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Global Forum on Competition

CRISIS CARTELS: BREAKOUT SESSIONS

Briefing Note by the Secretariat

This briefing note is submitted by the Secretariat in preparation of the Breakout Sessions of the Global Forum on Competition to be held on 18 February 2011 afternoon.

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CRISIS CARTELS: BREAKOUT SESSIONS

-- Briefing Note by the Secretariat --

1. Breakout sessions will take place in three separate rooms. Countries and jurisdictions will be grouped based on French alphabetical order. In each room, a Chair will be assisted by a member of the OECD Secretariat to guide and stimulate debate. All four experts will rotate 3 times so that all participants can benefit from their presence in one of the three sessions.
2. The sessions will be dealing respectively with:
 - Theme 1: The role of evaluation criteria and procedures for dealing with crisis cartels;
 - Theme 2: The role of cartels in restructuring a declining industry versus in industries subject to transitory shocks; and
 - Theme 3: The role of cartels in the current economic crisis.
3. The three themes will be discussed in all groups in turn. The Chairs will be:
 - Mr. Geronimo SY (Philippines),
 - Mr. David MILLER (Jamaica).
 - Mr. Thula KAIRA (Zambia)
4. The discussion will be organised around the three themes in order to complement the sector specific focus of the plenary session.
5. Participants should feel free to raise any issue or ask any question that falls under the crisis cartel heading even if it cannot be subsumed under one of the proposed themes. This of course also includes sector specific issues and questions where delegates are particularly encouraged to make use of the availability of the invited experts.

**THEME 1: THE ROLE OF EVALUATION CRITERIA AND PROCEDURES
FOR DEALING WITH CRISIS CARTELS**

6. The background paper discusses the various ways that governments react to a crisis situation. Under this theme, participants will exchange on: i) the specific economic and legal criteria that have to be fulfilled in order to trigger an exemption under competition law; and ii) the procedures and mechanisms foreseen by different competition laws for reaching a possible exclusion.

1. Evaluation criteria

7. Discussing the various provisions and considering the relevance and stringency of the specific evaluation criteria or “tests” in question is one of the key aims of this session.

8. In several jurisdictions, specific lists of objectives exist that would warrant an exemption if the conduct is found to be motivated by one of the criteria listed. While these lists contain many types of exemptions such as “maintenance and promotion of exports” or “promoting small businesses” they often also contain specific provisions alluding to overcapacity, declining demand or even economic crises in general.

9. Some competition laws explicitly mention decreasing demand and excessive supply during economic recessions as exemption conditions. Other competition laws mention the rationalisation of an organisational structure or the scale of business as exemption criteria. Again others foresee exemptions for previously notified otherwise collusive acts if their purpose is the recovery from previous economic slumps or industrial rationalisation.

10. In contrast to such listings or crisis specific exemptions, other jurisdictions employ more general criteria for assessing potential exemptions. An example of this may be found in cumulative conditions requiring the restriction to be indispensable, entail efficiency gains, result in a fair share of benefits for consumers and not to eliminate competition. Other jurisdictions simply emphasise that any exemption has to guarantee that the benefits for consumers of the restriction outweighs the effects of limiting competition.

11. So while several jurisdictions have specific legal provisions with respect to crisis cartels others have general provisions under which crisis cartels may or may not be subsumed under certain conditions. In general, however, all competition laws recognise the negative repercussions of cartels and crisis cartels and subject them to rather severe exemption conditions.

Questions to be addressed under this subtopic are for instance

- What are the advantages of specific crisis-related provisions as opposed to more general exemption criteria?
- What is the role of economic evidence, for instance, the role of entry barriers, variable cost or output limitations in assessing crisis cartels?

12. Issues that may also be addressed here concern, for example, sunset provisions on exemptions or other specific requirements.

13. Some competition laws foresee a review of the specific measures that were exempted under crisis or emergency justifications. These may specify that the measures are to be reviewed within a certain amount of time and also sets clear sunset clauses.

Questions to be addressed under this subtopic are for instance

- How can exempted behaviour be constrained, for instance via sunset clauses, in order to avoid damage to competition once the crisis is over?

2. Procedures

14. One of the most important procedural differences across jurisdictions is the distinction between *ex ante*, notification style provisions and *ex post* provisions, where crisis arguments may be evoked as a defence during prosecution.

15. Another important aspect concerns the question of whether the burden of proof should lie with the authority or the parties. While the burden of proof for establishing a restriction lies typically with the competition authority, the burden of proof for demonstrating that conditions for exemption are fulfilled typically lies with the parties. If the possibility of *ex ante* notification of the restriction is foreseen in the law, the burden of proof is explicitly put on the shoulders of the parties seeking the exemption.

16. It is often the case that an in-depth investigation before granting competition law exemptions is required and exemptions should not be granted arbitrarily but should instead follow a strict process.

Questions to be addressed under this subtopic are for instance

- What are the advantages of a notification system of crisis cartels *ex ante* versus a system treating crisis cartels considerations *ex post* in a prosecutorial context?
- Who should have the burden of proof concerning evidence leading to a potential exemption?

THEME 2: THE ROLE OF CARTELS IN RESTRUCTURING A DECLINING INDUSTRY VERSUS IN INDUSTRIES SUBJECT TO TRANSITORY SHOCKS

17. While the first theme focussed on evaluation criteria and different mechanisms and procedures for treating possible crisis exemptions of restrictive practices, this session may allow for a more detailed discussion of what criteria may be used in the context of transitory shocks where cartels may be a way for creating stability in an industry versus the classical criteria applied to cases of structural overcapacity.

1. Structural overcapacity or transitory shock?

18. A number of jurisdictions treat crisis cartels as synonymous to restructuring cartels and focus on specific criteria of relevance mainly to industries exhibiting long term structural overcapacity problems, which may occur in times of economic recession and/or declining demand.

19. The background paper and also the contribution by Steve McCorrison suggest that there may be a difference between cartels aimed at restructuring an industry (typically an industry in general decline) and those cartels that may be motivated by stabilisation concerns in order to allow a better absorption of transitory shocks. Such transitory shocks may even go in the opposite direction of traditional structural concerns, i.e. they may be based on increasing demand or decreasing supply. While the former type of cartel characterised by overproduction in case of falling demand and necessitating restructuring measures seems to be more prevalent in developed countries, the latter, characterised by insufficient production in light of increasing demand, may be more of a developing country concern.

20. While many jurisdictions tend to look at crisis cartels from a restructuring perspective, this session allows for the discussion of a different scenario, testing the rationale for stabilising fragile markets that may falter under transitory but severe shocks. If this distinction between types of crisis cartels is accepted, the session could focus on the different strands of justification and evaluation criteria brought to bear in the two distinct scenarios. It may also focus on differences concerning the suitability of alternative policy responses in these two cases. In light of current peaks in food prices, this session may also be used to discuss possible competition approaches to this important problem, including advocacy efforts.

Questions to be addressed are for instance

- Is it useful to distinguish between crisis cartels in sunset industries subject to structural overcapacity and crisis cartels in fragile industries subject to transitory shocks?
- Do the arguments in favour of exemptions in certain specific cases of structural overcapacity also translate to fragile industries subject to transitory shocks?
- In light of the distinction introduced, what is the role of the distinction between structural and cyclical overcapacity?

2. Stabilisation and other exemption rationales

21. Some competition laws are of particular relevance here as they provide for both a possibility to exempt certain practices if they contribute to the stability of an industry but also if they stop the decline of

an industry by changing the productive capacity of the firms. The explicit mention of stabilisation is in contrast to other competition laws that while acknowledging, for instance, the need for restructuring an industry exhibiting long-term overcapacity do not explicitly deal with transitory shocks.

22. Many competition laws explicitly mention overcapacity or severe reductions in demand as exemption criteria. Some of these explicitly foresee the possibility of concerted actions in case of overproduction either during overall economic depressions or sectoral downturns, but do not contain specific stabilisation elements. In addition, some laws, while not referring explicitly to economic crises, degrading demand or oversupply, allow exceptions on the basis of the benefits clearly outweighing the adverse effects of the absence or lessening of competition. Elsewhere, exemption may be authorised by Ministerial decree in cases of “exceptional and compelling reasons of public policy”.

23. For example, efforts to stabilise prices at a lower level through the approval of a retail price maintenance scheme by wholesalers to control retailer induced price increases, could be classified as a response to a transitory shock.

24. Economic stability arguments may also be invoked. In an effort to stabilise prices, due to food security concerns for example, exemptions contained in the applicable competition law may be invoked with the intention of creating an export cartel, for example, in order to limit domestic supply and thereby further decreases in price. Could this be an example of a transitory shock requiring some form of policy response if indeed long term food security is threatened?

25. Somewhat related are also threats to public health that may not only arise in the form of starvation due to increased food prices but due to epidemics. A limited antitrust liability might be implemented in case of a pandemic, to enable meetings between producers of relevant pandemic and epidemic products for example, which would recognise the need for competition law exceptions in case of imminent danger for human lives.

Questions to be addressed are for instance

- Should evaluation criteria to be employed be identical irrespective of whether the crisis is structural or transitory?
- Can stabilisation of an industry be a legitimate competition law concern?

THEME 3: THE ROLE OF CARTELS IN THE CURRENT ECONOMIC CRISIS

26. Under this theme, both normative and positive issues could be addressed. Given the challenges that competition authorities face and continue to face in the context of the economic crisis but also in the context of recent spikes for instance in food prices, this session could allow for a discussion on appropriate measures to be taken both, with respect to enforcement, but also with respect to advocacy.

27. While the title of the overall session is crisis cartels, a discussion on related crisis responses such as subsidies, mergers and trade measures but also reductions or non-imposition of fines or delayed fine payments could be discussed. The background paper suggests that the current economic crisis may not so much have triggered a cartel response by industry or governments who in the past often actively instigated cartels, but appears to have primarily been tackled with selective state aids and general fiscal stimulus packages.

1. No impact of crisis?

28. There seems to be wide agreement that the recent economic crisis has so far not led to a surge in cartels. While it may be too early to conclude on this, in particular in countries where crisis justifications only come in as a defence during prosecution, regimes that follow an *ex ante* notification system have not noted a surge in applications. Even jurisdictions with specific crisis provisions note that these provisions were not used in response to the recent global financial turmoil. Nor does it appear that the crisis manifested itself in any significant way through an increase in international co-operation efforts.

Questions to be addressed are for instance

- Is there evidence of a surge in crisis cartel notifications?
- Are crisis cartel cases expected to surface in jurisdictions without notification?

2. Other measures

29. Alternative responses to crises may include subsidies, mergers and trade measures. Vigilant competition enforcement may also complement other crisis management policies. Increased public spending and fiscal stimulus packages may result in increased challenges with respect to bid-rigging and public procurement, and therefore ensuring effective competitive processes in markets in general and tenders in particular, is key for an efficient use of the crisis measures. An important complementary role for competition authorities can be envisaged in ensuring that government responses and packages deliver their intended effect without being compromised by anti-competitive practices.

Questions to be addressed are for instance

- What is the role of competition authorities in times of crisis?
- How did competition authorities respond to the crisis?

2.1 *Merger review/ failing firm defence*

30. Jurisdictions may favour a more lenient approach to merger review as an alternative and less harmful means of resolving a sectoral crisis. Similarly, as regards structural overcapacity, an assessment may be made as to the likelihood that excess capacity could be reduced by way of mergers or specialisation agreements as these would generally also constitute a structural consolidation of the industry and could constitute a less restrictive remedy. Moreover, the failing firm defence provides a tool to facilitate the consolidation of industries facing structural problems such as overcapacity. It might 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.’

Questions to be addressed are for instance

- What was and should be the role of cartels, merger control and state aids in the economic crisis?
- What other measures or regulations, such as trade measures or specific regulatory provisions did and should play a role?

2.2 *Reduction in fines*

31. Jurisdictions may reconsider the extent of liability during extraordinary times of crisis. Decisions not to impose a financial penalty may be, at least in part, motivated by the severe repercussions of the crisis and consideration of the impact on the industry concerned of other measures taken to address/remedy the situation.

32. Similarly, other jurisdictions may consider that while crisis aspects have no bearing on finding an infringement, the impact a financial crisis may have on the cash flow of companies may render it necessary to allow for payments of financial penalties by way of instalments.

33. Others may foresee reductions in fines in their guidelines on the method of setting fines in the case of an inability to pay and may consequently grant small and medium sized companies, for example, reductions in the current economic crisis.

34. A further issue is that in times of severe economic downturns characterised by lower liquidity levels, successfully prosecuted cartel participants may have difficulties in paying fines in particular if there is an international dimension to the cartel. The question therefore arises of whether and how the (potential) fines of other agencies should be factored into the calculation. In the case of an inability to pay, the fining guidelines, where these exist, may foresee the possibility to defer payment of fines and in exceptional cases also reductions.

Questions to be addressed are for instance

- Is there a pro-competitive purpose of reductions in fines during crisis?
- What are the criteria for deciding reductions in fines, delayed payments or fine waivers?

3. *Advocacy*

35. Several jurisdictions underline the importance of competition advocacy as a counterweight to calls for government measures to protect certain sectors especially in times of economic crisis.

36. The detrimental effects of the New Deal policies have been widely recognised and are often mentioned as useful historical examples in advocacy efforts against a laxer approach to competition law.

Indeed, commentators have asserted that measures taken by a number of countries during the 1930s prolonged the Great Depression by seven years. It is now often asserted that suspending competition can actually prolong a crisis and that it may take a long time before any exemptions introduced are removed.

37. Therefore, many competition authorities underline the importance of maintaining open and effective communication channels with government, industry and other stakeholders. Alongside this, many encourage pragmatism and flexibility in enforcement, notably through quick decision-making and the development of transparent case selection and prioritisation criteria.

38. Joint advocacy efforts undertaken collectively by competition authorities resulting in a common position or report may have a bigger impact than any one individual authority's report. This emphasises the importance of international co-operation.

39. Tackling international cartels presents further complications. While advocacy and the stringent domestic application of competition law may prevent anticompetitive practices domestically, export cartels and international cartels may still have significant adverse effects on those countries that are the least equipped to react to such practices.

Questions to be addressed are for instance

- How can competition authorities best resist pressures for relaxing competition enforcement?
What is the role of international co-operation in facilitating crisis related advocacy?