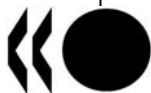


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CRISIS CARTELS

Contribution from the National Competition Commission of Senegal

-- Session III --

This contribution is submitted by Mr Diawara, Chairman of the National Competition Commission of Senegal, for Session III of the Global Forum on Competition, to be held on 17-18 February 2011.

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English - Or. French

CRISIS CARTELS

-- Contribution from the National Competition Commission of Senegal --

1. 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.)

2. Senegalese legislation has prohibited such anti-competitive cartels “subject to specific legislative or regulatory provisions” (Section 24 of Act 94-63).

3. 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.

4. Is this breach aimed at crisis cartels? Can they qualify for it? Or to answer the question more specifically, can crisis cartels be justified?

5. 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).

6. 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

7. 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”.

8. 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.

9. 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.

10. Crisis cartels, such as those found in the sugar industry from 1934 to 1974, were encouraged or supported by the US federal government.

11. 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.

12. 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”.

13. 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*

14. 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.

15. However, the facts of the matter seem to be quite different.

16. 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”.

17. 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).

18. 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.

19. 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

20. 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.

21. 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

22. 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”.

23. 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.).

24. 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.

25. This European example might certainly inspire other competition authorities whose legislation reproduces, to a great extent, the concepts of European law.

26. 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

27. 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.

28. 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”.

29. 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.

30. 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.

31. 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

32. 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.).

33. 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.

34. 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?

35. 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.

36. However, both in Senegalese legislation and that of WAEMU and ECOWAS, no reference is made to crisis cartels.

37. 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.

38. 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.

39. 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”.

40. 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.

41. 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.