=HTML&aged=0&language=EN&guiLanguage=en.

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[43],

> *"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."*[44]

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.[45] 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.[46] Investigation (principally by

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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.

44 Further information including links to references can be found at http://www.globaltradealert.org/measure/indonesia-malaysia-and-thailand-limiting-rubber-exports-915000-tons-during-2009.

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.

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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 understate 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.[51]

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-

[51] 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.

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.

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NOTE DE RÉFÉRENCE*

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 néfastes de la constitution d'ententes sur les acheteurs et les autres acteurs (Levenstein et Suslow 2005, 2007 ; Connor

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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 définirons 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 disponibles[1]. 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 citations[2].

2.1 Entente et entente de crise

Le présent rapport portera pour l'essentiel sur les types d'accords formels entre les entreprises[3] 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 reçues 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[4]. La présente étude ne traite pas des formes de collusion tacite ni des autres pratiques anticoncurrentielles[5].

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[6], 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[7]. Par contrecoup, les

4 Cette définition reste silencieuse sur la partie à l'origine de l'accord d'entente. Comme nous le verrons ci-après, les États peuvent promouvoir, encourager, et même faire appliquer des accords d'ententes entre des entreprises privées.

5 Cela ne veut pas dire que ces autres formes de pratiques anticoncurrentielles sont dénuées d'importance pendant les crises ou à d'autres moments.

6 La législation sur la concurrence de certains pays peut également contenir une définition de ces termes.

7 Même si le jargon économique se limite au strict minimum dans ce rapport, il est parfois nécessaire d'y avoir recours pour exposer avec précision les aspects essentiels de certains arguments ou les principaux points de désaccord. L'augmentation des coûts de production est égale à l'accroissement du total des coûts engagés à la suite de la production de la dernière unité de production. Lorsque les marchés fonctionnent bien, l'augmentation des coûts de production est égale au coût pour la société de l'ensemble des ressources utilisées pour la production de la dernière unité d'un produit. Un marché est réputé atteindre l'efficience allocative si le prix payé par un consommateur pour la dernière unité du produit vendue recouvre le coût total supporté par la société pour produire la dernière unité, c'est-à-dire, si le prix payé est égal à l'augmentation des coûts de production.

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[8]. 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

[8] 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 corroboré cette affirmation.[9]

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 acception 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[10]. 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 (G_1) – 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 (G_0) 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 :

$$\left(G_1 - pF\right) > G_0 \Rightarrow \left(\frac{G_1 - G_0}{p}\right) > F$$

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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.

10 Même si Stigler (1964) est la référence autorisée en matière de relation entre les différents aspects de l'environnement commercial et l'incitation des entreprises privées à former des ententes, Alfred Marshall et Joseph Schumpeter s'étaient auparavant penchés sur la formation et les effets des ententes et leur origine allemande. D'après Kinghorn (1996), les premiers travaux allemands sur les *Kartells* ont été rédigés par Friedrich Kleinwächter en 1883. On notera que les premiers auteurs allemands auraient souligné la capacité des Kartells à faire correspondre l'offre et la demande et à empêcher le contrôle d'un marché par une seule entreprise, ce que les deux auteurs considéraient comme des avantages. Des auteurs plus récents, principalement dans la tradition néoclassique, ont associé les ententes à l'exercice du pouvoir de monopole. Voir Kinghorn (1996) pour une synthèse de ces différents points de vue.

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 cartellisation 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[11].

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 avantageux 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.

[11] 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 économique[14] 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

Le document du Secrétariat de l'OCDE préparé pour l'examen mutuel de 2006 du droit de la concurrence du Taipei Chinois relève que, par le passé, la tendance politique consistait généralement à limiter la concurrence interentreprises. Selon l'OCDE (2008) :

> *« 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 20me 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 19e siècle[15]

La justification et la raison d'être apparentes des ententes de crise en Allemagne à la fin du 19e 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[16], 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)[17]. 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 a 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'étaient 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

La crise financière est-asiatique, qui a débuté avec la dévaluation du baht thaïlandais en juillet 1997, s'est rapidement étendue à l'Indonésie. D'après Iwantono (2003), la crise économique qui en a découlé en Indonésie a duré de 1998 à 2003. La politique indonésienne à l'égard des ententes semble avoir été contrastée pendant cette crise, même si une loi sur la concurrence contenant des dispositions relativement claires en matière d'ententes a été promulguée en 1999. D'une part, l'idée a prévalu que l'effondrement de la demande globale avait perturbé de nombreuses ententes sans qu'aucune action officielle soit menée. D'autre part, la toute nouvelle autorité indonésienne de la concurrence (KPPU) (d'après Iwantono, c'est en effet la crise qui a permis l'adoption de la loi sur la concurrence en 1999) a engagé l'État à abolir l'entente qui existait dans le secteur du transport aérien et à mener des consultations.

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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.

Pourtant, comme Iwantono (2003) l'explique, pendant la crise, la KPPU n'a pas recommandé la suppression des « opérations d'entente » qui avaient cours dans l'importante industrie du sucre. Les considérations de concurrence auxquelles une autorité de la concurrence peut se trouver confrontée – et auxquelles il est pratiquement sûr que les États se trouvent confrontés – sont parfaitement résumées dans l'affirmation suivante d'Iwantono :

> *« 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 » (page 6).*

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[18]. 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[19].

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 (1987) expliquent le rôle des ententes dans les politiques japonaises envers les secteurs sur le déclin. Bien que le gouvernement japonais ait pris des mesures pendant un temps pour atténuer l'impact du déclin de certains secteurs, une approche globale a été adoptée avec la promulgation en 1978 d'une loi intitulée Mesures provisoires de stabilisation de certains secteurs touchés par la crise[20]. 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).

Les ouvrages relatifs au Japon contiennent également des informations sur l'application de ces politiques d'ententes de crise. Quant à leur fréquence, Rotwein (1976) et Weinstein (1995) font tous les deux observer que les ententes de récession ne représentaient qu'une petite part des ententes japonaises. Weinstein note également que la plupart des ententes de dépression n'ont duré qu'un an[21] alors que les autres types d'entente ont duré plus longtemps.

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[22]. 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.

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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 (1987) analysent les 14 secteurs japonais qui se sont vu accorder de l'aide au titre de la Loi de 1978 (mentionnée ci-dessus). La plupart des secteurs étudiés avaient subi les « effets préjudiciables » des hausses brutales des prix de l'énergie de 1973 et 1979 (page 85). Seuls six d'entre eux avaient une production très concentrée. Sept des secteurs couverts ont été autorisés à former des ententes de récession. Les disparités entre les secteurs qui avaient reçu des aides, ceux qui étaient en situation de concentration et ceux qui connaissaient une entente de récession, sont liées aux indicateurs de performance des secteurs concernés.

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 connait 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).*

Porter, Takeuchi et Sakakibara (2000) ont examiné l'impact de la présence d'une entente sur les résultats à l'exportation, sur la base de données prenant en compte chacune des ententes japonaises (de tous types) approuvées par l'État de 1953 à 2004. Ces auteurs ont mis en évidence que les ententes n'étaient quasiment jamais créées dans les secteurs d'exportation les plus rentables du Japon. Cet élément jette le doute sur l'affirmation selon laquelle les ententes de crise protègent le marché national, sur lequel reposent les bases du succès futur des exportations. Cette étude considère plutôt que l'intensité de la concurrence sur les marchés nationaux est liée de manière positive aux futurs résultats à l'exportation.

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 :

> *« En apparence conçues pour mettre un terme aux formes 'inéquitables' ou 'peu scrupuleuses' de comportement des entreprises, les conférences visaient en pratique à restreindre les moyens légitimes de faire jouer la concurrence. La FTC a inauguré les conférences en invitant l'ensemble des entreprises d'un secteur à se rencontrer, en présence d'un commissaire et d'agents de la commission, afin de discuter des pratiques contestées au sein des milieux professionnels. Lorsqu'une majorité de ses membres s'opposait à certaines tactiques commerciales, la conférence adoptait des résolutions préconisant l'interdiction des pratiques suspectées. Si la FTC confirmait la position des membres de la conférence, elle classait les résolutions en règles du 'Groupe I' ou du 'Groupe II'. La Commission qualifiait les violations des règles du Groupe I de violation prima facie du FTC Act et prenait des ordonnances de cessation et d'abstention pour y mettre un terme. Mais pour les violations des règles du Groupe II, la FTC basait sa décision d'engager des poursuites sur les circonstances de chaque infraction réputée » (page 13).*

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 réglementation[24]. 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).

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23 Miller, Walton, Kovacic et Rabkin (1984), page 14.

24 Miller, Walton, Kovacic et Rabkin (1984) citent le Président Roosevelt déclarant : « Nous assouplissons certaines des mesures de sauvegarde du droit de la concurrence…[Nous] remplaçons les vieux principes de concurrence sans entrave par un certain nombre de nouvelles mesures de contrôle de l'État … » (page 16).

Malgré tout, la NRA et les activités de l'AAA ont eu le temps d'affecter le fonctionnement du marché. Miller, Walton, Kovacic et Rabkin (1984) résument ainsi les effets du NIRA :

> *« Ces avantages pour les entreprises, les travailleurs, et les intérêts de l'État ont cependant souvent été réalisés au détriment des consommateurs. Les planificateurs gouvernementaux [étaient] 'avides de nouveaux terrains à conquérir, sautant sur toute occasion d'étendre leur sphère d'intérêt...' Outre la création mûrement réfléchie de monopoles, les administrateurs de la NRA ont par ailleurs facilement accepté les nombreuses dispositions des codes de fonctionnement des ententes encourageant la fixation de 'prix de monopole ou de semi-monopole'. Certains codes favorisaient de vastes collusions explicites entre les soumissionnaires dans le cadre de marchés nationaux, locaux, et fédéraux, augmentant ainsi les bénéfices des entreprises favorisées. D'autres ont encouragé la fixation clandestine de prix et limité les expéditions interrégionales de produits. Le secteur des récipients en verre a bénéficié d'un code particulièrement solide, pour avoir aidé le gouvernement à faire respecter les en récompense de l'aide apportée à l'État dans l'application des lois sur la taxation des boissons alcooliques (...). Les codes relatifs aux secteurs du bois, du cuivre, et des récipients en verre 'trouvaient tous leur origine dans les pratiques de fixation des prix des groupes concernés antérieures au code'.*
>
> *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 défections), et ce point doit également être pris en compte[25]. 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

[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 défections restaient impunies, les autres entreprises revoyaient leurs sanctions à la baisse, entraînant ainsi de nouvelles défections. '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 ».*

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 défections 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[26]. 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.

La dénonciation imprévue, par la Cour suprême des États-Unis, du NIRA et de son équivalent agricole, l'AAA, offre à Alexander et Libecap (2000) l'occasion de tirer profit d'une structure expérimentale naturelle. Même si ces lois ont été rejetées, d'autres dispositions légales auraient permis de rétablir les principales formes de l'intervention des pouvoirs publics[27]. Chose intéressante, ces dernières mesures ont été exploitées dans le domaine agricole mais pas dans les industries manufacturières. Sur la base de données portant sur 23 secteurs d'activité américains, Alexander et Libecap avancent l'hypothèse que le degré d'hétérogénéité des coûts dans le secteur agricole était inférieur à celui des secteurs manufacturiers au milieu des années 30, ce qui permettait au premier d'accepter plus facilement un retour de l'intervention publique[28].

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 défections 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'existaient 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 ».*

De manière plus générale, l'hétérogénéité des coûts a également été l'un des facteurs de l'instabilité et du démantèlement des ententes, selon Alexander et Libecap (2000, page 395). Ils constatent que les données nécessaires aux codes NIRA ont tendance à être plus stables dans les secteurs dans lesquels les coûts totaux moyens ne varient pas beaucoup par rapport aux niveaux de production.

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 donné 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[29]. 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[30]. 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.

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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 en vigueur à l'époque en Allemagne qu'aux origines liées à la crise des premier et deuxième « groupements » de producteurs allemands 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 une évaluation 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 ferroviaires avançait 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 entrepreneurs trouvaient 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).*[31]

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[32]. 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 appréciables 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 ».

En revanche, Levenstein (1997) rattache la création du groupement à l'évolution ultérieure des prix du bromure.

> *« 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 » (Babezat 1989, page 436).*

Le 1er octobre 1926, l'Entente internationale de l'acier (EIA) était constituée. Les quatre membres fondateurs de cette entente continentale européenne étaient la Belgique, la France, l'Allemagne et le Luxembourg. Ensemble, ils représentaient 65 % des exportations mondiales d'acier en 1926 et 30 % de la production mondiale. L'EIA « a fixé des contingents sur la production totale de chacun des pays, et les membres ont accepté de respecter les frontières nationales en limitant leurs exportations à destination des pays membres. L'entente n'a pas expressément fixé les prix, mais cherchait simplement à fixer des quotas de production pour les lingots d'acier » (page 436). L'accord d'entente prévoyait des pénalités en cas de surproduction et contenait des dispositions de résiliation de l'accord en 1929, 1931 ou, au moment où l'Allemagne modifierait les taux de droits applicables.

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[34], 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[35]. 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 prévoyaient 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) :

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34 Libecap (1998) offre un excellent aperçu des politiques agricoles des États-Unis de 1884 à 1970. Dans la Section 6.2 de son exposé, Libecap distingue trois types d'intervention des autorités : la fourniture de biens publics, les transferts, et la réglementation économique (catégorie comprenant la constitution d'ententes de marchés). Libecap montre que la période du New Deal (1933-1939) a été associée à une brusque augmentation de la réglementation économique, dont une grande partie a subsisté dans la législation jusqu'à la deuxième moitié du 20e siècle. Libecap examine les conséquences de la réglementation en place à l'époque du New Deal, sans toutefois insister sur l'impact des ententes. Le blé est le seul produit de base dont il analyse les données sur les prix.

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 laisser leurs entreprises organiser des ententes en période de crise 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 en acceptent un, qui ne contenait pas de restrictions sur les expéditions d'oranges de Floride.

[36] Il est à noter que ce sont les 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 hebdomadaires 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.

4.6 L'entente américaine sur les prix du ferrosilicium, 1989-1991

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, son prix réel 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.

Plusieurs entreprises américaines de silicium auraient fixé les prix de 1989 à 1991, à en croire les accusations ultérieures portées par les autorités fédérales américaines (USGS 1998). Au cours de l'année 1988, les prix du ferrosilicium ont augmenté d'environ 20 % en termes réels avant de reprendre leur baisse. La forme de l'entente (fixation des prix) et la baisse tendancielle des prix réels du ferrosilicium s'expliquent par la volonté d'endiguer, voire d'inverser une diminution durable de la rentabilité du secteur ce qui permet d'y voir une forme d'entente de crise, bien qu'elle ne soit pas approuvée par l'État.

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.[37]

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[38].

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)[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*[40].
>
> *La Commission craint notamment que ce projet, en vertu duquel les propriétaires européens de navires sont 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 »*[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 »*[42].

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39 Pour plus de détails, voir Janet Porter, « Brussels stands firm over shipowner crisis cartel plans », *Lloyds List*, 29 octobre 2009 et Greenberg, Traurig et Maher, « Sink or Swim? The Baltic Max Feeder Investigation Signals First Full Competition Probe Under New Maritime Regulatory Framework », *Antitrust & Trade Regulation*, janvier 2010.

40 Un seul agent a ensuite cherché seul à surmonter le problème des pratiques concertées traditionnellement associé à l'organisation d'ententes.

41 Communiqué de presse « Antitrust: la Commission ouvre une procédure formelle d'examen concernant le projet 'Baltic Max Feeder' réunissant les propriétaires européens de navires de collecte », 15 janvier 2010. Consultable à l'adresse: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/21&format=HTML&aged=1&language=FR&guiLanguage=en.

42 Communiqué de presse « Ententes: la Commission clôture l'enquête sur le projet 'Baltic Max Feeder' », 26 mars 2010. Consultable à l'adresse: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/374&format=HTML&aged=1&language=FR&guiLanguage=en.

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 Alert[43] :

> *« 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 gouvernements[45]. D'après Global Trade

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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.

44 De plus amples informations ainsi que des liens vers d'autres références peuvent être consultés à l'adresse http://www.globaltradealert.org/measure/indonesia-malaysia-and-thailand-limiting-rubber-exports-915000-tons-during-2009.

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[46]. L'enquête (provenant essentiellement de sources gouvernementales)[47] 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[48].

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[49]. 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

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les subventions. 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 fausser « 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 sauvetages 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 concurrence 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 sauvetages 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).[50] 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

[50] 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.[51]

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'approbation* 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 paraît 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.

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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[1]. 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[2]. 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.

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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.

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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[2]: (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[3] 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.

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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.

2 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.09.2006, p. 2-5).

3 The Commission has itself been dealing with such cases and is aware of similar cases being addressed by national competition authorities.

4 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 04.01.2003, p.1-25) sets out the enforcement regime for Antitrust in Europe.

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*

5 See Case T-16/99 Lögstör Rör v Commission [2002] ECR II-1633, paragraphs 319-320; Joined Cases T-236/01, T-239/01, T-244/01 à T-246/01, T-251/01 et T-252/01 Tokai Carbon e.a./Commission [2004] ECR II-1181, paragraph 345; and Case T-30/05 William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission [2007] ECR II-107, paragraphs 207-208.

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 Beef*[8], 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).

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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.

10 See, e.g., Joined Cases C-506 P et al, GlaxoSmithKline, [2009] ECR I – 09291, paragraph 55; Case C-209/07, BIDS, [2008] ECR I-8637, paragraph 16; Case C-8/08, T-Mobile Netherlands, [2009] ECR I-4529, paragraph 29 et seq.

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 remedying 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.[11] However, the more severe the restriction of competition the less likely it is that an exemption will be available.[12]

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.

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11 Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, pp. 342, 343 and 347, and Case T-17/93 Matra Hachette v Commission [1994] ECR II-595, paragraph 85.

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.[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.[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*".[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".*[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.[17]

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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 the light of actual experience […] The question of what degree of probability must exist for it to be considered that there is an appreciable objective advantage does, admittedly, arise in principle in this context. In my opinion, a high degree of probability must be set here. That is because, with infringements of Article 81(1) EC [now: Article 101(1) TFEU], the existence of losses in efficiency in the form of a restriction of competition must already be postulated."

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.[18] 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*".[19]

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.[20] 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

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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.

19 See OJ C 37, 9.2.2002, p. 19.

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.[21]

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.[22] 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.[23]

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.

3.2.2 The third condition – restrictions must be indispensable to the attainment of these objectives[24]

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.[25] This paper will comment only on the first of these

21 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").

22 This is of particular relevance in the assessment of whether consumers obtain a fair share of the benefits (see later).

23 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 66.

24 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).

25 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 73.

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

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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.

30 See Case T-29/92 Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO) [1995] ECR II-289, paragraph 294.

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.*[31] *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.*[32] *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.

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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.

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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.

35 Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43.

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

36 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 85.

37 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 90.

38 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 98.

39 See Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 101.

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.[41]

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 competitions 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.[42] 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.

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41 See Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 97.

42 See Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, paragraph 98.

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.

5 See Weitbrecht, *From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law*, in E.C.L.R [2008], p. 81 *et seq*.; Klocker, *50 Jahre Bundeskartellamt*, in: *Bundeskartellamt, 50 Jahre Bundeskartellamt – 50 Jahre Gesetz gegen Wettbewerbsbeschränkungen*, Bonn, 2008, p. 11 *et seq*.; Basedow, *Kartellrecht im Land der Kartelle*, WuW 2008, p. 271.

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*, 12 August 2004, 7th amendment of the ARC, Statement of the bill, BT-Drucks. 15/3640, p. 27.

7 See Braun in Langen/Bunte, nach § 2 para. 36f with further references.

8 cf. *Bundeskartellamt*, Decision of 31 May 1983 "Betonstahlmatten", published in WuW/E BKartA, 2049 et seq.; BKartA, Decision of 22 July 1987 "Leichtbauplatten", published in WuW/E BKartA, 2271 et seq.

9 cf. *Bundeskartellamt*, Decision of 31 May 1983 "Betonstahlmatten", published in WuW/E BKartA, 2049 et seq.

10 cf. *Bundeskartellamt*, Decision of 22 July 1987 "Leichtbauplatten", published in WuW/E BKartA, 2271 et seq.

11 cf. *Bundeskartellamt*, TB 1987/88, BT-Drucks. 11/4611, S. 28.

Regulation (EC) 1/2003, the German legislator abandoned Section 6 ARC^{old} in 2005, noting that the provision had rarely been applied in practice.[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^{old}.[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.

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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.

13 See European Commission, 12th Report on Competition Policy, 1982, p. 43 et seq. and 13th Report on Competition Policy , 1983, p. 53 et seq.; see also COM, OJ 1984 L 207/17, para. 25 et seq. "Kunstfasern";OJ 1984 L 212/1 "BPCL/ICI"; OJ 1988 L 150/39 et seq. "Bayer/ BP Chemicals"; OJ 1994 L 131/18 et seq. "Stichting Baksteen".

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.*"[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.[15]

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.

15 See *Monopolkommission*, 22 January 2009, Press Release "Staatliche Reaktionen auf die Wirtschaftskrise stellen Marktwirtschaft und Wettbewerbsordnung in Frage".

GREECE

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.

Figure 1. Table 1. A static 'capacity expansion' game

A Prisoner Dilemma game		**2nd Incumbent**		
		Build a big plant	**Build a small plant**	**Not build a plant**
1st Incumbent	Build a big plant	**a, α**	**b, β**	**c, γ**
	Build a small plant	**d, δ**	**e, ε**	**f, ζ**
	Not build a plant	**g, η**	**h, θ**	**i, ι**

The Greek letters denote the payoffs of 2nd Incumbent.

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:

$$\begin{matrix} a<b<c \\ d<e<f \\ g<h<i \end{matrix} \quad \text{and} \quad \begin{matrix} a<d, b<e, c<f \\ a<g, b<h, c<i \\ d<g, e>h, f>i \end{matrix} \qquad (1)$$

Also, the structure of the payoffs of the 2nd incumbent is the below:

$$\begin{matrix} \alpha<\beta<\gamma \\ \delta<\varepsilon>\zeta \\ \delta<\zeta \\ \eta<\theta>\iota \\ \eta<\iota \end{matrix} \quad \text{and} \quad \begin{matrix} \\ \\ \alpha<\delta<\eta \\ \beta<\varepsilon<\theta \\ \gamma<\zeta<\iota \end{matrix} \qquad (2)$$

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[5]. 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

A reduced Prisoner Dilemma game		**2nd Incumbent**	
		Build a small plant	**Not build a plant**
1st Incumbent	Build a small plant	**f, ε**	**g, ζ**
	Not build a plant	**i, θ**	**j, ι**

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 1st incumbent will always choose to expand its supply in the market since its payoffs **e** & **f** are higher than **h** & **i** correspondingly. Similarly, the 2nd incumbent will always choose to expand its supply in the market since its payoffs **ε** & **θ** are higher than **ζ** & **ι** correspondingly. In the reduced game matrix, the Nash equilibrium is dominant strategy equilibrium.[7]

However, payoffs **i** & **ι** are higher than payoffs **e** & **ε** 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 1st incumbent is the leader and the 2nd 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 built a plant knows that the follower will decide to build a small plant since it maximises its payoff (**ι < θ & θ > η = ι,** where **θ** is the payoff of the follower if it decides to built a small plant). Similarly, if the 1st incumbent selects to built a small or a big plant, the follower will choose to built a small or not to built a plant correspondingly (when the follower chooses the first, **ζ < ε, ε > δ < ζ**, where **ε** denotes the payoff by building a small plant and when the follower decides the second, **γ > β > α**, where γ denotes the payoff by not building a plant).

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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 1st incumbent will always choose to expand its supply in the market.

7 A dominant strategy equilibrium occurs when each firm uses a dominant strategy.

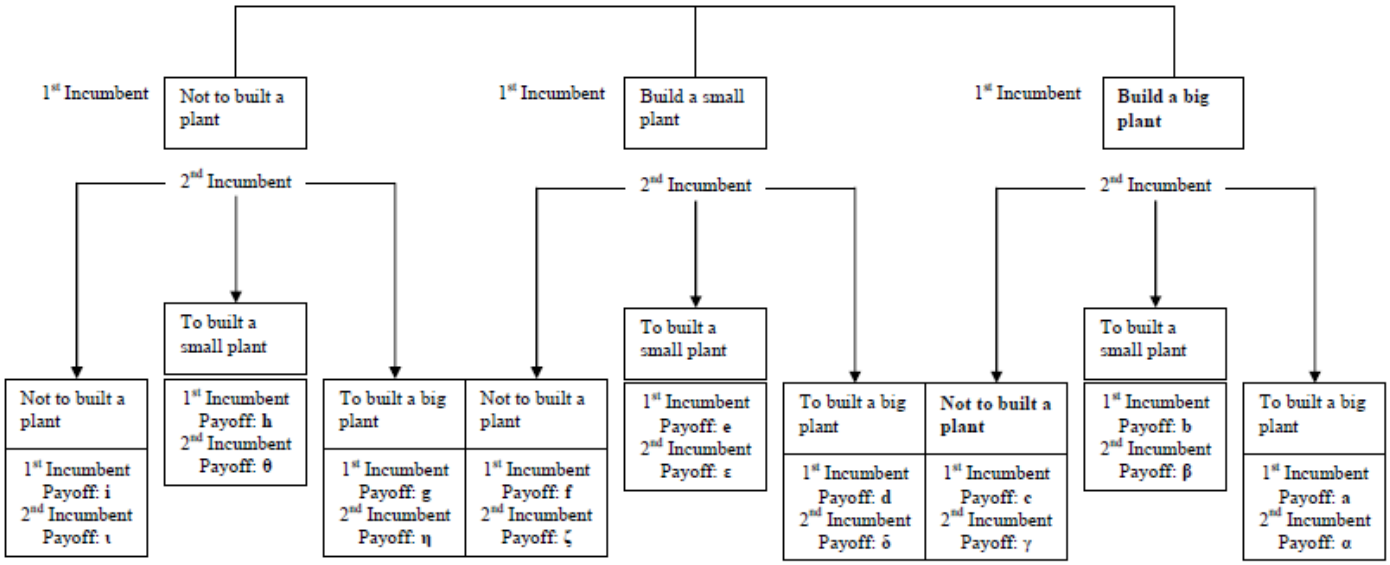
8 The leader differs from the follower in terms of market shares (size). Therefore, the two incumbents are not symmetric firms.

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



Payoff structures: 1st Incumbent [i > h > g], [f > e > d], [c > b > a], [i = c < f], [e > h > b], [g > d > a], [c > e > h].
2nd Incumbent [ι < θ & θ > η = ι], [ζ < ε, ε > δ < ζ], [γ > β > α], [ι > ζ > γ], [θ > ε > β], [η > δ > α].

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".*[10]

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.[11] Such agreements will not be

10 Commission Decision of 16 December 2003 (*Industrial tubes*), OJ [2004] L 125/50, para. 371.

11 Case C-209/07, *Competition Authority v. Beef Industry Development Society Ltd. and Barry Brothers (Carrigmore) Meats Ltd.*, [2008] ECR I-8637, para. 40.

considered as *per se* illegal, since it is theoretically possible that they satisfy the criteria of Article 101(3) TFEU,[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.[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*".[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]".*[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".*[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*

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12 Joined Cases 56/64 and 58/64, *Établissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v. Commission*, [1966] ECR 299, pp. 342, 343 and 347; Case T-17/93, *Matra Hachette SA v. Commission*, [1994] ECR II-595, para. 85; Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*, [2006] ECR II-2969, para. 233.

13 *Commission Notice - Guidelines on the Application of Article 81(3) of the Treaty*, OJ [2004] C 101/97, para. 46.

14 Commission Decision of 16 December 2003 (*Industrial tubes*), OJ [2004] L 125/50, para. 374.

15 Case T-13/89, *Imperial Chemical Industries plc v. Commission*, [1992] ECR II-1021, para. 372.

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*

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17 Case C-308/04 P, *SGL Carbon AG v. Commission*, [2006] ECR I-5977, para. 105. See also Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paras 54 and 55.

18 Commission Decision of 6 August 1984 (*Zinc Producer Group*), OJ [1984] L 220/27; Commission Decision of 4 July 1984 (*Synthetic Fibres*), OJ [1984] L 207/17); Commission Decision of 29 April 1994 (*Stichting Baksteen (Dutch Bricks)*), OJ [1994] L 131/15, para. 26.

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]*".

20 European Commission, *Twelfth Report on Competition Policy – 1982* (Brussels/Luxembourg, 1983), para. 38.

21 European Commission, *Thirteenth Report on Competition Policy – 1983* (Brussels/Luxembourg, 1984), para. 56.

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".[22]

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".[23]

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,[24] 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

22 Commission Decision of 8 December 1999 (*Seamless steel tubes*), OJ [2003] L 140/1, paras 25 and 26.

23 Commission Decision of 4 December 1986 (*ENI/Montedison*), OJ [1987] L 5/13, paras 26-28.

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[25] of almost 7% and an increased mark-up of net profit of almost 7%.[26] At the same time, EBITDA remained stable, from 16.92% to 17.15%.

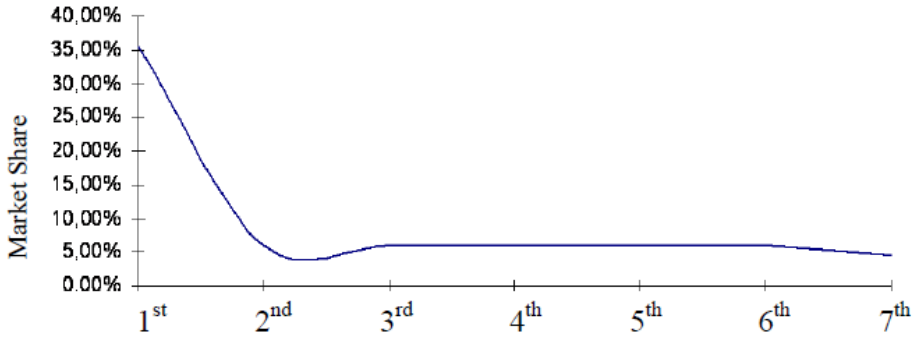
However, on the same period under scrutiny, the total number of firms (including the small and non-profitable firms) showed a decreased mark-up of operating profit of almost 5.5%, a decreased mark-up of net profit of almost 10% and a decreased EBITDA of almost 10.5%.

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



7 largest firms of the market for the production and distribution of fresh fish of Mediterranean fish farming

Source: HCC's elaboration of data

25 $\frac{Operating\ mark-up}{Total\ \text{Sales}} * 100$.

26 $\frac{\text{Pr}ofit\ \text{pre taxes}}{Total\ \text{Sales}} * 100$.

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).

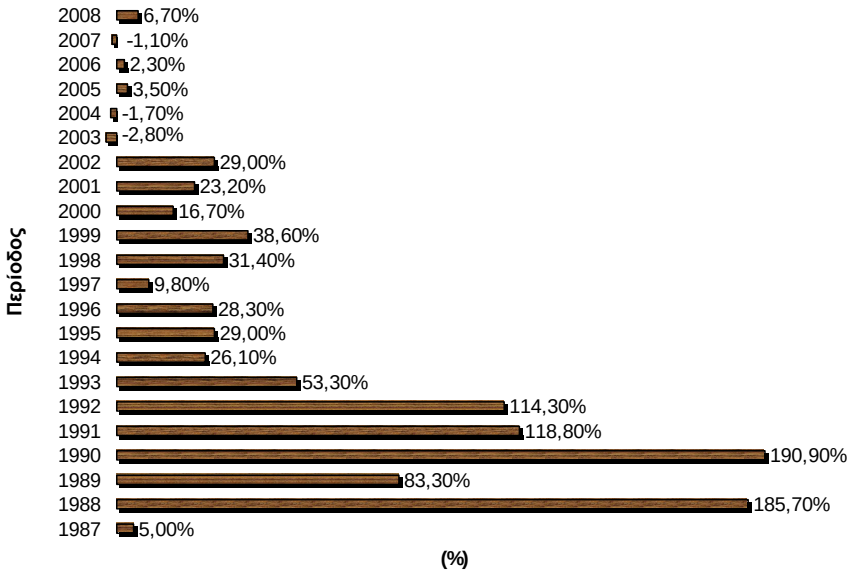
Table 3. Domestic consumption and exports of gilthead sea bream and bash fish: (2004-2008)

Year	Production of gilthead sea bream (tns)	Production of bash fish (tns)	Total production	Imports	Exports	Consumption
2004	44,200	40,800	85,000	1,500	48,000	38,500
2005	48,400	39,600	88,000	1,300	54,500	34,800
2006	51,300	38,700	90,000	2,500	55,000	37,500
2007	55,000	34,000	89,000	5,500	70,000	24,500
2008	62,000	33,000	95,000	6,200	72,000	29,200

Source: ICAP (2009)

Diagram 2 below depicts the average rate of annual production change of gilthead sea bream from 1987 to 2008.

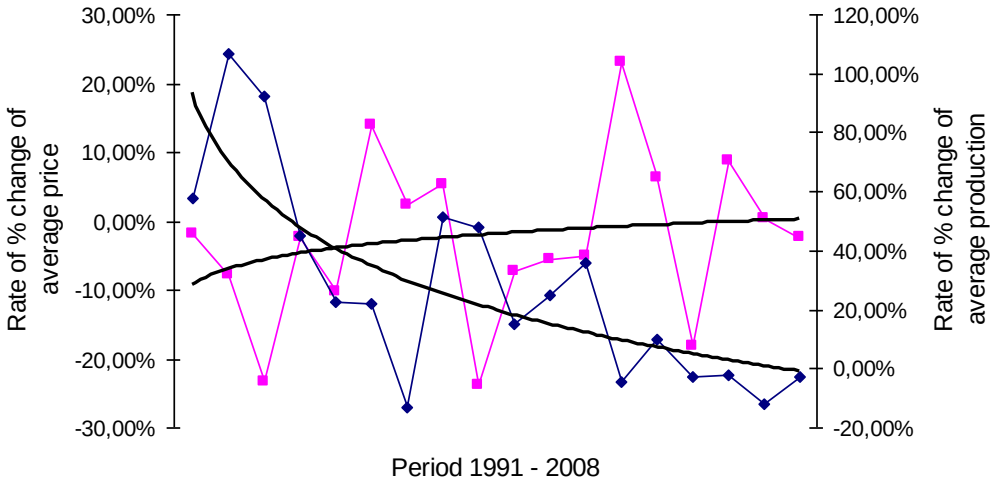
Diagram 2. Average rate of annual production change of gilthead sea bream: 1987-2008



Source: HCC's elaboration of data

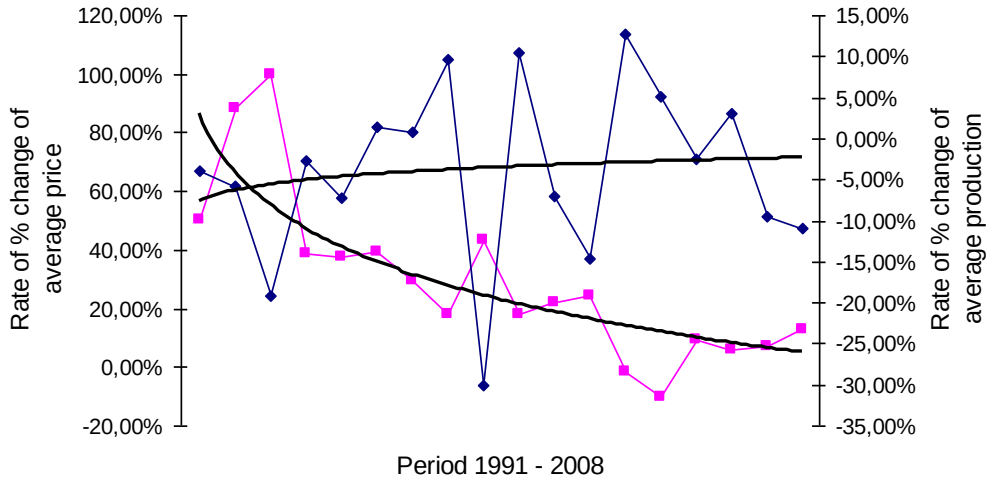
The evolution of the price for gilthead sea bream and bash fish shows that it followed the law of demand. Diagrams 3 & 4 show that an increase in the average production of both products decreases the price of both of them, assuming that all other factors which may affect demand, remain stable. The decrease 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



Source: HCC's elaboration of data

Diagram 4. Rate of % change of average price and production of gilthead sea bream: 1991-2008

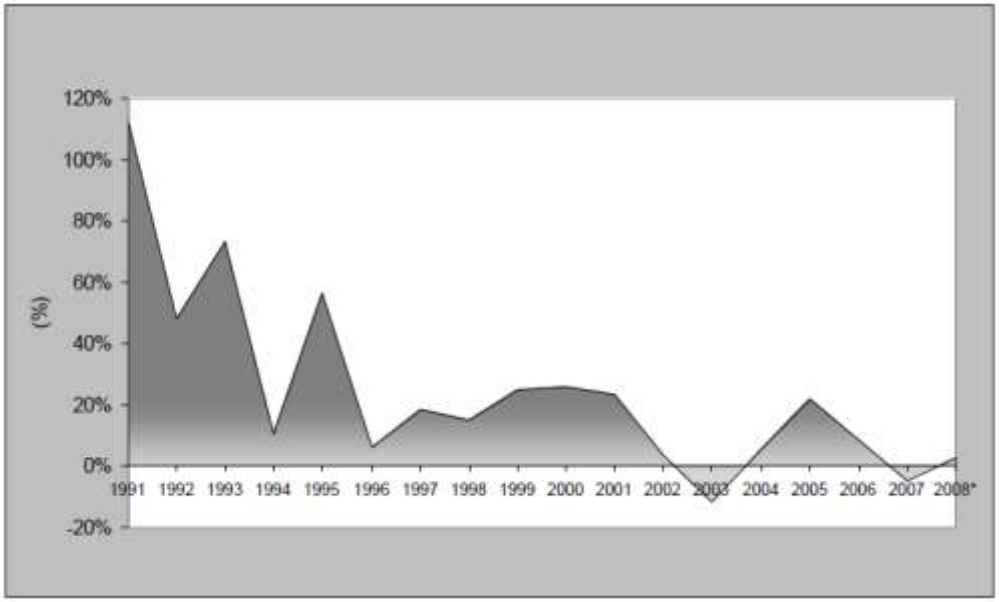


Source: HCC's elaboration of data

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.

Diagram 5. Average rate of annual production change of fry and eggs for fish farming: 1991-2008



Source: Data elaboration by the HCC. *Estimation

Moreover, the evolution of domestic consumption of fry and eggs for gilthead sea bream and bash 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).

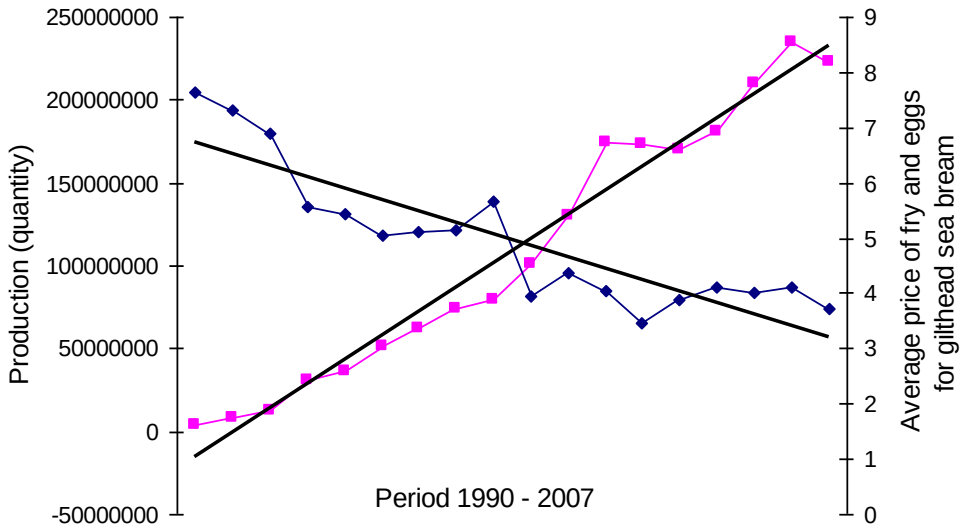
Table 4. Domestic consumption and exports of fry and eggs for gilthead sea bream and bash fish: (2004-2008)

Year	Production of fry and eggs for gilthead sea bream (tns)	Production of fry and eggs for bash fish (tns)	Total production	Imports	Exports	Consumption
2004	180,500,000	99,500,000	280,000,000	12,000,000	0	292,000,000
2005	219,000,000	122,000,000	341,000,000	15,000,000	20,000,000	336,000,000
2006	235,000,000	135,000,000	370,000,000	16,000,000	22,000,000	364,000,000
2007	223,000,000	130,000,000	353,000,000	16,000,000	55,000,000	314,000,000
2008*	217,000,000	145,000,000	362,000,000	17,000,000	57,000,000	322,000,000

Source: ICAP (2009). *Estimation

During the period 1990 - 2007, the average price of fry and eggs for gilthead sea bream and bash 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).

Diagram 6. Average price and production of fry and eggs for fish gilthead sea bream: 1990-2007

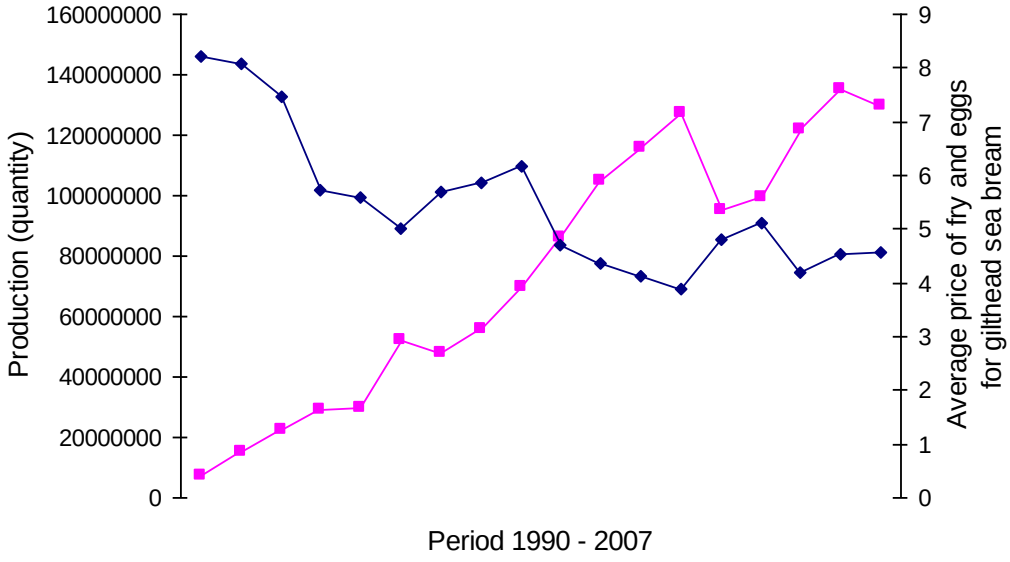


Source: Data elaboration by the HCC.

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.

Diagram 7. Average price and production of fry and eggs for bash fish: 1990-2007



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

1 Synthetic Fibres, OJ [1984] L 207/17.

2 Stichting Baksteen, OJ [1994] L 131/15.

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).

4 OJ C 101, 27.4.2004.

temporary drop in demand, or (b) chronic, being a product of a low level of demand coupled with a chronic excess productive capacity[5].

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 Fibres*[6] and *Dutch Bricks*[7], in both of which the

5 See further at 4.2.2 below.

6 Synthetic Fibres, OJ [1984] L 207/17.

7 Stichting Baksteen, OJ [1994] L 131/15.

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[10]. 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[11], 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*

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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 proof 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

12 Competition Authority -v- Beef Industry Developments Society Limited & anor [2009] IESC 72.

13 Competition Authority -v- Beef Industry Developments Society Limited & anor [2009] IESC 72.

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 Fibres*[14] (1984) and *Dutch Bricks*[15] (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.

14 Synthetic Fibres, OJ [1984] L 207/17.

15 Stichting Baksteen, OJ [1994] L 131/15.

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[16]. 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[17].

- 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.

20 Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, Metropole television SA and Reti Televisive Italiane SpA and Gestevision Telecinco SA and Antena 3 de Television v Commission [2006] ECR II-649.

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[21]. 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)[22].

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."*[24]

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[25] 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… ."*[26]

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."*[27]

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.

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24 John Fingleton, Competition Policy in Troubled Times, pp 4, OFT paper, January 2009.

25 For example the US financial 'Panic of 1907' and the 'Great Depression' of the 1930s.

26 Christina Romer, "Why Did Prices Rise During the 1930s?" Journal of Economic History, 59(1),167-199.

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.

JAPAN

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 crisis[1].

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

1 Please refer to the presentation below at the roundtable regarding competition and financial crisis held in February 2009 for further details on this theme. Akira Goto, "Challenges and role of competition policy during the past economic slump in Japan," (2009), Competition and Financial Markets 2009, 305-310, available at http://www.oecd.org/dataoecd/45/16/43046091.pdf .

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,[3] 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[4] 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.

4 "The Law on Temporary Measures for Stabilization of Specified Depressed Industries" enacted in 1978, and "The Law on Temporary Measures for the Structural Improvement of Specified Industries" revised in 1983.

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[5]. 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.

Purpose of Cartel	Approval Requirements
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[2] along with other necessary documents[3] 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[4].

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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[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.

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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 1was 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 a 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[6] 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.

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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 though 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".

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.

MONGOLIA

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[1]

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.[2]

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.[3]

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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.

2 See Preben Munthe (1993). "Trekk av norsk pris- og konkurransepolitikks historie", Pristidende nr. 5/93.

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.[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.[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.[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

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straits than at the beginning of the Great Depression. Over time, consumer interests, labour groups, smaller producers, antitrusters, and government purchasers became increasingly concerned with higher prices and began to vocally oppose the National Recovery Administration (NRA) and its codes." See also article by Clive Crook in the Financial Times from 8 November 2008: *"The NRA slowed the recovery".*

4 See, for example, Reed, L. W. (2005). "Great Myths of the Great Depression", Mackinac Center

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".*

6 See http://www.konkurransetilsynet.no/ImageVault/Images/id_1998/ImageVaultHandler.aspx.

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.

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7 See Kehoe & Prescott, Great Depressions of the Twentieth Century, Review of Economics Dynamics, vol. 5, issue 1 2002.

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.

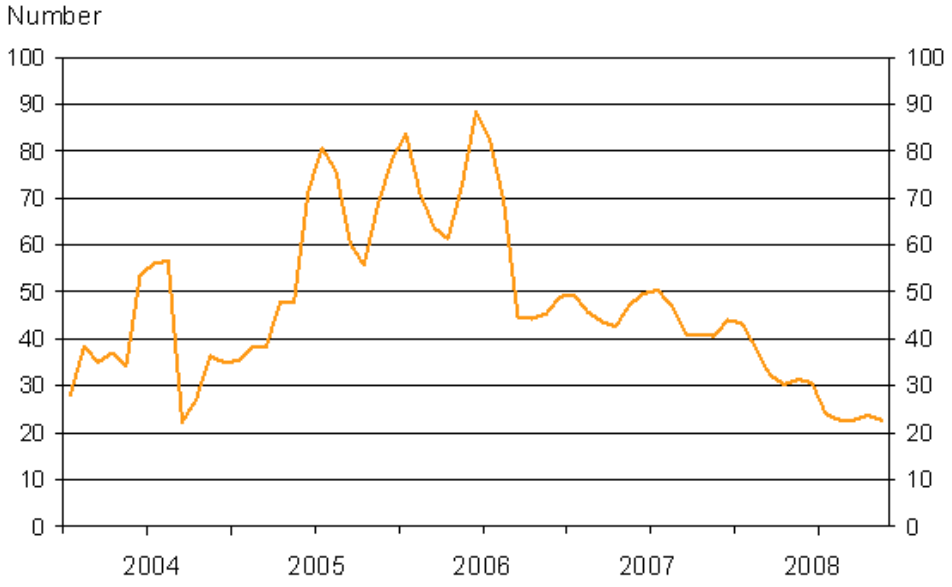
The authority has in the first nine months of 2010 conducted 3 dawnraids in 17 different locations. In the same period, 5 leniency applications have been received, of which three are granted. These ongoing cases draw heavily on the authority's resources.

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[10]



Source: Konkurransetilsynet

As the crisis evolved and deepened, the NCA expected to be challenged on two specific merger related issues:

i) the failing firm defence and

[10] 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.

ii) the implementation prohibition in section 19. [11]

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]

1. Governmental policies towards cartels during crises: assessment and evolution

The Peruvian competition law (Legislative Decree Nº 1034[2]) 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[3].

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[4]. 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[5] 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.

5 For instance, see: http://www.globalviewc.com.ar/files/article/file/30.pdf .

raised the credit rating of Peru to investment grade on December 2009, following other credit ratings agencies[6].

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.

6 See: http://semanaeconomica.com/articulos/47923-moody-s-otorga-grado-de-inversion-al-peru-por-sucapacidad-para-resistir-shocks-externos.

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

- a state of war is declared.

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 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 "butter 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 dilluted; 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

Republic Act No. 7581, The Price Act.

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".

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 prices 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".

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 pourrait-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 ».

D'autre part, comme le révèle une étude faite sur le cartel du sucre qui dura de 1934 à 1974, ce cartel s'est caractérisé par plusieurs distorsions dans l'économie : notamment, l'augmentation des prix, la baisse de qualité des récoltes et la diminution du surplus des consommateurs (in « *the Economic Performance of Cartels : Evidence from the New deal US sugar manufacturing Cartel*, 1934-1974 », Bridgman, Qi, Schmitz).

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 encourent.

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 prohibe 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 règlementaire (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].

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1 See Ministry of Trade and Industry (MTI) Annual Statistics, National Income and External Trade 2009, available at: http://app.mti.gov.sg/default.asp?id=725

2 http://www.business.gov.sg/EN/News/Jan2008/20080102Singapor.htm?TextBoxSearch=singapore+economy+grew&site=EnterpriseOne

3 http://www.business.gov.sg/EN/News/Jan2010/20100104Sgeconom.htm

4 http://www.istana.gov.sg/News/Address+by+President+S+R+Nathan+at+the+Opening+of+Parliament.htm

5 http://app.mti.gov.sg/data/article/23503/doc/PR_3Q2010_ESS.pdf .

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 voluntary 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[6]. 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

6 See http://app.casebank.ccs.gov.sg/.

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.

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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.

CHINESE TAIPEI

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.

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[2] Case C-209/07, Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) 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.

3 http://www.oft.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/livestock (4 February 2003).

UNITED 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*

[1] "Vigorous Antitrust Enforcement in this Challenging Era," Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the Center for American Progress, May 11, 2009, available at http://www.justice.gov/atr/public/speeches/245711.htm.

> *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."[2]

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.[3]

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 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

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2 *Id.* Attached to this submission is a more detailed exposition of the economic damage caused by lax antitrust enforcement during the Great Depression: "Competition Policy in Distressed Industries," Carl Shapiro, Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the ABA Symposium: Competition as Public Policy, May 13, 2009, available at http://www.justice.gov/atr/public/speeches/245857.htm.

3 U.S. Sentencing Guidelines, *Guidelines Manual* (2010), § 8C3.3.

4 *United States v. Signature Flight Support Corp.*, available at http://www.justice.gov/atr/cases/f243900/243975.htm.

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.[5]

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.[6]

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

5 See the FTC's November 30th 2010 complaint, available at http://www.ftc.gov/os/adjpro/d9345/101201lapcorpcmpt.pdf §§ 38-41. The case is currently under litigation

6 See United States Department of Justice, Antitrust Division, Criminal Enforcement Fine and Jail Charts 2000-2010, available at: http://www.justice.gov/atr/public/criminal/264101.html.

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.[7] 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.[8]

Although related to a public health crisis, rather than an economic one, the Pandemic and All-Hazards Preparedness Act of 2006[9] 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.

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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.

8 Statement of Carl Shapiro before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives, "A New Age for Newspapers: Diversity of Voices, Competition, and the Internet," April 21, 2009, available at http://www.usdoj.gov/atr/public/testimony/245063.htm. *See also* OECD Roundtable on Failing Firm Defense, Contribution by the United States, DAF/COMP/WD(2009)99 (October 6, 2009); ICN Recommended Practices for Merger Analysis, VIII. Failing Firm/Exiting Assets, 30-34 (2010), *available at*: http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.

9 Public Law 109-417, 120 Stat. 2831-81 (2006).

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 cartelThe 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 regulatorThe 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 CO_2 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 CO_2 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.

Au fil des ans, les autorités de la concurrence de certains pays ont pris des mesures à l'encontre de producteurs et de fournisseurs d'acier pour leurs comportements anticoncurrentiels, et ce, en particulier pour les produits destinés au secteur de la construction. Ces dernières années, des actions ont été intentées contre des entreprises sidérurgiques en Afrique du Sud, en Corée, au Brésil et dans l'Union européenne.

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'enlisaient 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'affut 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[1]. 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[2]. 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).

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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

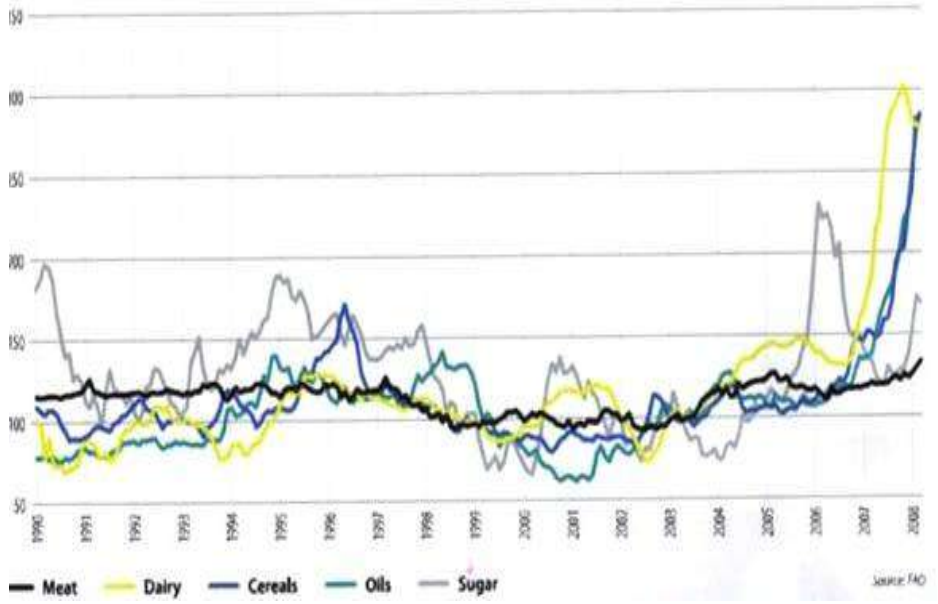
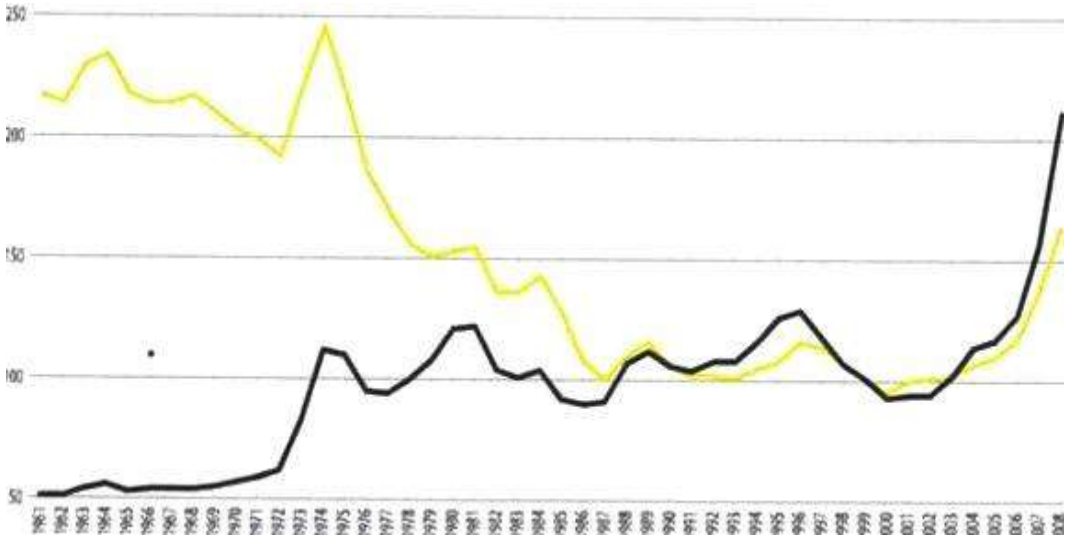


Figure 3. Figure 2: Real (Yellow) and Nominal (Black) Food Price Index: 1961-2008



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*, 30th December, 2010) while the risk of another general agricultural and food crisis has also been highlighted (*Financial Times*, 5th January, 2011). Figure 3 documents the recent rise in world agricultural prices.

Figure 4. Figure 3: Recent price developments in world agricultural markets

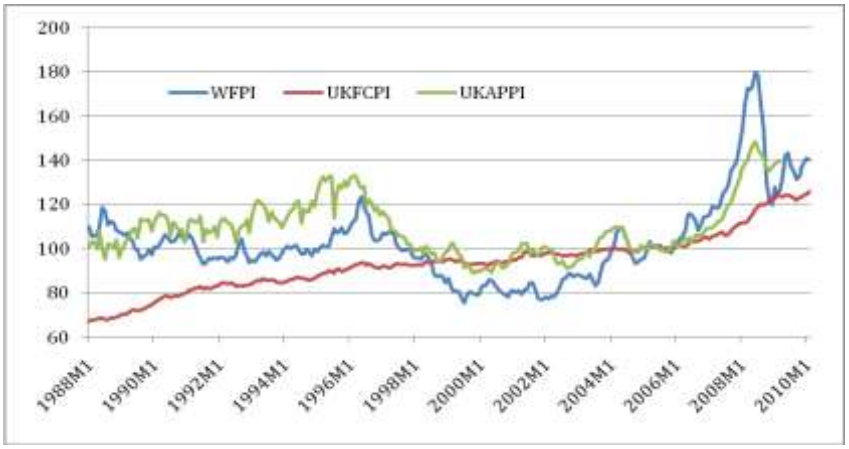
3 Price shocks can impact on inflation which underlies some of the concerns associated with recent events on world and domestic food markets and hence generates a macroeconomic context in which policy makers address the issue of high food prices. There are two aspects to this. First, price increases 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.

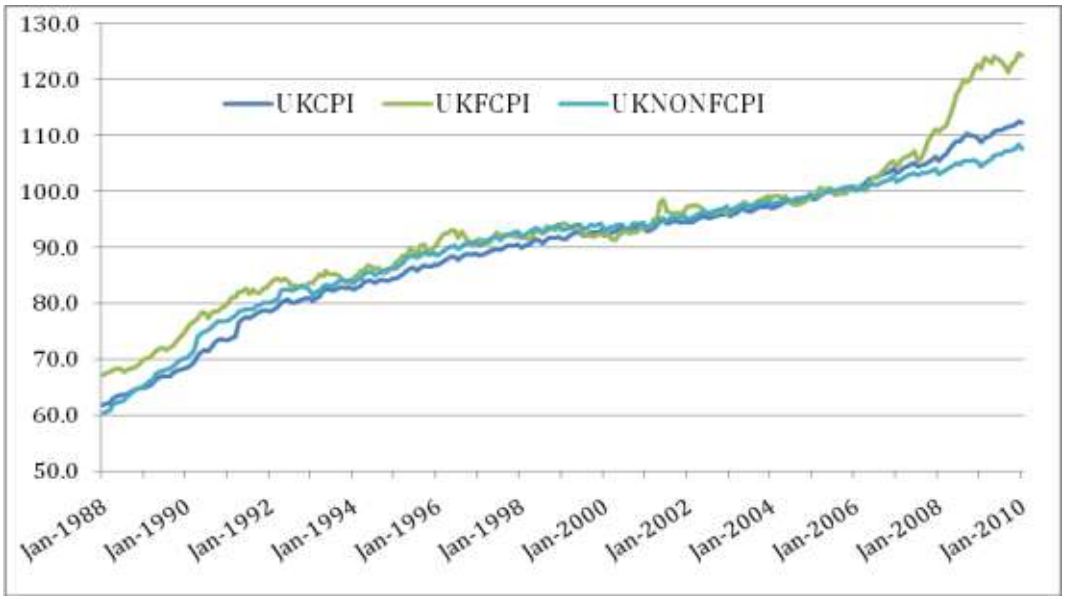
Figure 4: World and UK Domestic Producer Prices and Retail Food Prices, 1998-2010



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 Kwiencinski (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 factors[4].

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.

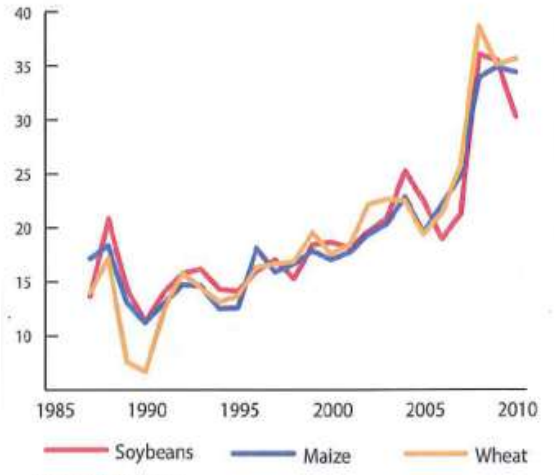
Apartheid regime, the existence of cartels has been identified across the food sector in South Africa covering bread and milling, milk and fertilisers. Second, and more recently, rising food price inflation has served as the background for cartel investigations in the Baltic States. These examples highlight 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 %)



Source: FAO (2010)
Note: Implied volatility represents the market's expectation of how much the price of a commodity might move in the future.

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))[5]. 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.

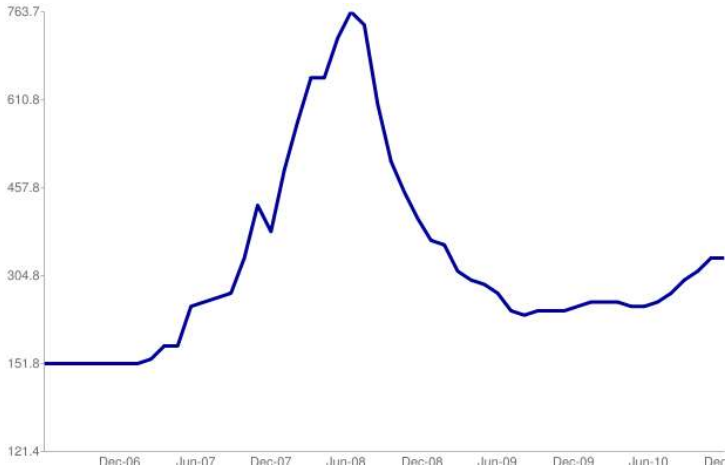
Some examples highlight these issues, some of which pre-date the more recent crisis and others which relate (either directly or coincidently) with recent events. Two examples relating to domestic issues which pre-date the recent surge in prices. First, is the reference already made to cartel activity 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

5 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[6]. 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,

6 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.

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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 clémente à l'égard de la coordination entre entreprises ou si, au contraire, elles doivent sanctionner explicitement ces ententes.

Traditionnellement, le débat sur le rôle convenable de la politique de la concurrence dans le contexte de crise économique fait souvent référence aux États-Unis dans les années 1930. Crane (2008) par exemple, donne des éléments sur le contexte politique et économique ayant présidé à l'assouplissement des principes de la politique de la concurrence aux États-Unis durant cette période. Les recherches universitaires sur la question tendent à montrer que l'application laxiste du droit de la concurrence a prolongé la récession aux États-Unis dans les années 1930, tandis qu'une étude sur la récession au Japon indique que les interventions des pouvoirs publics visant à restreindre la concurrence dans des branches d'activité en crise structurelle ont prolongé la récession des années 1990 (Porter *et al*., 2000). On trouvera un tour d'horizon rétrospectif plus précis des ententes de crise dans Evenett (2011).

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 sont 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 de récession. Fingleton (2009) et Vickers (2008) sont des tenants de ce point de vue.

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 apparue 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 XIX^{e} siècle en Allemagne, Kinghorn (1996) met aussi en avant la nature stabilisatrice des ententes 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 partaient d'un niveau relativement faible et accru les revenus des producteurs, est bien plus ancienne[1]. 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 agricoles ; 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

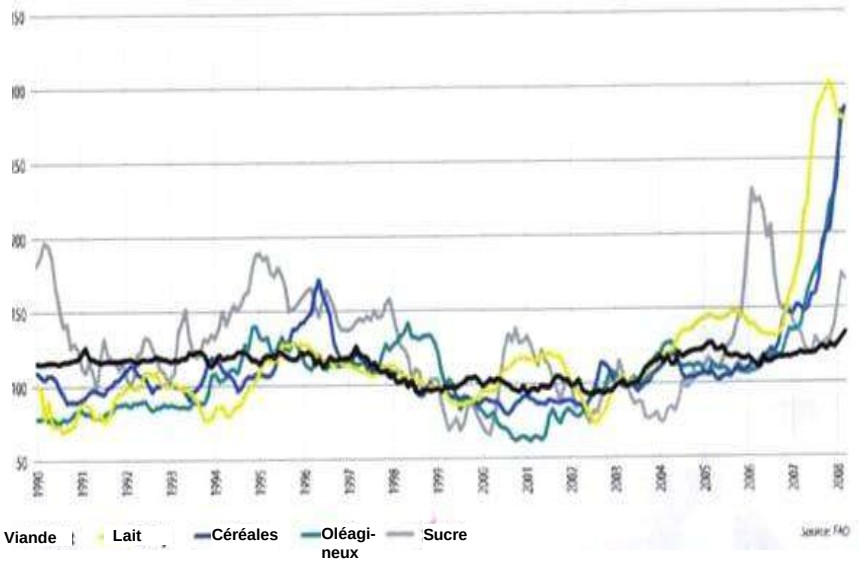
[1] La question de la façon dont l'évolution des prix influe sur les objectifs des pouvoirs publics se pose depuis longtemps. La Grande Crise des années 1930 et les problèmes liés à la « sécurité des approvisionnements » à la suite de la Seconde Guerre mondiale, ont déterminé en grande partie les conditions 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[2]. 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 d'État 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).

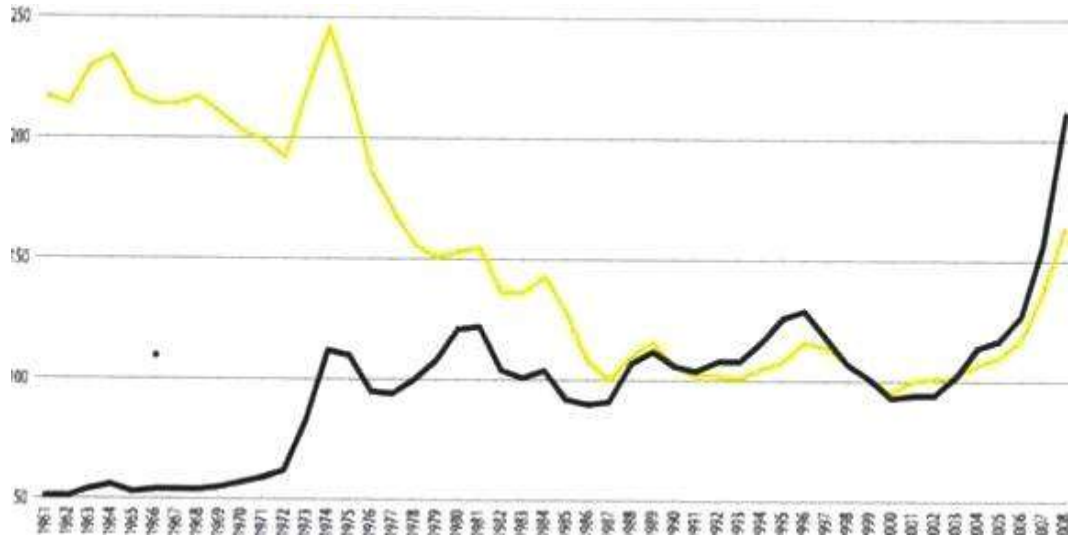
Cela étant, la récente attention accordée aux marchés agricoles et alimentaires est née d'une flambée des prix. Le graphique 1 est consacré à la flambée des prix alimentaires de 2007-2008 dans le contexte de l'évolution des prix alimentaires mondiaux depuis le début des années 1990. Même si la flambée 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



[2] 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.

Figure 6. Graphique 2 : Indice des prix alimentaires réels (en jaune) et nominaux (en noir) : 1961-2008



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)[3]. 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

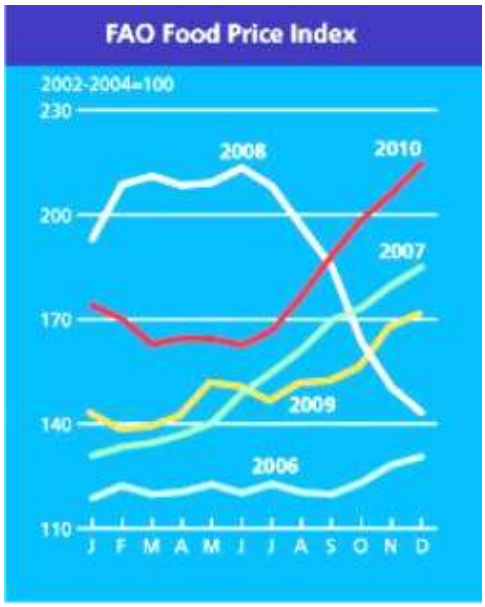
[3] Les chocs de prix peuvent avoir des répercussions sur l'inflation, élément qui explique certaines inquiétudes associées aux événements récents sur les marchés alimentaires nationaux et mondiaux et qui détermine donc le contexte macroéconomique dans lequel les pouvoirs publics traitent le problème 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.

Même si l'intérêt accordé aux marchés agricoles et alimentaires a principalement porté sur les causes et conséquences de la flambée des prix de 2007-2008, la hausse des prix agricoles du second semestre de 2010 et du début de 2011 a elle aussi retenu l'attention. Bien que les prix agricole soient redescendus de leur crête de 2007-2008, ils ont repris leur ascension, ce qui pose un problème de hausse des prix alimentaires dans de nombreux pays (*Financial Times*, 30 décembre 2010) et on a aussi pu évoquer le risque d'une nouvelle crise générale agricole et alimentaire (*Financial Times*, janvier 2011). Le graphique 3 illustre la hausse récente des prix agricoles mondiaux.

Figure 7. Graphique 3 : Évolution récente des prix sur les marchés agricoles mondiaux

Indice des prix alimentaires de la FAO

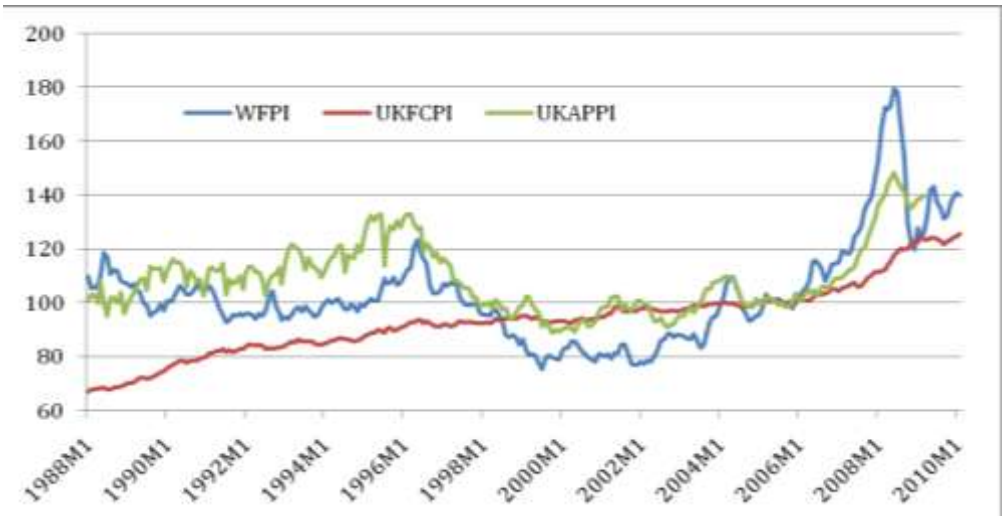


3.2 Prix agricoles mondiaux et prix de détail sur le marché intérieur

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

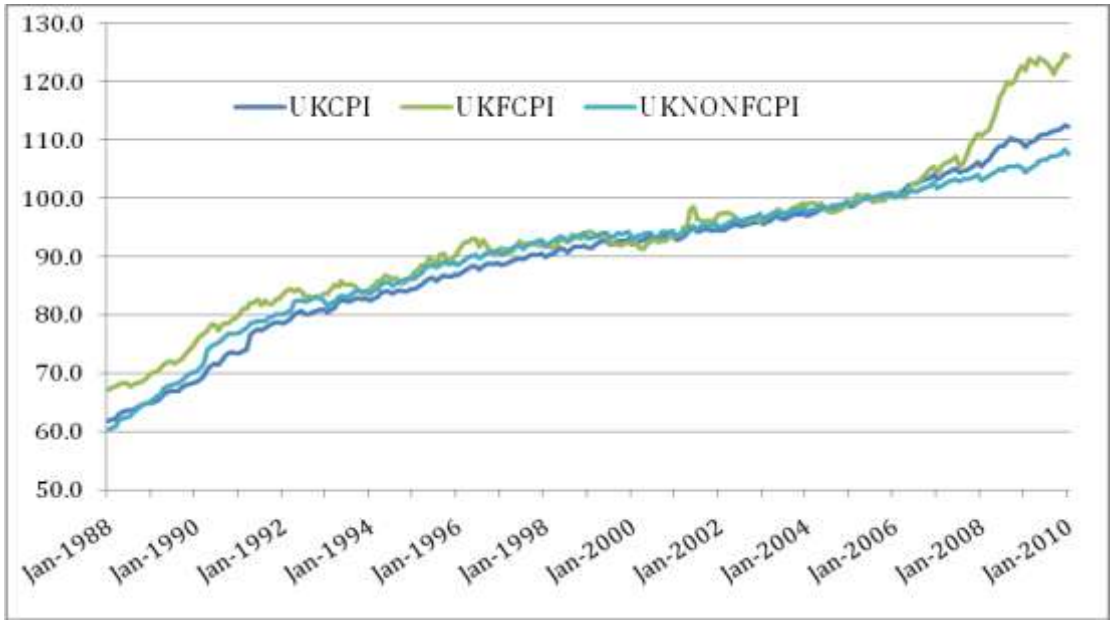


Le comportement des prix intérieurs à la consommation par rapport aux évolutions observées sur les marchés mondiaux a cependant varié selon les pays. La FAO note que la transmission des flambées des prix des produits de base a été très variable dans de nombreux pays en développement. Par exemple, la 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 Kwiencinski (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 illustreront 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 anticoncurrentiels 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.

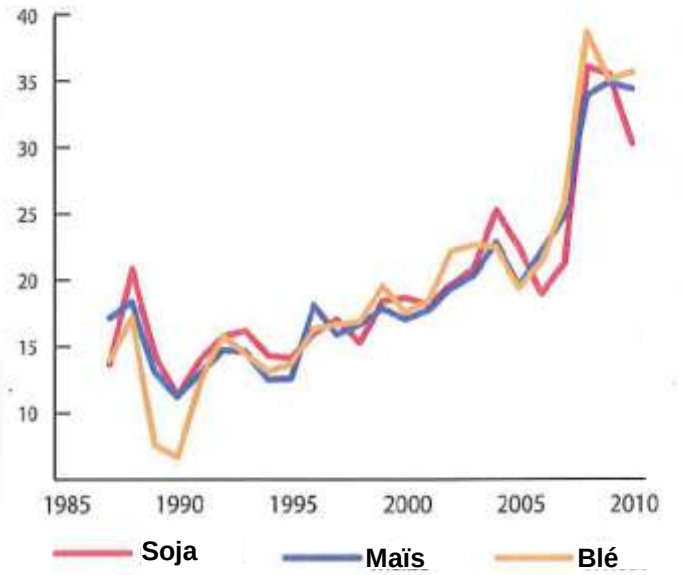
l'augmentation des prix alimentaires. Néanmoins, dans le contexte de la déréglementation qui a suivi la fin du régime de l'*Apartheid*, des ententes ont été mises en évidence dans tout le secteur de l'alimentation sud-africain, de la boulangerie et la meunerie jusqu'au secteur du lait et celui des engrais. Deuxièmement et plus récemment, l'accélération de la hausse des prix alimentaires a été l'occasion de mener des enquêtes sur des ententes dans les États baltes. Ces exemples illustrent le caractère sensible des hausses des prix alimentaires intérieurs et l'attention que ces hausses suscitent auprès des autorités de la concurrence.

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.

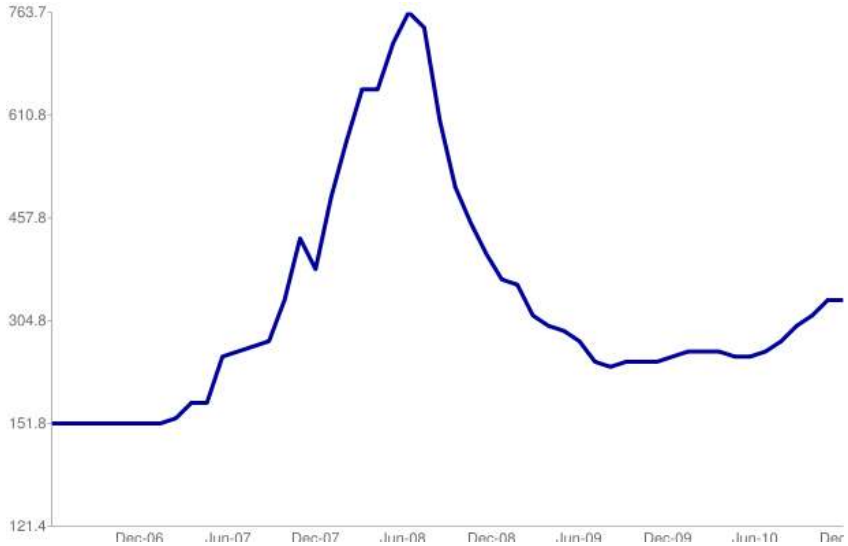
Quelques exemples permettent d'illustrer ces questions, certains étant antérieurs à la crise récente et d'autres étant liés (de façon directe ou par coïncidence) avec les événements récents. Deux exemples ont trait à des problèmes nationaux antérieurs à la récente poussée des prix. On retiendra d'abord 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[6]. 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

[6] Des ententes internationales impliquant des entreprises privées ont aussi été mises en évidence dans le secteur de l'alimentation et des activités connexes. Dans leur revue des ententes internationales identifiées durant les années 1990, Evenett *et al*. (2001) en évoquent plusieurs dans le secteur de l'agriculture et de l'alimentation ou des branches connexes, ces ententes portant sur toute une série de produits de base, notamment le sucre, les vitamines et la lysine.

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 survive 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 de détail 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

concurrence 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 atténue 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 ailent 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) apporte 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 a 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'ampleur 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.

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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[1]".

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.

[1] Evenett, S. (2011) page 3.

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[2]. 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[3]."

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

2 Levenstein and Suslow (2006).

3 Evenett. S. (2011), page 31.

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[4]:

- 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 details[10]. The economics profession is finally beginning to address its own deficiencies and also its own ethics in recent conferences[11].

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 Kwak[12] and others, that economic capture by the financial community played some part in the current global crisis[13].

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

9 FCIC Report (2011), pg. xvii.

10 See work of Posner (2008) etc.

11 Note agenda of American Economic Association Annual Conference agendas of 2008-2010.

12 Simon Johnson and James Kwak, "13 Bankers: The Wall Street Takeover and the Next Financial Meltdown", Pantheon Books, New York, 2010.

13 Sheng, A. (2010) Are Current Global Reforms Sufficient for EME Financial Stability? High Level Meeting on Better Supervision and Better Banking in a Post-crisis Era, Institute of Global Economics/IMF, Seoul, November 2010.

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)[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

[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).

Financial Services	Number of top players	Combined global share of business (%)
Asset Custodian	Top 4 firms	60
Insurance brokerage	Top 3 firms	64
Foreign Exchange trading	Top 10 firms	64
Accounting Services	Top 4 firms	53
Equity underwriting	Top 10 firms	70
Debt underwriting	Top 10 firms	62

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)[15], "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"[16]. 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[17].

The opposing view is that a more concentrated banking structure in fact results in more bank fragility[18]. 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.

16 Beck, T. (2008), *Bank Competition and Financial Stability: Friends or Foes?* World Bank Policy Research Working Paper, 4656, Washington DC. See also Boyd, H.J., De Nicolo, G., Jalal, A.M. (2005), "Bank Competition, Risk and Asset Allocations", IMF Working Paper No. 09/143.

17 Beck, T. (2008), "*Bank Competition and Financial Stability: Friends or Foes?*" World Bank Policy Research Working Paper, 4656, Washington DC.

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[19]".

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

19 Ibid.

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[20].

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)[21]. 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[22].

The opposite view is that a more concentrated banking structure enhances bank fragility. Boyd and De Nicolo (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 Nicolo (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

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20 Beck *et al* (2005), pp.1.

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)[23] [24].

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.[25]

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[26]. 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?

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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.

26 Morris Goldstein and Nicolas Veron, "Too Big to Fail: The Transatlantic Debate", Peterson Institute for International Economics, Working Paper 11-2, January 2011.

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[27]."

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[28]".

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)[29], "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[30] 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.

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27 Minsky (1986, 2008 edition), pg.264.

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 4.1 Concentration in Australia's Banking Sector – 1890 – 2009[a]

	Assets		Deposits		Home Loans	
	Share of 4 largest banks	HH index[b]	Share of 4 largest banks	HH index[b]	Share of 4 largest banks	HH index[b]
1890	0.34	0.06				
1913	0.38	0.10				
1950	0.63	0.14	0.64	0.15		
1970	0.68	0.16	0.68	0.16	0.77[c]	0.21[c]
1990	0.66	0.12	0.65	0.12	0.65	0.13
Oct 2008	0.65	0.11	0.65	0.12	0.74	0.15
July 2009	0.74	0.15	0.78	0.16	0.90	0.27

(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 2009

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[31].

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[32].

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.

31 APRA *Insight*, Issue 1 2001 and Issue 1 2008.

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[33]".

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[34] 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[35], 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[36].

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, 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 [37].

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

[36] See China Financial Stability Report 2011, People's Bank of China, available at www.pbc.gov.cn.

[37] China Banking Regulatory Commission Annual Report, 2009, available at www.cbrc.gov.cn.

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.

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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 »[1].

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 marchés 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

[1] Evenett, S. (2011) page 3.

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 les 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 efficace[2]. 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 surveiller 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 ».

[2] Levenstein et Suslow (2006).

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 injustifiables[3] ».

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 suivantes[4] :

- 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.

3 Evenett. S. (2011), page 31.

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 systémiquement 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[5]. 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[6], 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

5 Voir Brunnermeier *et al.* (2009) ; Commission d'experts (2009) ; De Larosiere (2009) ; Group of Thirty (2009) ; Turner (2009).

6 Consultable à l'adresse www.fcic.gov.

en matière de réglementation et de surveillance financière, des manquements en matière de gouvernement 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[7] 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[8], 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 millions 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*[9] ».

7 Keith Hennessey, Douglas Holtz-Eakin et Bill Thomas, p. 413-438.

8 Rapport de la commission d'enquête sur la crise financière (2011) pp. 441-538.

9 Rapport de la commission d'enquête sur la crise financière (2011), p. xvii.

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[10]. Dans les récentes conférences, les économistes commencent enfin à se pencher sur leurs propres déficiences et sur leur propre éthique[11].

On peut reprocher quatre principaux écueils 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[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[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

10 Voir les travaux de Posner (2008), etc.

11 Ordres du jour de l'American Economic Association Annual Conference, 2008-2010.

12 Simon Johnson et James Kwak, « 13 Bankers: The Wall Street Takeover and the Next Financial Meltdown », Pantheon Books, New York, 2010.

13 Sheng, A., Are Current Global Reforms Sufficient for EME Financial Stability? High Level Meeting on Better Supervision and Better Banking in a Post-crisis Era, Institute of Global Economics, FMI, Séoul, novembre 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 linéaire 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'être 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) [14]. 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

[14] 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).

Services financiers	Nombre d'acteurs de premier rang	Part d'activité mondiale combinée (%)
Conservation d'actifs	4 premières entreprises	60
Courtage en assurance	3 premières entreprises	64
Commerce des devises	10 premières entreprises	64
Services comptables	4 premières entreprises	53
Souscription d'actions	10 premières entreprises	70
Souscription de titres de créance	10 premières entreprises	62

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 interconnections 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 reconnaisse 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 concentré (ou sur un marché doté de barrières à l'entrée) engrangeront des bénéfices qui les protègeront 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.

16 Beck, T., *Bank Competition and Financial Stability: Friends or Foes?*, 2008, Banque mondiale, Document de travail de recherche sur les politiques n° 4656, Washington DC. Voir également Boyd, H.J., De Nicolo, G., Jalal, A.M. (2005), « Bank Competition, Risk and Asset Allocations », FMI, Document de travail n° 09/143.

17 Beck, T., « *Bank Competition and Financial Stability: Friends or Foes?* », 2008, Banque mondiale, Document de travail de recherche sur les politiques n° 4656, Washington DC.

18 Ibid.

tendance à être constitués de banques plus grandes, qui proposent un large éventail de services, ce qui rend leur contrôle plus compliqué[19].

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 en effet 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 règlementations 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 bancaire[20].

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 nombreuses[22].

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20 Beck *et al.* (2005), p.1.

21 Smith (1984) soutient que moins de concurrence peut mener à plus de stabilité si les informations sur la distribution de probabilité des besoins en liquidité des déposants restent privées. Matutes et Vives (1996) soulignent cependant la complexité des liens entre structure de marché, concurrence et stabilité bancaire, et montrent qu'une fragilité bancaire peut faire irruption dans n'importe quelle structure de marché.

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)[23] [24].

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[25].

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.

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23 Selon les textes publiés sur les garanties des dépôts et leurs effets sur les décisions des banques (par exemple, Merton (1977), Sharpe (1978), Flannery (1989), Kane (1989), Keeley (1990), Chan, Greenbaum et Thakor (1992), Matutes et Vives (2000) ou encore Cordella et Yeyati (2002)), il apparaît que la mauvaise évaluation des garanties des dépôts incite les banques à prendre des risques.

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[26]. 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. 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 continuer 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[27] ».

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

[26] Morris Goldstein et Nicolas Veron, « Too Big to Fail: The Transatlantic Debate », Peterson Institute for International Economics, Document de travail n° 11-2, janvier 2011.

[27] Minsky (1986), édition 2008, p.264.

simplement erroné de prétendre que la recherche par chaque entité de son propre intérêt confère à l'économie un équilibre[28] ».

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 australien[30] 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 hypothèques (tableau 4.1).

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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)]

	Actifs		Dépôts		Prêts immobiliers	
	Part des quatre plus grandes banques	Indice HH[(b)]	Part des quatre plus grandes banques	Indice HH[(b)]	Part des quatre plus grandes banques	Indice HH[(b)]
1890	0.34	0.06				
1913	0.38	0.10				
1950	0.63	0.14	0.64	0.15		
1970	0.68	0.16	0.68	0.16	0.77[(c)]	0.21[(c)]
1990	0.66	0.12	0.65	0.12	0.65	0.13
Oct. 2008	0.65	0.11	0.65	0.12	0.74	0.15
Juillet 2009	0.74	0.15	0.78	0.16	0.90	0.27

(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[33] ».

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 Canada[34], Allen et Engert concluent que, globalement, malgré leur concentration, les banques canadiennes sont des prestataires de services financiers relativement efficients, 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 réexamens 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 par ces deux 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 conservative, 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[35] 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 sauvegardant 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[36].

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[37].

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36 Voir le China Financial Stability Report 2011, Banque populaire de Chine, consultable à l'adresse www.pbc.gov.cn.

37 China Banking Regulatory Commission Annual Report, 2009, consultable à l'adresse www.cbrc.gov.cn.

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 était ramené de 37 à 11, tandis que certaines banques commerciales urbaines se sont définitivement débarrassées de leurs prêts non performants et ont achevé leur restructuration.

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 [38]

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 régit 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.

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OTHER

COLOMBIA

SUGAR MARKET AND AGRICULTURAL CARTEL INVESTIGATIONS IN COLOMBIA

Ministerio de Comercio, Industria y Turismo
República de Colombia

Industria y Comercio
SUPERINTENDENCIA

NEW ANTITRUST FRAMEWORK 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

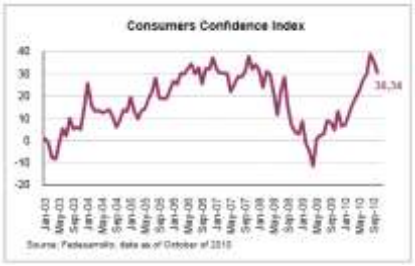
- Grant free participation of competitors in the market
- Guarantee consumer welfare
- Ensure economic efficiency

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.

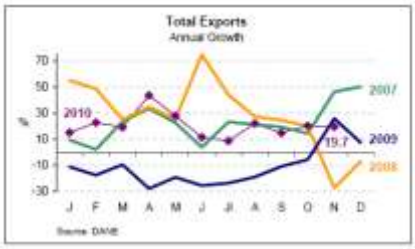
OVERVIEW OF MACROECONOMIC INDICATORS IN COLOMBIA

AN OVERVIEW OF MACROECONOMIC INDICATORS IN COLOMBIA



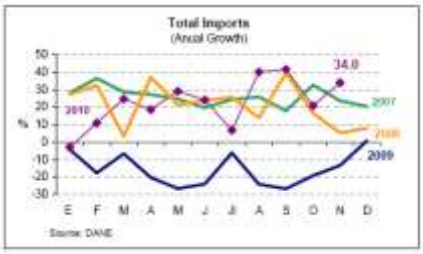
- Colombia has not experienced an economic crisis per se in the last four years.
- The country's economic activity has not presented severe symptoms of deceleration.
- Nonetheless, some economic indicators reflect the impact of the world economic situation in the country.

AN OVERVIEW OF MACROECONOMIC INDICATORS IN COLOMBIA

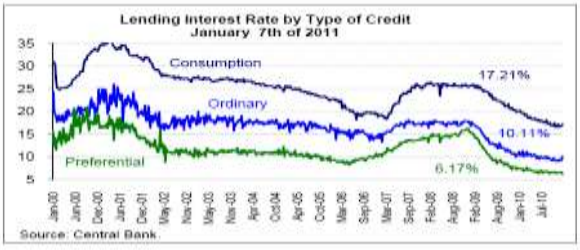


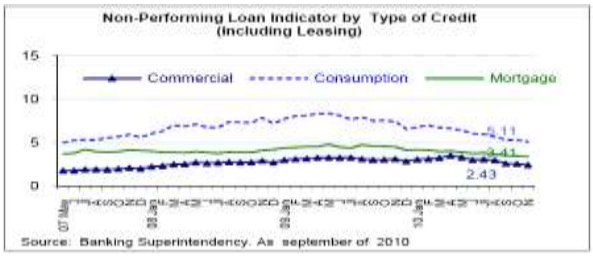
- In terms of international trade, 2009 reflects the effect of the global economic situation.

- 2010 evidences the recovery of the economic situation around the world.



AN OVERVIEW OF MACROECONOMIC INDICATORS IN COLOMBIA



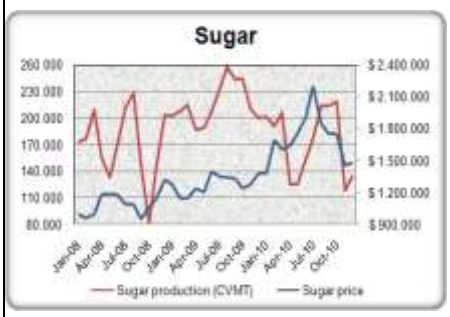


- The financial indicators reflect a solid and stable economy, including the critical period of the world recession

COMPETITION IN AGRICULTURAL MARKETS

SUGAR CANE MARKET IN COLOMBIA

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.

INDONESIA


"CRISIS CARTELS"
POTENTIAL IN INDONESIA
FACING THE FOOD AND ENERGY CRISIS

BACKGROUND

- In times of crisis , economic downturn in which businesses face potential to go bankrupt and exit of the market.
- This situation make 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.

Background

- 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 exportp 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).

Mr. Frédéric JENNY

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)

2

- «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 ».

(1) Information, Finance and the New International Inequality: The Case of Coffee, John Talbot, Journal of World-System Research, VIII, 2, Spring 2002, p 214-250.

2. Downward concentration and barriers to vertical integration (1)

3

- 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.

(1). Information, Finance and the New International Inequality: The Case of Coffee, John Talbot, Journal of World-System Research, VIII, 2, Spring 2002, p 214-250.

3. Downward concentration and barriers to vertical integration (cont.)

4

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

5

Crop year	2005	2006	2007	2008	2009	2010
WORLD	111 247	128 913	120 014	128 500	123 074	134 498
Brazil	32 944	42 512	36 070	45 992	39 470	**48 095**
Vietnam	13 842	19 340	16 467	18 500	18 200	**18 000**
Indonesia	9 159	7 483	7 777	9 612	11 380	**9 500**
Colombia	12 564	12 541	12 504	8 664	8 098	**9 000**
Ethiopia	4 779	5 551	5 967	4 949	6 931	7 450
India	4 090	4 563	4 319	4 062	4 827	5 000
Mexico	4 225	4 200	4 150	4 651	4 200	4 500
Guatemala	3 676	3 950	4 100	3 785	3 835	4 000
Honduras	3 204	3 461	3 842	3 450	3 575	3 850
Peru	2 489	4 319	3 063	3 872	3 315	3 718
Uganda	2 159	2 700	3 250	3 197	2 797	3 200
Côte d'Ivoire	1 691	2 177	2 317	2 397	1 795	2 200
Nicaragua	1 489	1 425	1 903	1 442	1 831	1 800
Costa Rica	1 778	1 580	1 791	1 320	1 450	1 414
El Salvador	1 502	1 252	1 505	1 450	1 065	1 365

4. Coffee consumption

6

Rank	Countries	Amount (in thousands USD)
# 1	United States:	2,075,050
# 2	Germany:	1,272,700
# 3	France:	692,048
# 4	Japan:	683,060
# 5	Italy:	502,965
# 6	Canada:	402,870
# 7	Netherlands:	375,987
# 8	Belgium:	361,999
# 9	Nigeria:	309,323
# 10	Spain:	305,561
	Total:	9,838,010

40% of world consumption in 4 countries

Source: International Trade Centre UNCTAD/WTO

5. Coffee trade

7

World Coffee Exports

6. Instability of supply of coffee (1)

8

- 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)

9

- 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.**

(1) Government Actions to Support Coffee producers - An Investigation of Possible measures from the European Union Side, G Calfat, Renato Flôres, April 2002.

8. Importance of coffee for LDCs

10

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) »

(1) Richard Bilder « the International Coffee Agreement: a Case History in Negotiations » , 1963.

9. Coffee dependence

Country	Value of green and roasted coffee (US $ 1000)	Coffee as % of total exports	Exports as % of GDP
Burundi	30.951	**56**	8
Uganda	308.721	**52**	12
Rwanda	17.402	**27**	6
Ethiopia	255.306	**26**	16
Honduras	410.039	16	**42**
Nicaragua	134.826	15	37
Guatemala	575.357	15	20
Ecuador	24,349	11	**42**
El Salavador	340,342	9	28

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

12

- 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

13

- 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.**

On the operations of the International Coffee Agreement, R. Bates and Da-Hsiang Donald Lien, International Organization 39,3,Summer 1985.

12. The ICAs: success and failure

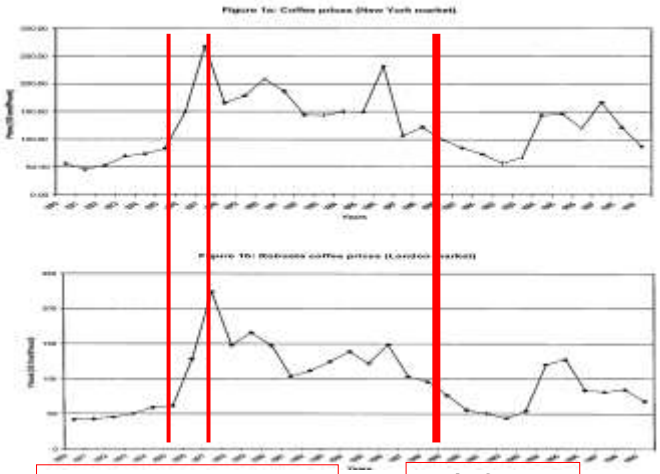
14

- « **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.**

(1) Government Actions to Support Coffee producers - An Investigation of Possible measures from the European union Side, G Calfat, Renato Flôres, April 2002.

13. The stabilisation of the price of coffee (cont.)

15



Effect of 1975 frost in Brazil

End of ICA*

* International Coffee Agreement

14. Why enter a cartel agreement ?

16

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)

(1) Richard Bilder «The International Coffee Agreement: a Case History in Negotiations», 1963.

15. Why enter a cartel agreement ?

17

- «**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.

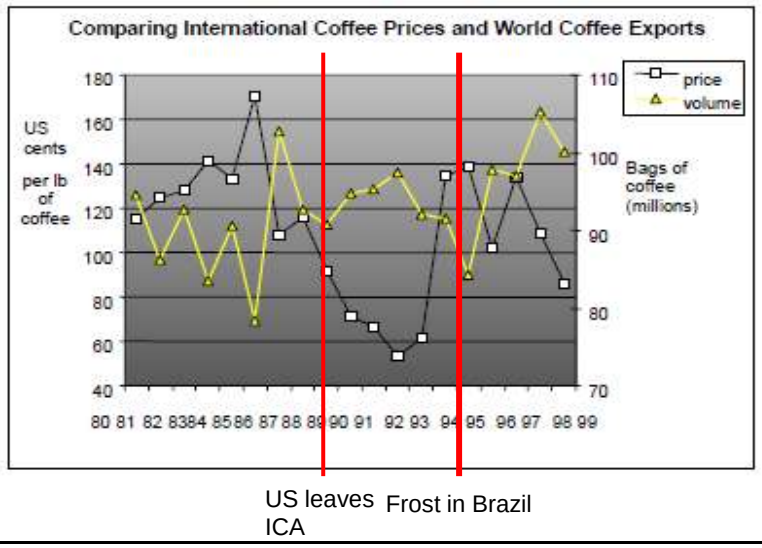
16. Market developments in the 1990's

18

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 hardier Robusta plant was introduced and in 199à 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.)

19



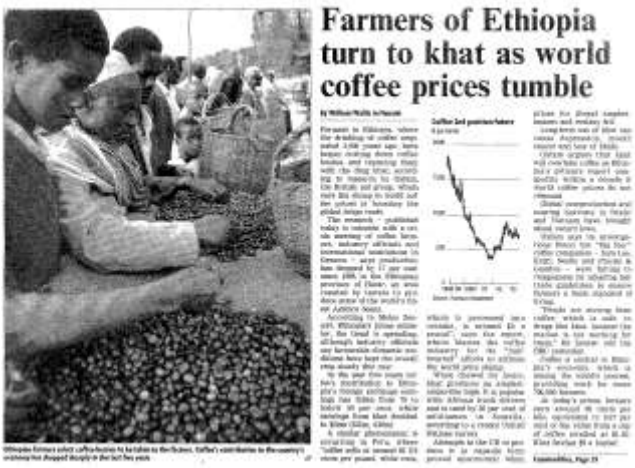
18. Prices in the early 2000

20

- 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

21



Farmers of Ethiopia turn to khat as world coffee prices tumble

Financial Times Dec. 9 2003

20. The price instability of coffee (cont.)

Coffee, robusta

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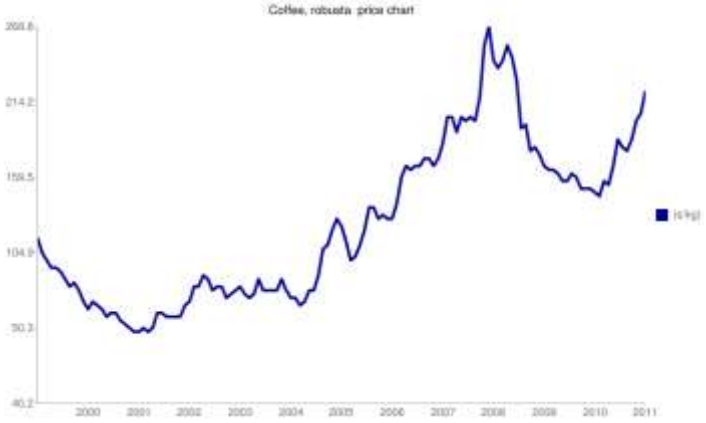


Units: U.S. cents per kilogram

21. Coffee: developing a niche market

23

Producers to launch coffee branding

- 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.

22. Rwanda's coffee success story

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.

William Easterly and Laura Freschi | Published May 12, 2010

23. Rwanda's coffee success story

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.

William Easterly and Laura Freschi | Published May 12, 2010

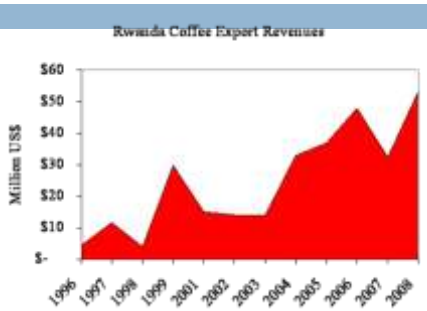
24. Rwanda's coffee success story

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.

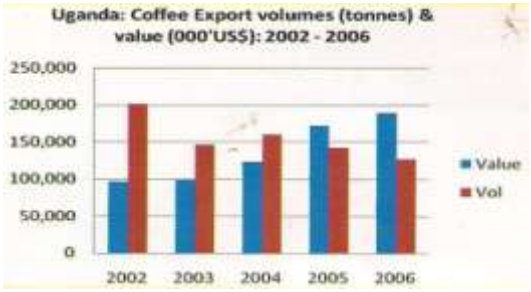
Still, Rwanda's revenues from coffee are still growing in the face of global recession, and these revenues bring real benefits to Rwanda's rural poor.

William Easterly and Laura Freschi | Published May 12, 2010

25. Rwanda's coffee success story



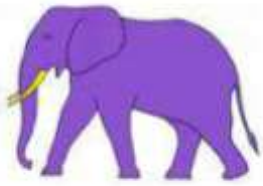
26. Uganda



27. Kenya Burundi

KENYA

100 % Arabica



Subtil & Corsé

28 . Conclusion

30

- 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 smalle 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

31

- 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.

Mr. Ian CHRISTMAS

worldsteel ASSOCIATION

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

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Cartels in Steel

Illegal

Legal

Cartels in steel industry suppliers

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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 ?

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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

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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

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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

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Examples from Steel: USA

The Bush Initiative 2003 – 2006

- Trade restrictions (WTO compliant)
- Government takes over pension liabilities
- Competition authorities allow mergers

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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

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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

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Mr. SIMON EVENETT

Crisis Cartels: Can They Be Justified?

Professor Simon J. Evenett
University of St. Gallen
Switzerland

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.

2

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.

3

- *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?

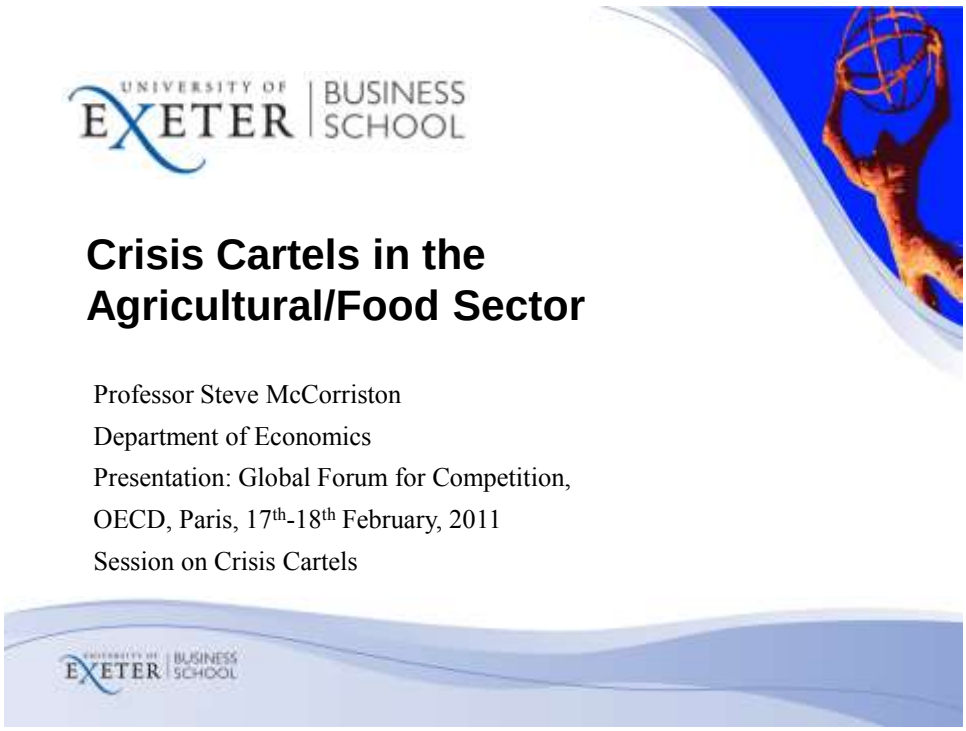
- Evidence mainly from the early stages of development of the richer OECD countries.
- Sharp price falls tended to trigger crisis cartels.
- Government involvement was rarely limited to cartelisation—if anything, state involvement grew over time.
- When foreign competition was significant before a cartel 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.

4

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.

Mr. Steve McCORRISTON



Typical Perspectives of Crisis Cartels

- Declining demand
- Low/falling prices
- Excess capacity
- 'Need' for orderly re-structuring
- Role for competition policy in this context

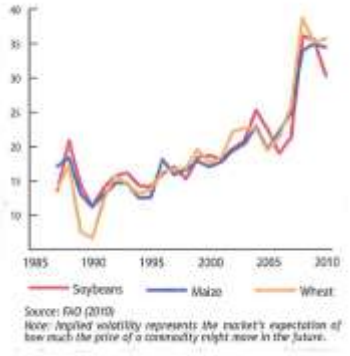
Crisis in Agricultural/Food Markets

- 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

Figure 3: Recent Price Developments in World Agricultural Markets.

Figure 5: Implied Price Volatility for Selected Agricultural Commodities (in %).



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

Mr. Andrew SHENG

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

2

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)

3

Ⅱ. Financial sector objectives and role of financial regulations

4

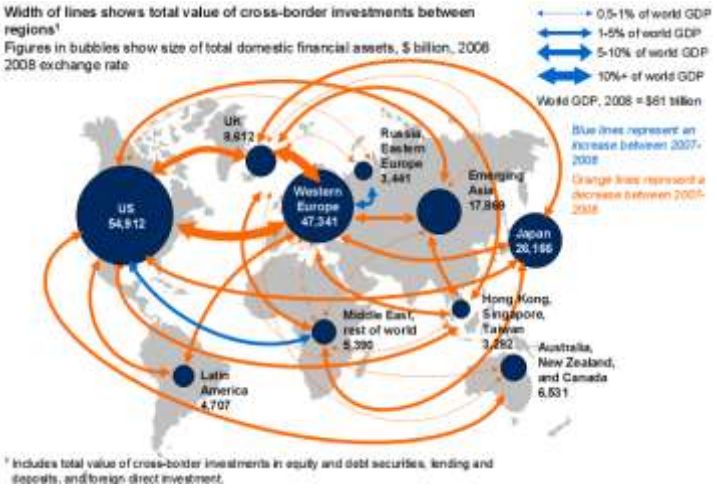
2. Financial Sector Objectives

- **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***

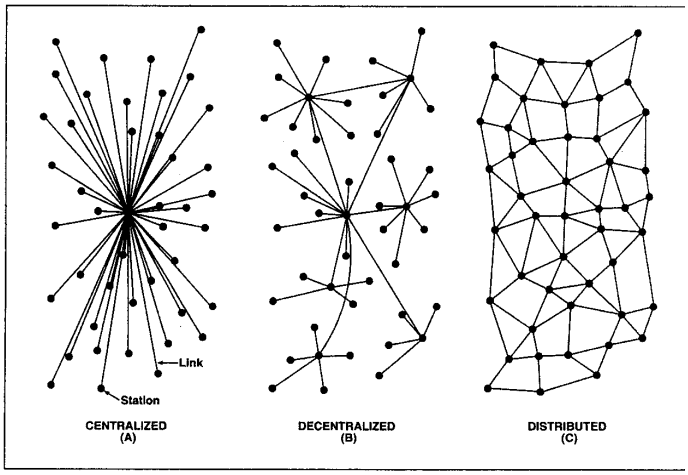
Networked Globalized Finance



Source: McKinsey Global Institute（2009）

7

Network Topology determines efficiency vs robustness



8

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.**

9

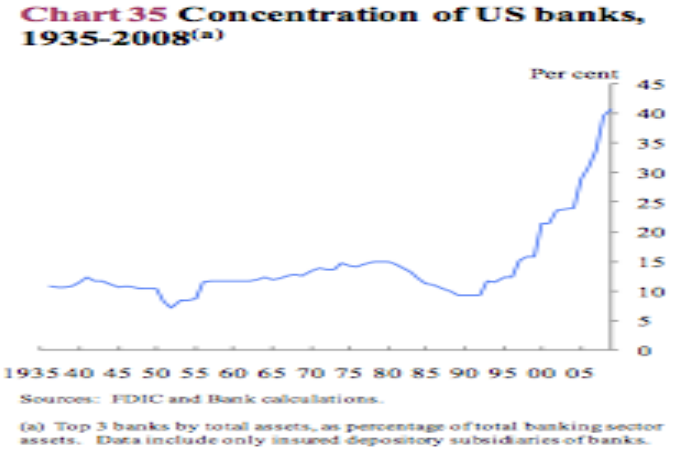
Concentration of financial services

Financial Services	Number of top players	Combined global share of business (%)
Asset Custodian	Top 4 firms	60
Insurance brokerage	Top 3 firms	64
Foreign Exchange trading	Top 10 firms	64
Accounting Services	Top 4 firms	53
Equity underwriting	Top 10 firms	70
Debt underwriting	Top 10 firms	62

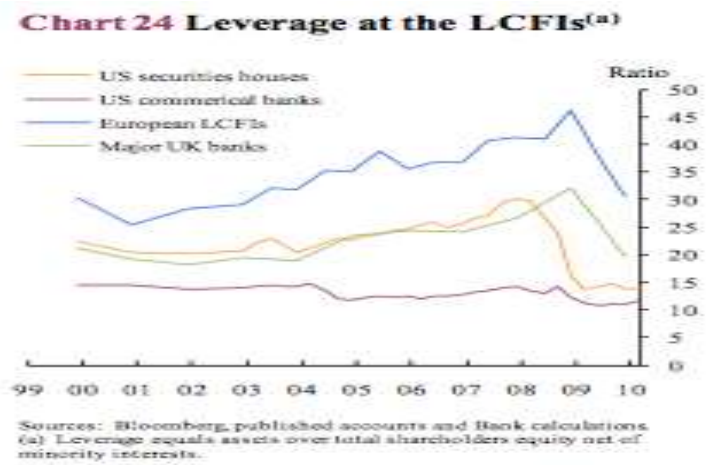
Source: Nolan, Zhang and Liu (2007)

10

Concentration in US Banks



Financial Institutions make profit through scale and leverage



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?

13

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!**

14

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）

15

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）

16

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

— Nothcott，C.（2004）

17

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

18

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.

19

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**

20

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).**

21

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.

22

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.

23

Public-Private Checks & Balance

	Private	Public
Private	I – Private Self Interest for Private Gain [Business]	II – Private Effort for Public Good [Civil Society]
Public	III – Bureaucratic Self-Interest [Capture]	IV – Public Sector for Public Good

Adam Smith assumed I + IV. Risk in practice I + III (Crony Capitalism).

24

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

25

Ⅲ. Country experiences – Australia, Canada and China

26

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.

27

Concentration in Australian banking sector, 1890-2009

Table 4.1 Concentration in Australia's Banking Sector – 1890 – 2009[a]

	Assets		Deposits		Home Loans	
	Share of 4 largest banks	HH index[b]	Share of 4 largest banks	HH index[b]	Share of 4 largest banks	HH index[b]
1890	0.34	0.06				
1913	0.38	0.10				
1950	0.63	0.14	0.64	0.15		
1970	0.68	0.16	0.68	0.16	0.77[c]	0.21[c]
1990	0.66	0.12	0.65	0.12	0.65	0.13
Oct 2008	0.65	0.11	0.65	0.12	0.74	0.15
July 2009	0.74	0.15	0.78	0.16	0.90	0.27

(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 2009

28

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.**

29

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.

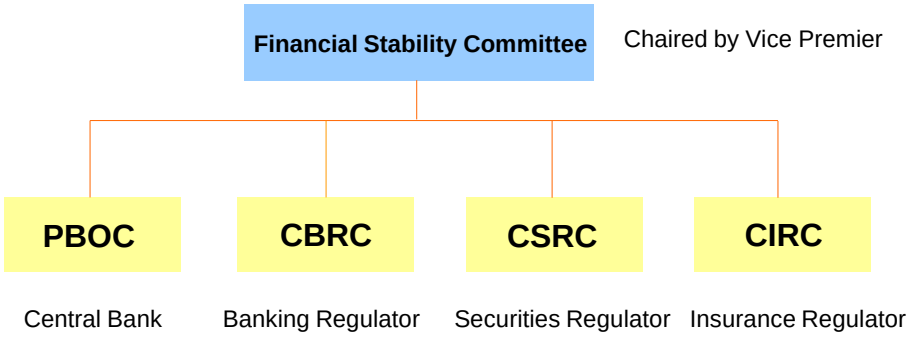
30

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.

31

Financial Regulatory Framework in China



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What does China's banking sector look like?

- 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,
- 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

33

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.

34

IV. Tentative Conclusions

35

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?

36

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.

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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 accounts 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 the 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 aujourd'hui de ces expériences passées entre clairement dans le sujet de cette session et la note de référence et son auteur traiteront ces aspects.

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 inefficiences. 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 pécuniaires 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 recherchent 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 faiseurs 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.

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 pernicieux des ententes sur les consommateurs ont pu être observés et ont conduit les pouvoirs publics a 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.

Un autre facteur important concerne l'évolution des modèles d'entreprises des entreprises elles-mêmes. Cet aspect revêt une importance particulière dans le secteur de la sidérurgie, surtout depuis plusieurs années. En 2009, la consommation d'acier des pays de l'OCDE a chuté de 30 % par rapport à l'année précédente, alors qu'elle a augmenté en Chine, en Inde et en Amérique Latine. Malgré cette évolution, peu d'entreprises ont quitté le secteur, ce qui s'explique par le fait qu'elles ont modifié leurs modèles d'entreprises pour améliorer leur survie sur la durée du cycle économique (l'orateur cite ici favorablement Nucor, le premier groupe sidérurgique américain). D'autres aciéristes, en Europe notamment, ont bénéficié des programmes d'aide à l'emploi mis en œuvre par les pouvoirs publics pour soutenir l'ensemble des secteurs de l'économie. Cette intervention récente se distingue de l'arsenal d'outils apparentés aux ententes auquel avait jadis recours l'industrie sidérurgique, qui comprenait les contrôles de prix, les quotas de production, les restrictions à l'importation et à l'exportation, les restrictions sur les prix et le commerce de matières premières et les subventions directes accordées à certaines entreprises et aux salariés.

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 retraite 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 pouvaient 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.

La seconde présentation de cette section, délivrée par M. Jenny, porte sur une entente spécifique mise en œuvre par les pouvoirs publics : l'Organisation internationale du café, en vigueur de 1962 à 1989. Cette entente améliorait les conditions allouées aux très nombreux producteurs pauvres de café des pays en développement au détriment des quatre grands acheteurs de café d'alors. On craignait que, sans cette entente, ces derniers n'utilisent leur considérable puissance d'achat pour négocier des prix qui auraient diminué les revenus des petits producteurs.

Le marché du café est concentré aussi bien du côté des acheteurs que de celui 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 revêtent des implications importantes pour la stabilité macroéconomique ainsi que pour le niveau de vie des caféiculteurs, 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 caféiculteurs 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'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 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 étayé 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'émoi 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

pression de la filière du diamant, soumise à une instabilité des prix préoccupante pour les fournisseurs. En fin de compte, une seule dérogation a été émise sous l'empire de cette disposition du droit. Il s'agit de celle accordée au secteur pétrolier en marge de la tenue de la Coupe du Monde en Afrique du Sud. Deux demandes sont toutefois en cours d'examen par le Ministre, l'une émanant du secteur laitier et l'autre du marché de la santé.

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, estime l'orateur, et à les soumettre à des réexamens 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 toutefois à évaluer l'impact des fusions sur la concurrence, tandis que l'autorité de régulation prudentielle australienne (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 appellent 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 a 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.