OECD Global Forum on Competition

On 16-17 February 2012, the 11th meeting of the global competition forum for the Organisation for Economic Cooperation and Development (OECD) was held in Paris. The forum provides an opportunity for policy dialogue between OECD and non-OECD countries, enabling competition authorities and other representatives of the developing world to discuss key issues affecting the global economy.

The discussion topics of this year’s forum were: (i) commodities and price volatility; (ii) improving international cooperation in cartel investigations; and (iii) state-owned enterprises and competition neutrality. This article considers the first of these discussion topics, which received a record number of submissions from delegates and was the key theme of the forum.

PRICE VOLATILITY IN COMMODITIES MARKETS

Both agricultural and mineral commodities markets are subject to a high level of price volatility, though distinct market characteristics influence different cycles of price variation. For example, agricultural commodities are strongly affected in the short term by seasonality and weather patterns, causing supply-side shocks that, due to the inelasticity of the market, demand strong variations in prices to restore the market position. Mineral commodities, by contrast, are affected more by the health of the global economy which stimulates or depresses medium term demand (and therefore prices), by financial trading and speculation, and by features unique to a particular commodity; for example, the cost of iron ore is often affected by transport costs, while the energy costs of the refining process affect the price of aluminium.

Agricultural commodities have been subject to particularly high levels of price volatility in the last decade, with prices peaking in 2008. This has prompted a G20 commissioned report to develop options on how to reduce future price volatility and mitigate its consequences, without distorting market behaviour.\(^1\) The report cited

\(^1\) Price Volatility in Food and Agricultural Markets: Policy Responses, 2 June 2011. The report included contributions from the following international institutions: FAO; IFAD; IMF; OECD; UNCTAD; WFP; the World Bank; the WTO; IPPRI; and the UN HLF.
improvements in the competitive environment as one of the options to be explored in addressing these issues. The remainder of this article addresses the role that competition authorities can play in strengthening the markets in which agricultural and mineral businesses operate, with a view to reducing unexpected volatility in commodities prices, without affecting the expected volatilities that contribute to a stable and competitive marketplace.

ROLE OF COMPETITION AUTHORITIES

Competition authorities can contribute to the reduction of price volatility in global and domestic commodities markets and the mitigation of its consequences in two principal ways: (i) by competition law enforcement; and (ii) through competition advocacy aimed at removing the regulatory barriers to competition imposed by over-zealous government policies.

Competition Law Enforcement

Competition law enforcement with respect to commodities typically arises in four areas. The first of these areas, and the major focus of competition authorities, is the tackling of cartel behaviour. The background note to the OECD forum comments that, although at the production level the minerals business may be more prone to cartelisation due to the lower number of players and higher barriers to entry, cartels more typically occur in both agricultural and mineral commodities markets at the levels of the supply chain upstream and downstream of production. This is illustrated by the recent EU cases in the area. Governments may also be involved in establishing cartels, for example by providing explicit exemptions in their national legislation for export cartels, by which competitors agree to charge a specified export price or divide the export markets, or even by providing well-intentioned support for horizontal co-operation by e.g. funding joint research and development projects.

The second area of competition law enforcement arises in relation to vertical conduct issues, which are prevalent in commodities markets particularly in regions without established infrastructure, where companies often construct dedicated railway lines and even sea-ports to provide links to their production facilities. Although vertical integration can be pro-competitive, it may also provide a significant barrier to entry and can lead to abuse of dominance - the third area in which competition law enforcement arises.

The final area of competition law enforcement involves mergers. At the production level, these tend to be scrutinised more frequently in the minerals sector than the agricultural sector due to the smaller number of larger players. As for cartels, however, contentious merger cases have generally arisen upstream and downstream of commercial production.

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2 For example, the Italian Raw Tobacco cartel (European Commission decision 20.10.2005), and, further downstream, the Southern Europe Banana importers cartel (European Commission decision 12.10.2011). The European Commission’s contribution to the OECD forum, which used the food supply chain to illustrate its activities in the commodities markets, confirmed that its focus in the food sector was tackling hard core cartels (see www.oecd.org).

3 Export cartels were identified in the OECD forum as an area in particular need for reform, as it was one of the features of the commodities markets causing global price volatility. A further example where governments have become involved in establishing cartels is the International Tin Council, which involved 22 leading tin-producing and consuming nations aiming to control the world supply and price of tin.

4 An exception was the proposed merger between BHP Billiton and Rio Tinto in the market for the production of iron ore, which was abandoned in 2008.
Competition Advocacy

Governments have attempted to tackle the price volatility of commodities using a number of short and medium term policies, including: export restrictions, price regulation, trade subsidies, price monitoring, and reducing import tariffs. These market reforms can significantly improve national economic performance. However, extensive regulatory intervention by governments not only restricts competition, but also undermines competition law enforcement. The food sector provides a useful illustration of this issue (and indeed is the area most prone to regulatory government policy). Trade subsidies, for example, can stimulate over-production and distort the market, pricing controls, on the other hand can stifle the incentive for increased production, often leading to further government intervention being required.

The aim of competition advocacy is not to remove all government policy in commodities markets; these policies are often necessary for short-term crisis management, as well as supporting otherwise unstable market structures (e.g. through initiatives that encourage sustainable production). Competition authorities can instead provide a broad understanding of the market and advocate reforms that stimulate competition and help to establish a more stable economic future, whilst preventing or limiting policies that may cause long-term harm.

OECD FORUM

Following presentations by various speakers on the themes outlined above, competition authorities had the opportunity at the forum to discuss their recent experiences and general role in strengthening commodities markets at break-out sessions chaired by competition regulators. The following suggestions were put forward by the OECD as topics for further work:

• Competition authorities need to undertake anticipatory monitoring in commodities markets, most significant to their respective economies.

• Competition law enforcement and advocacy are important tools that should be used in removing impediments for key inputs, and in the markets for processing and distributing commodities. Government subsidies in these areas should be discouraged.

• Pro-competitive reforms such as price deregulation and the removal of trade barriers are particularly important.

• Competition authorities have a role in recognising when short-term crisis measures are required, identifying the costs to be borne by each sector of society, and devising a long-term solution that is sufficiently publicised to allow market players to react.

• Post-crisis evaluations should be carried out to quantify any realised costs and benefits.

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5 Scott Davenport, 'Competition Issues in Agricultural Supply'.
6 Angel Gurria, OECD Secretary-General, Opening Remarks.
CONCLUSION

It remains to be seen whether the discussions held at the OECD forum will drive any policy discussions at a global or national level; the major findings of the forum will be published in May 2012. The next steps considered to be most important, however, were summarised at the conclusion of the session by John Davies, the head of the OECD’s competition division. He stressed that competition resources should be focussed in particular in areas of high price volatility, where cartels were more likely to be exposed. Davies also advised, however, that the price regulation often imposed by governments should neither be abandoned nor ignored, as a price regulation structure that stabilises markets without stifling incentive for growth was also critical to providing a healthy economic market.

The outcome of the session, therefore, was a recognition that competition authorities have a significant role to play in addressing price volatility in domestic and global commodities markets, particularly by limiting anti-competitive behaviour and incentivising pro-competitive government policies. They also have a significant advisory role in identifying when short-term crisis measures are required and, more importantly, in recognising the extent of government intervention needed to restore normal market forces. The central message of the forum, however, was that national governments, supported by their competition authorities, need to work together in establishing global and national commodities markets that show expected, and not unexpected, price volatilities.

SOURCES

Background Note to Session I of the OECD Competition Forum: Competition and Commodity Price Volatility
Merger Control

NOTIFICATIONS

1. Telefónica UK/Vodafone UK/Everything Everywhere/JV (M.6314, 06.03.2012).

2. Simplified procedure cases
   - Samsung Group/Corning Group (M.6532, 05.03.2012).
   - Remondis/Sortiva/Stam Papier Recycling (M.6510, 05.03.2012).

PHASE I CLEARANCES

3. Unconditional clearances: simplified procedure
   - GE/KGAL/Entresol-2 (MEX/12/0308, 08.03.2012).
   - Anglo-American/De Beers (MEX/12/0306, 06.03.2012).
   - AXA REIM/CBRE PFCE Management/Warsaw III (MEX/12/0503, 05.03.2012).

COURT PROCEEDINGS/PROCEDURE

4. Advocate General Mazák’s Opinion confirms General Court’s judgment dismissing an action for annulment against the Commission decision authorising the acquisition of Vivendi Universal Publishing by Lagardère – On 6 March 2012, Advocate General (‘AG’) Mazák issued his Opinion in the Éditions Odile Jacob case in which the European Commission’s decision to authorise the merger between Vivendi Universal Publishing (‘VUP’) and Lagardère SCA was challenged. The European Commission had authorised the merger subject to commitments requiring Lagardère to sell a number of assets. On 13 September 2010, the General Court (‘GC’) rejected this challenge brought against that decision by Éditions Odile Jacob, which had declared an interest in acquiring the assets to be sold. The Éditions Odile Jacob then appealed this judgment to the Court of Justice. In his Opinion, AG Mazák found that a number of the alleged errors claimed by Éditions Odile Jacob had no practical bearing on the nature of the merger notified. He found that unless a merger creates or strengthens a dominant position as a result of which competition would be significantly impeded, it cannot be declared incompatible with the common market merely on the basis that it was notified out of time. In addition, AG Mazák found that the GC did not err in its review of the commitments accepted by the Commission nor did it err in finding that a financial buyer would be a potential competitor if it had a real capacity to maintain or preserve effective competition on the market in question even though it had no experience on that market. AG Mazák therefore recommended that the Court of Justice dismiss the appeal (Advocate General’s Opinion in Case C-551/10P, Éditions Odile Jacob SAS v. European Commission, 06.03.2012; Press Release No.22/12, 06.03.2012).

Antitrust

5. General Court hands down judgments on final three appeals against industrial bags cartel decision – On 6 March 2012, the GC handed down three separate judgments in appeals against the European Commission’s decision on the industrial bags cartel adopted in November 2005. The Commission fined 16 firms a total of €290.71 million for operating an illegal cartel in the plastic industrial bags market for over 20 years. The Commission found that the cartel participants infringed Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) by fixing prices in Germany, Belgium, the Netherlands, Luxembourg, France and Spain; and that they had agreed sales quotas by geographical area, had shared orders from large customers, had exchanged information on their sales volumes...
and had organised collective bidding in response to invitations to tender. All cartel participants appealed the Commission’s decision. This week the judgment came down in the appeals lodged by UPM-Kymmenen, FLS Plast and FLSmidth. In UPM-Kymmenen, the GC found that the Commission had erred in its calculation of the fine and adjusted the level of the fine imposed only to take account of the reduced duration of UPM’s participation in a single and continuous infringement, reducing the fine from €56.55 million to €50.7 million. In relation to the FLS Plast and FLSmidth appeals, the GC found that the Commission had erred in imputing liability to FLS Plast/FLSmidth for the year 1991. It found that the Commission’s decision should be annulled in relation to that time and that the fine be adjusted accordingly. The GC concluded that the fine for which FLS Plast and FLSmidth were jointly and severally liable should be reduced from €15.3 million to €14.45 million (Cases T-53/06, UPM-Kymmenen Oyj v. Commission, Case T-64/06, FLS Plast A/S v. Commission and Case T-65/06, FLSmidth & Co. A/S v. Commission, judgments of 06.02.2012).

State Aid

6. **General Court annuls in part the Commission decision concerning various forms of aid granted to ING on account of the financial crisis** – In 2008, ING Groep NV (‘ING’) was the subject of three State aid measures (on capital injection, impaired assets and guaranties) designed to maintain the continuity of the payments systems and the inter-bank market in the Netherlands. On 18 November 2008 and after a number of administrative procedures, the European Commission approved the State aid measures. The Commission approved the impaired asset aid measure and the restructuring aid under Article 107(3)(b). However, it also found that, due to amendments to the terms for the repayment of the capital injection, ING had received additional State aid of about €2 billion; and it required a number of commitments to minimise the distortions of competition resulting from the aid, mainly that ING was required to reduce its balance sheet, was prohibited from acquisitions for three years, was prohibited from acting as price leader, and was required to cease certain activities. Both the Netherlands and ING challenged aspects of the Commission’s decision to the GC. On 2 March 2012, the GC found that it was not apparent whether the Commission had examined and proved that the amendment of the repayment terms constituted an advantage for ING which a private sector investor in the same situation would not have granted. The GC annulled the Commission’s decision in so far as it is based on the finding that the amendment to the repayment terms constituted additional aid of approximately €2 billion (Joined Cases T-29/10 and T-33/10, Kingdom of the Netherlands and ING Groep NV v. European Commission, judgment of 02.03.2012; Press Release No.19/12, 02.03.2012).

7. **General Court annuls State aid decision on UK aggregates levy following referral from ECJ** – On 7 March 2012, the General Court handed down its judgment on an appeal by the British Aggregates Association against a European Commission decision that found that the UK aggregates levy did not contain elements of State aid within the meaning of Article 107(1) TFEU. The appeal had previously been dismissed by the GC, but the judgment was appealed to the European Court of Justice (‘ECJ’) which annulled the GC’s decision. The ECJ therefore referred back the case to the GC for reconsideration. In its judgment this week, the GC concluded that the Commission had erred in its assessment of the selective advantage granted to producers of certain materials that were exempt from the aggregates levy. It found that the Commission had misconstrued the concept of aid within the meaning of Article 107(1) TFEU and that the tax differentiation under the aggregates levy scheme was not justified by the nature and the general scheme of the tax system. The GC therefore annulled the Commission’s...
Miscellaneous

8. **Speech by Joaquín Almunia on Competition policy for innovation and growth: Keeping markets open and efficient European Competition and Consumer Day Copenhagen** – On 8 March 2012, Joaquín Almunia, Vice President of the European Commission responsible for competition policy, gave a speech on the contribution of competition policy to innovation and growth in the EU. The Commissioner first provided an update on providing on the latest developments in the EU strategy for economic recovery, and then discussed a number of issues relating to the creation of the best conditions for business to produce growth. He also discussed the importance of fostering healthy competitive pressure and of promoting innovation. Lastly, Almunia highlighted the importance of a modern industrial policy based on open markets and well-regulated competition (**SPEECH/12/172, 08.03.2012**).