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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Global Forum on Competition

CRISIS CARTELS

-- Session III--

Call for Country Contributions

This document is a call for country contributions for Session III of the Global Forum on Competition to be held on 17-18 February 2011. GFC participants are invited to submit their contributions by 10 December 2010 at the latest.

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TO ALL GLOBAL FORUM PARTICIPANTS

RE: Crisis Cartels

Global Forum on Competition (17-18 February 2011)

Session III

Dear GFC Participant,

The OECD Global Forum on Competition will hold a discussion on the challenges posed by cartels in times of economic crisis on 18 February 2011. You are invited to make a written contribution to this session by 10 December 2010 at the latest.

Past severe economic downturns - whether sectoral, national, or global in scope - have prompted cartelisation. In some cases cartels have been instigated by private firms. In others governments have played a role in creating, encouraging or accommodating so-called crisis, recession or depression cartels. Irrespective of their origin, such cartels influence the pattern of resource allocation with potential negative consequences for productivity growth, innovation, and consumer welfare at least over the long-term. Some of these crisis cartels have subsequently become the target of enforcement action by competition authorities. In other cases, governments have reviewed and curtailed cartel-related exemptions from competition laws.

The purpose of this discussion is to take stock of national experiences with crisis cartels, bearing in mind that government ministries and agencies can respond to adverse economic developments in a variety of possibly complementary ways. Laws and enforcement practice towards cartels and exemption from such laws are part of the toolbox available to policymakers. In addition, corporate adjustments to downturns can be influenced by changes in merger review requirements and selective state aids as well. Moreover, sectoral and national industrial policy initiatives may gain currency in policymaking circles during downturns increasing the pressure on competition authorities to adjust their enforcement practices.

Participants are encouraged to draw from experiences gained during previous episodes of downturn-induced cartelisation including the recent global economic downturn. Examples of pertinent enforcement experiences and policies towards crisis cartels and general lessons learned in the aftermath of such crises can usefully inform the discussion. Such experiences will strengthen the evidence upon which competition authorities and governments can draw when formulating their policies towards cartels during adverse sectoral, national or global economic circumstances.

To assist with the preparation of your contribution, a number of issues and questions are attached to guide your submissions. This is not an exhaustive list and participants are encouraged to raise and address other pertinent crisis cartel-related issues.

Please advise the Secretariat by 1 November 2010 if you will be making a written contribution. As noted above, written contributions are due by 10 December 2010. This deadline applies to both members and non-members. Failure to meet this deadline may result in the contribution not being taken into account in the preparation of the scenario for the discussion. In addition, late contributions may not be distributed via the Forum website www.oecd.org/competition/globalforum in advance of the meeting.

All communications regarding documentation for this session should be sent to Ms. Erica Agostinho (Email: Erica.AGOSTINHO@oecd.org ; Tel: + 33 1 45 24 89 73; Fax: + 33 1 45 24 96 95), with a copy to Ms. Helene Chadzynska (Email: Helene.CHADZYNSKA@oecd.org). All substantive queries relating to this session should be sent to Mr. Frank Maier-Rigaud (Email: Frank.MAIER-RIGAUD@oecd.org; Tel: +33 1 45 24 89 78). The GFC Programme Manager, Ms. Helene Chadzynska, will be happy to answer any questions you may have about the GFC more generally. She can be reached via telephone on + 33 1 45 24 91 05.

Questions and points for consideration

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

For each of the following questions please identify the relevant provisions in national law, associated implementing regulation, and enforcement experience. Where a substantial policy discussion was associated with a change in law or practice, please indicate the principal arguments considered during these deliberations and the evidence referred to.

1. Does the competition law enacted in your jurisdiction afford different treatment of cartels during severe economic downturns, typically referred to as sectoral, national or global crisis? If so, please summarise the contents of and rationale for these provisions. Such treatment could include:
 - a) Provisions altering the set of corporate acts treated as illegal cartel acts under national competition law. In particular any exemptions or other derogations from the cartel provisions during severe economic downturns.
 - b) Provisions allowing the explicit creation of cartels, whether private or government orchestrated, during severe economic downturns. Here please specify the forms of cartels covered by these provisions.
 - c) Special provisions and practices relating to the sanctions that may be applied against successfully prosecuted cartels during severe economic downturns.
 - d) Special provisions relating to defences that cartel members can invoke during severe economic downturns.
 - e) Special provisions relating to a sector specific treatment of cartels during severe economic downturns.
 - f) Provisions relating to the considerations a competition authority or comparable implementing agency must take into account when enforcing competition laws including provisions relating to the cartel-related enforcement methods allowed during severe economic downturns.
2. In which sectors have cartels or cartel-like arrangements been permitted during severe sectoral or national economic downturns? Have sectoral policies towards such cartels changed over time? If so, why? We would particularly welcome examples from the financial services, steel and food/agri-business sectors, but responses should not be limited to these sectors.
3. Which, if any, of the provisions identified in question 1 have been invoked during the recent economic crisis and have not been invoked previously? For each provision invoked during the recent crisis, what rationale was provided?
4. Please identify and summarise the findings of any official reviews or assessments of policies towards cartels - sectoral or otherwise - during severe economic downturns. What evidence or experience was particularly informative or persuasive?
5. Please describe your country's current position on policies towards cartels during severe economic downturns and its underlying rationale. Did any particular cartel episodes - recent or in the more distant past - shape this position in a decisive way?

II. Enforcement record on cartels during the recent crisis

1. On the basis of the experience of your country, contrast the nature of, intensity of, and challenges facing cartel enforcement during the crisis with the enforcement prior to the crisis and to a possible prior severe economic downturn, i.e. how it has changed over the course of different crises. In particular:
 - a) Was there a change in your country's cartel-related enforcement priorities as a result of the recent crisis?
 - b) Where there noticeable differences in the types of cartels investigated during the recent crisis? Given that fiscal stimulus packages were implemented in numerous jurisdictions, was there, for instance, an increase in the number of bid-rigging cases?
 - c) What was the role of (selective) aids and merger review procedures in the recent crisis? How did possible changes in state aid and merger control affect the formation of cartels in the economy – i.e. were these used as alternatives to a more lax approach towards cartels?
 - d) Where there any differences in the proportion of investigated cartels whose illegal acts affected foreign as well as domestic commerce?
 - e) Did the severe adverse economic circumstances of the recent crisis appear to alter the incentives and propensity of cartel members to seek leniency or to otherwise cooperate with the competition authority?

III. International cooperation on cartels

1. In what ways, if at all, does a crisis affect the quantum and nature of cross-border cooperation with other competition authorities on cartel-related matters? Specifically:
 - a) Compared to the period prior to the crisis, did your authority receive more requests from foreign competition authorities for cooperation on cartel-enforcement matters during the crisis?
 - b) Compared to the period prior to the crisis, did your authority seek more cooperation from foreign competition authorities on cartel-enforcement matters during the crisis? If so, why? If not, why not?
 - c) Compared to the period prior to the crisis, did your authority engage in more bilateral, non-enforcement yet cartel-related consultations and discussions with foreign competition authorities?

IV. Competition advocacy on cartel-related matters

1. To the extent that your jurisdiction's statutes grant cartel-related powers to public agencies other than the competition authority (e.g. government ministries), has the competition authority undertaken cartel-related competition advocacy during times of crisis? If so:
 - a) Describe one or two examples of such advocacy and the subsequent outcome(s).
 - b) From the perspective of the competition authority conducting advocacy which arguments, if any, were most persuasive?
 - c) Were references to international norms on cartel and cartel enforcement made during advocacy efforts? If so, which ones? Did such references increase the impact of the advocacy?

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